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Guilt By Intuition: The Insufficiency of Prior Inconsistent Statements to Convict

Stanley A. Goldman

GUILT BY INTUITION: THE INSUFFICIENCY OF PRIOR INCONSISTENT STATEMENTS TO CONVICT

STANLEY A. GOLDMAN†

The United States Supreme Court has held that prior inconsistent statements, which have traditionally been admissible to impeach, also are admissible to show the truth of those prior statements. Professor Goldman argues that prior inconsistent statements lack the trustworthiness associated with other hearsay exceptions. He argues also that courts inappropriately have begun to equate substantive admissibility with sufficiency to convict. Convictions based solely on prior inconsistent statements raise serious due process and confrontation clause issues. Professor Goldman, therefore, proposes that prior inconsistent statements alone should not be sufficient to convict unless two criteria are met. First, the prior inconsistent statements, at the time they were made, must have been subject to some form of cross-examination, and, second, there must be some factual basis in the record to support crediting the prior statements over the in-court testimony.

I. INTRODUCTION

It was like many other teenage parties, except for the guest list—attending were members of five rival neighborhood street gangs. By the evening's end, those attending had exchanged insults and, eventually, gunshots. One person was killed.

When the police arrived one gang member told them that she had seen a member of another gang fire the fatal shot. She identified the culprit and described him as having fired his gun while standing across the street from the deceased. At the murder trial,[1] however, this eyewitness denied the truth of her prior out-of-court identification. The prosecution's only evidence linking the accused to the commission of the crime was the witness' now recanted prior out-of-court statement into evidence. The court admitted the statement into evidence. Fortunately for the defendant, an autopsy report revealed that the deceased had died from a contact wound, a type of wound that occurs only when a

† Associate Professor of Law, Loyola Law School, Los Angeles. B.A. 1972, University of California at Los Angeles; J.D. 1975, Loyola Law School, Los Angeles.

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1. People v. Ramos, Sup. Ct. #A618584, Jan. 21, 1981, Department C, Compton Superior Court. Based on an interview with Charles Gessler, Deputy Public Defender, Los Angeles County (Oct. 17, 1986).

gun is fired from a position almost touching its target.[2] The accused could not have fired the fatal shot from across the street as described in the witness' prior statement. The court returned a verdict of not guilty.

In this case concrete circumstantial evidence existed to establish that the prior statement was false. Had the autopsy report not existed, however, the defendant might have been convicted solely on the recanted prior statement.[3] Experienced criminal lawyers know that people tend to believe the prior statements rather than the in-court repudiation.[4] However, the danger of unreliability is inherent in the substantive evidentiary use of any out-of-court assertion[5] and never more so than with the use of a prior inconsistent statement, the truth of which the declarant-witness denies at trial. When a trier of fact decides to believe a witness' prior out-of-court assertions[6] rather than that same witness' present in-court contradiction of those earlier remarks, that decision often is based solely on guess or intuition, not credible facts. This inherent danger is compounded when that prior inconsistent statement is the only prosecution evidence against the accused and becomes the sole basis for conviction.[7]

Could a verdict based solely on such evidence be permissible under the due process clause? Triers of fact are of course given considerable discretion in weighing the evidence and reaching their legal conclusions. Even when evidence of criminal guilt is overwhelming, the fact finder may enter an irreversible acquittal. However, courts have never held that the jury's power to err in favor of innocence justifies a corresponding right to enter an unreasonable finding of

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2. J. MASON, FORENSIC MEDICINE FOR LAWYERS 88-91 (2d ed. 1983).

3. California, where this case was actually tried, is one of the few jurisdictions in which a prior inconsistent statement standing alone may be insufficient to justify a conviction. *See infra* text accompanying notes 119-29.

4. People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied*, 393 U.S. 1051 (1969), for example, involved a mother and teenaged daughter who had claimed that defendant, husband and father, had been having sexual relations with the daughter. The complaining witness and her mother had made these accusations to both the police and the prosecutor. *Id.* at 649-50, 441 P.2d at 113-14, 68 Cal. Rptr. at 601-02. At trial, however, both witnesses recanted their earlier stories, stating that their prior statements were fabrications. They testified that defendant had not had sexual intercourse with his daughter. *Id.* at 649, 441 P.2d at 113, 68 Cal. Rptr. at 601. The jurors chose to believe the prior, now recanted, statements rather than the witnesses' present, in-court testimony and found Johnson guilty as charged. *Id.* at 647, 441 P.2d at 112, 68 Cal. Rptr. at 600. Under these facts the California Supreme Court struck down, as an unconstitutional denial of confrontation, a California rule of evidence that had authorized the substantive admissibility of prior inconsistent statements. *Id.* at 660, 441 P.2d at 120-21, 68 Cal. Rptr. at 608-09; *see* CAL. EVID. CODE § 1235 (West 1966). The court reversed the conviction based on this evidence's inadmissibility and, consequently, never reached the question of the prior statement's sufficiency to convict. *Id.* at 660, 441 P.2d at 121, 68 Cal. Rptr. at 609. The decision to hold such evidence inadmissible, however, was short lived. *See* California v. Green, 399 U.S. 149 (1970).

5. "Due process also requires that the defense be given ample opportunity to alert the jury to the pitfalls of accepting hearsay at face value, and the defendant would, of course, upon request be entitled to cautionary instructions." California v. Green, 399 U.S. 149, 186 n.20 (1970); *cf.* MANUAL ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES § 6.17, 33 F.R.D. 601 (1963) (no cautionary instructions needed when witness is available to both parties).

6. In this Article "out-of-court" refers to any statement not made at the present judicial proceeding, even if the statement is testimony taken at an earlier judicial proceeding.

7. "The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." Jackson v. Virginia, 443 U.S. 307, 323 (1979).

guilt.[8] Due process protection limits the jury's ability to convict.[9] The United States Supreme Court has long acknowledged that due process prohibits a criminal conviction except on proof beyond a reasonable doubt.[10] This rule requires more than a ritualistic trial.[11] The Supreme Court in *Jackson v. Virginia*[12] noted:

> A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury.[13]

The Court concluded in *Jackson* that reversal is mandated when a conviction is based on proof of less than beyond a reasonable doubt, even if the jury was properly instructed.[14] This Article raises the question whether, in the absence of effective safeguards to assure reliability, a conviction based solely on a witness' out-of-court inconsistent statement satisfies the requirements of due process as set forth in *Jackson*.

No hearsay[15] exception or exemption[16] has been subject to more thorough analysis in the past twenty years than that for prior inconsistent statements.[17]

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8. Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979); *see also* United Bd. of Carpenters and Joiners v. United States, 330 U.S. 395, 408 (1947) (Court held that refusal to properly instruct jury was reversible error, "no matter how conclusive the evidence" pointing to guilt); *cf.* Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899) (judge can set aside jury's verdict "if in his opinion it is against the law or the evidence").

9. *See* Jackson v. Virginia, 443 U.S. 307, 319 (1979).

10. *Id.* at 316; *see also In re* Winship, 397 U.S. 358 (1970) (Court recognized reasonable doubt standard as essential to due process).

11. Jackson v. Virginia, 443 U.S. 307, 316-17 (1979).

12. 443 U.S. 307 (1979).

13. *Id.* at 317.

14. *Id.*

15. The Federal Rules of Evidence define hearsay as follows:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

FED. R. EVID. 801(a)-(c).

16. The Federal Rules of Evidence divide traditional hearsay exceptions into two categories: exceptions and exemptions. Exemptions, prior out-of-court statements submitted to prove their truth but defined by the Federal Rules as nonhearsay, include all admissions made by a party to the litigation, FED. R. EVID. 801(d)(2), as well as many prior statements made by a testifying witness, FED. R. EVID. 801(d)(1)(A). As a matter of convenience and in recognition of tradition, this Article treats exemptions as exceptions to the hearsay rule.

17. For examples of some, but not all, of the articles dealing with the substantive admissibility of prior inconsistent statements, the reader is referred to the following materials: Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); Beaver, *Attending Witnesses Prior Declarations As Evidence: Theory vs. Reality*, 3 IND. L. REV. 309 (1970); Bein, *Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)*, 26 UCLA L. REV. 967 (1979); Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L.J. 3 (1975-76); Blakey, *You Can Say That If You Want—The Redefinition of Hearsay in Rule 801 of the Proposed Rules of Evidence*, 35 OHIO ST. L.J. 601 (1974); Dow, *Criminal Hearsay Rules: Constitutional Issues*, 53 NEB. L. REV. 425 (1974); Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of*

Preoccupied with the admissibility of such statements, courts and scholars have paid comparatively little attention to whether prior inconsistent statements alone can provide the basis of a constitutionally valid conviction. Although the United States Supreme Court has upheld the substantive admissibility of prior inconsistent statements as constitutionally valid,[18] it has never decided specifically whether such a statement alone could be sufficient to convict. As a result, there has been little consistency among lower federal and state courts on the question of sufficiency.[19]

Evidence 801(d)(1)(A), 613 and 607, 75 MICH. L. REV. 1565 (1977); Graham, *The Confrontation Clause, the Hearsay Rule and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972); Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH. L. REV. 67 (1969); Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. FLA. L. REV. 207 (1984); Ordover, *Surprise! That Damaging Turncoat Witness Is Still With Us: An Analysis of Federal Rules of Evidence 607, 801(d)(1)(A) and 403*, 5 HOFSTRA L. REV. 65 (1976); Peeples, *Prior Inconsistent Statements and the Rule Against Impeachment of One's Own Witness: The Proposed Federal Rules*, 52 TEX. L. REV. 1383 (1974); Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine*, 26 HASTINGS L.J. 361 (1974); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971); Silbert, *Federal Rule of Evidence 801(d)(1)(A)*, 49 TEMP. L.Q. 880 (1976); Stalmack, *Prior Inconsistent Statements: Congress Takes A Compromising Step Backward in Enacting Rule 801(d)(1)(A)*, 8 LOY. U. CHI. L.J. 251 (1977); Wieder & Speed, *Evidence—Hearsay and the Federal Rules of Evidence: A Practitioner's Guide*, 1977 ANN. SURV. AM. LAW 621; Younger, *Confrontation and Hearsay: A Look Backward, and a Peek Forward*, 1 HOFSTRA L. REV. 32 (1973).

18. *See* California v. Green, 399 U.S. 149 (1970).

19. *See* United States v. Orrico, 599 F.2d 113 (6th Cir. 1979) (holding there was insufficient proof of defendant's guilt when the sole evidence against defendant was prior grand jury testimony of one witness and prior written statement of another, neither of which were confirmed at trial). In United States v. Hines, 18 M.J. 729, 741 (A.F.C.M.R. 1984), when the two victims and their mother refused to testify at trial, their sworn statements were submitted under MILITARY R. EVID. 804(b)(5). Because no evidence existed contradicting the out-of-court statements, the court held those declarations alone sufficient to convict. *Id.* at 743-44; *see also In re* Miguel L., 32 Cal. 3d 100, 649 P.2d 703, 185 Cal. Rptr. 120 (1982) (conviction allowed to stand based solely on a prior inconsistent statement when that statement was confirmed at a judicial proceeding and when there was some basis in the record to credit that prior statement despite the in-court recantation); People v. Ford, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981) (pretrial identification made at a preliminary examination, later repudiated at trial, was sufficient to convict), *cert. denied*, 455 U.S. 1003 (1982); People v. Chavez, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980) (prior statements made by rival gang member at a preliminary examination were the sole basis for conviction); *In re* Johnny G., 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (1979) (victim's out-of-court statement, which could not be confirmed at trial, was held insufficient to sustain defendant's conviction); People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971) (witness' inconsistent statements made to police officer and later at preliminary hearing were properly admitted against defendant under CAL. EVID. CODE § 1235 (West 1966)), *cert. dismissed*, 404 U.S. 801 (1971); People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960) (en banc) (extrajudicial photographic identification that the witness did not confirm at trial was insufficient to convict absent other inculpatory evidence); People v. Brown, 150 Cal. App. 3d 968, 198 Cal. Rptr. 260 (1984) (defendant's conviction sustained even though the only evidence presented against him was the out-of-court statement of a witness who recanted at trial); Webb v. State, 426 So. 2d 1033 (Fla. Dist. Ct. App.), *petition for cert. denied*, 440 So. 2d 354 (Fla. 1983) (Defendant's conviction was based on the grand jury testimony of the victim and her mother, which was later repudiated at trial. These out-of-court declarations were considered not hearsay under the Florida statute and thus substantively admissible.); State v. Moore, 424 So. 2d 920 (Fla. Dist. Ct. App. 1983) (A Florida statute permitted the substantive consideration of out-of-court incriminating statements made by four eyewitnesses, two of whom testified under oath before a grand jury. Even though all of the witnesses recanted their testimony subsequent to the indictment, the court considered this evidence to be sufficient substantive evidence so that a dismissal of the indictment was not required. This suggests that such evidence may also have been sufficient to sustain a conviction.); Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (court upheld murder conviction based primarily on unsworn prior inconsistent statements witness allegedly made to police officer); People v. Lucas, 58 Ill. App. 3d 541, 374 N.E.2d

This Article addresses the issue of conviction based solely on an incriminating prior inconsistent statement.[20] The Article first summarizes the history of the substantive admissibility of prior inconsistent statements, demonstrates why these statements lack the trustworthiness associated with longer established hearsay exceptions, and illustrates how courts have inappropriately equated admissibility with sufficiency to convict. Second, the Article analyzes the confrontation and due process issues raised by a conviction based solely on such statements. Last, the Article proposes a standard that courts should apply in determining whether a trier of fact has correctly judged such evidence to be sufficient. This suggested standard requires that no prior inconsistent statement shall be sufficient to convict unless, at the time the statement was made, it was subject to some form of cross-examination[21] *and* there is some reasonable factual basis appearing in the record to credit the prior inconsistent statement over the present in-court testimony.

II. THE SUBSTANTIVE ADMISSIBILITY OF PRIOR INCONSISTENT STATEMENTS

When a witness testifies at a judicial proceeding, the witness' previous remarks inconsistent with his or her present testimony are admissible, at least for limited purposes. For years the general rule,[22] sometimes referred to as the orthodox rule,[23] provided that a witness' prior inconsistent statements could be

884 (1978) (conviction founded solely upon prior inconsistent statement overturned in a jurisdiction then, but no longer, governed by orthodox rule of admissibility); State v. Mally, 139 Mont. 599, 366 P.2d 868 (1961) (defendant's conviction may have rested on additional evidence other than the prior inconsistent statements of the defendant's brother); State v. Maestas, 92 N.M. 135, 584 P.2d 182 (N.M. Ct. App. 1978) (quoting favorably 4 J. WEINSTEIN & M. BERGER, WEINSTEIN ON EVIDENCE § 801-76.1, "The fact that the prior statement is admitted and given substantive effect does not mean that it will suffice as the sole basis for a conviction."); State v. Igoe, 206 N.W.2d 291 (N.D. 1973) (sworn testimony of a witness given before a grand jury proceeding was sufficient to sustain defendant's conviction).

20. Inconsistencies range from minor discrepancies between the two versions, to the recantation of the witness' earlier comments, to denials that the prior statements were ever made.

> [H]earsay evidence, ranging as it does from mere thirdhand rumors to sworn affidavits of credible observers, has as wide a scale of reliability, from the highest to the lowest, as we find in testimonial or circumstantial evidence generally, depending as they all do upon the frailties of perception, memory, narration, and veracity of men and women.

E. CLEARY, MCCORMICK ON EVIDENCE 728 (3d ed. 1984) [hereinafter MCCORMICK]. Prior inconsistent statements must, by definition, fall at the lower end of the reliability scale because the out-of-court declarant is now in court and, while under oath, is testifying in a manner inconsistent with his or her prior out-of-court statements.

21. The quality of the cross-examination to which the prior statement was subjected is not analyzed in this Article. The opportunity to cross-examine satisfies this prong of the proposed standard regardless of whether counsel takes advantage of that opportunity. However, the quality, or lack thereof, of the actual cross-examination can affect the second prong of the proposed standard—whether there is a reasonable factual basis in the record to credit the prior statement over the present in-court testimony.

22. *See* 3A WIGMORE, EVIDENCE § 1018, at 998 n.3 (Chadbourn rev. ed. 1970); *see also* United States v. Rainwater, 283 F.2d 386, 390 (8th Cir. 1960) ("The orthodox rule has been virtually universally accepted by the courts in both criminal and civil cases.").

23. [T]he traditional view had been that a prior statement of a witness is hearsay if offered to prove the happening of matters asserted therein. This categorization has not, of course, precluded using the prior statement for other purposes, *e.g.*, to impeach the witness by showing a self-contradiction if the statement is inconsistent with his testimony. . . . But the

used to impeach that witness' credibility, but could not be considered by the trier of fact as proof of the truth of the matters they asserted. When such statements are submitted for impeachment purposes only, the theory of admissibility "is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements."[24] When submitted for this limited purpose, prior inconsistent statements are not categorized as hearsay because they are not offered to prove their truth.[25]

A major deviation from the orthodox rule appeared in 1965 with the passage of California Evidence Code section 1235.[26] California became the first state to permit the use of all prior inconsistent statements both for impeachment purposes and to prove the truth of those prior statements. This change, however, did not gain immediate national acceptance. Proponents of the orthodox rule warned that if such prior statements were substantively admissible against criminal defendants, the inability to "cross-examine" the statement at the time it was made would not allow adequate confrontation as the sixth amendment to the United States Constitution requires.[27] Reflecting the view held by courts adhering to the orthodox position, the California Supreme Court has noted: "The chief merit of cross-examination is not that at some *future* time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its *immediate* application of the testing process. Its strokes fall while the iron is hot."[28] Based on this rationale the California Supreme Court subsequently declared section 1235 unconstitutional when used against defendants in criminal cases.[29]

In *California v. Green*,[30] however, the United States Supreme Court resurrected section 1235 by rejecting the California court's earlier interpretation of the sixth amendment. Writing for the Court, Justice White held that "[t]here is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as

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prior statement has been admissible as proof of matter asserted therein, *i.e.*, as "substantive" evidence, only when falling within one of the exceptions to the hearsay rule. The logic of the orthodox view is that the previous statement of the witness is hearsay since its value rests on the credit of the declarant, who, when the statement was made, was not (1) under oath, (2) in the presence of the trier, or (3) subject to cross-examination.

MCCORMICK, *supra* note 20, at 744.

24. MCCORMICK, *supra* note 20, at 744; *see also* 3A WIGMORE, *supra* note 22, § 1017, at 993-95 (inconsistent statements of a witness demonstrate capacity to err).

25. For the definition of hearsay, see *supra* note 15.

26. CAL. EVID. CODE § 1235 (West 1966) provides as follows: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

27. *See* People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 559 (1968). *But see* California v. Green, 399 U.S. 149 (1970) (confrontation clause does not exclude prior statements of witness who concedes making the statements and may have to explain an inconsistency at trial).

28. People v. Johnson, 68 Cal. 2d 646, 656, 441 P.2d 111, 118, 68 Cal. Rptr. 599, 606 (1968) (citing State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939)).

29. *See* People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968).

30. 399 U.S. 149 (1970).

a witness and is subject to full and effective cross-examination."[31]

In spite of the *Green* Court's elimination of the constitutional barriers, there was little additional movement away from the orthodox position until the 1975 adoption of the Federal Rules of Evidence. Rule 801(d)(1)(A) provides for the substantive admissibility of prior inconsistent statements,[32] so long as those statements were made while the declarant was under oath. (This is in contrast to the California rule that allows all such statements into evidence irrespective of oath. Neither rule, however, requires that the witness' prior remarks be subject to cross-examination when made.) Congressional acceptance of the substantive use of prior inconsistent statements proved very influential. Within the next decade, a majority of states adopted rules permitting the use of prior inconsistent statements to prove their truth as well as for impeachment purposes.[33]

III. A CRITICAL LOOK AT THE REASONS FOR ABANDONING THE ORTHODOX RULE

There are two primary justifications for the abandonment of the orthodox rule. First, the prior statement is more trustworthy than the present in-court testimony because it was made closer in time to the event that it describes.[34] Second, because the declarant is present at trial, the defendant has an opportunity to cross-examine the declarant effectively concerning the earlier out-of-court assertion and thereby reveal any inaccuracies in those prior remarks.[35] Though these two rationales arguably offer a conceptual basis for finding the earlier statements sufficiently trustworthy to permit their admission, the reliability of this evidence is still highly suspect. Moreover, even assuming that the evidence is sufficiently reliable to be admitted, neither rationale for admission provides sufficient justification for accepting such out-of-court assertions as the sole basis for conviction.[36]

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31. *Id.* at 158.

32. Rule 801(d)(1)(A) states:

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

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

33. *See* Appendix.

34. *See* MCCORMICK, *supra* note 20, at 745; *see, e.g.*, MODEL CODE OF EVIDENCE Rule 503(b) (1942).

35. "The major justification offered to support a hearsay exception for prior statements by available declarants is that the declarant's presence at trial provides an opportunity for cross-examination which protects against many of the same dangers that the hearsay rule is designed to avoid." R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 507 (2d ed. 1982).

36. In addition, it is argued that the change from the orthodox rule to a rule permitting the substantive admissibility of prior inconsistent statements is simply a recognition of the realities of the courtroom. Under the orthodox rule the trier of fact was permitted to consider the prior statement, but only for impeachment purposes and only under the control of a limiting instruction. The ability to follow the dictates of such a limiting instruction and not consider the statement for its truth may be beyond the abilities of most jurors. Therefore, it was suspected that most jurors were in fact considering the prior statements for their truth as well as for impeachment purposes in spite of the limiting instruction to the contrary. In discussing the orthodox rule, Maguire noted:

Under the first rationale, because the prior statement is made closer in time to the event it describes, the declarant is not as likely to fabricate or forget the truth as he or she would when a greater amount of time has elapsed before the recantation at trial. This reasoning is similar to the rationale underlying the past recollection recorded exception to the hearsay rule.[37] However, the past recollection recorded exception requires additional assurances of reliability not required for the admission of a prior inconsistent statement. First, the statement must have been recorded close in time to the event described. Second, the statement must be contained in a writing prepared for the purpose of preserving that statement. Third, the declarant must take the stand and confirm that, at the time the prior statement was recorded, it was a true and accurate reflection of the event observed. On the other hand, a prior inconsistent statement, to be admissible, need not have been made *close* in time to the event it describes, but merely *closer* in time than the witness' present testimony. Further, in many jurisdictions[38] the prior statement need not be memorialized in a writing, and, most importantly, a witness' prior inconsistent statement is admissible *not* when the witness affirms its accuracy, but rather when the witness testifies in a manner inconsistent with the truth of that prior statement. Thus, the only reliability-ensuring safeguard supporting the substantive admissibility of prior inconsistent statements is the fact these statements are made *closer* in time to the event described than the in-court repudiation. Is this minimal guarantee of trustworthiness sufficient to justify a criminal conviction based solely on such evidence?[39]

The second rationale underlying the change from the orthodox rule arises from the declarant's presence at trial and the opportunity to cross-examine the declarant effectively concerning the prior statement. The trier of fact can observe the declarant's demeanor and response to the cross-examiner's attempts to expose the conditions under which the prior statement was made, as well as the inconsistencies between the prior remarks and the present testimony. It is in the

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> [T]he contradictory statement is operative only to diminish or nullify the credence given to the witness' testimony, not to establish that the opposite is the real truth. Some critics say that this is too refined a distinction for a juror, or perhaps even a judge, to make, and that the purported limitation of probative effect is mere pretense. But trial lawyers—some good ones, too—assert that the distinction can easily be made and actually is made every day.

J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 58 (1947). Even if we accept the criticism of the orthodox rule as a persuasive argument in favor of admitting the prior assertion, this acceptance does not affect the question whether such statements, once admissible, should be sufficient to support a conviction.

37. Federal Rule of Evidence 803(5) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> (5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

FED. R. EVID. 803(5).

38. *See* Appendix, Section II.

39. Sufficiency under the due process clause is a different standard than that required for admissibility under the confrontation clause. *See infra* text accompanying notes 170-81.

courtroom that the flaws in this seemingly cogent rationale are exposed. As Professor Maguire has noted, "[M]any trial lawyers will have none of this [argument]. They say it is a professional pipe-dream. They have in mind considerations of practical policy . . . ."[40] What are these practical considerations? When the prosecution offers into evidence both a witness' testimony and prior inconsistent assertion to establish the truth of the prior statement, there is no in-court witness presently asserting the truth of that prior statement. The defense has only a memory to cross-examine. Although defense counsel can question the declarant about the out-of-court assertion, this cross-examination can rarely be as effective as questioning that immediately follows the assertion. The California Supreme Court has noted, "This practical truth is daily verified by trial lawyers, not one of whom would willingly postpone to both a later date and a different forum his right to cross-examine a witness against his client."[41]

The traditional classification of prior inconsistent statements as inadmissible hearsay recognizes the difficulty encountered in cross-examining a witness about that witness' prior out-of-court statement when that statement is offered for its truth.[42] Although today many jurisdictions do define the prior statements of a witness as nonhearsay,[43] many such statements are so classified only in certain situations.[44] For example, the admissibility of prior *consistent* statements is conditioned on the declarant-witness' ability or willingness while testifying to affirm the accuracy of his or her earlier statement. No such prerequisite is required for the admission of a prior *inconsistent* statement.[45] Cross-examination can be a fully effective means of testing the truth of an earlier statement only if a witness testifies *consistently* with the out-of-court statement.[46] For this reason the substantive admission of prior inconsistent statements does not possess the same assurance of reliability as that required for the admission of prior *consistent* statements.

The problem for the defense in cross-examining a prosecution witness about the truth of his or her prior statement exists in its most pristine form when that

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40. J. MAGUIRE, *supra* note 36, at 59.

41. People v. Johnson, 68 Cal. 2d 646, 655, 441 P.2d 111, 118, 68 Cal. Rptr. 599, 606 (1968).

42. *See* MCCORMICK, *supra* note 20, at 73, 115, 744.

43. *See* Appendix, Sections I and II.

44. *See* Appendix.

45. *See supra* note 32. The confrontation clause, however, would seem to preclude admission of prior inconsistent statements unless the witness-declarant admits having uttered the earlier remarks.

> This Court held that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness *who concedes making the statements*, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories."

Delaware v. Fensterer, 106 S. Ct. 292, 295 (1985) (emphasis added) (quoting *Green*, 399 U.S. at 164). *But see* Nelson v. O'Neil, 402 U.S. 622, 629-39 (1971) ("We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments.").

46. Paradoxically, this is the one situation that will never arise because the witness must in some manner contradict his or her earlier remarks before those remarks will be admissible as prior inconsistent statements. *See* MCCORMICK, *supra* note 20, at 744-47.

witness is unable or unwilling to remember either making the statement or the event the statement describes.[47] Although the witness' presence at trial may permit the cross-examiner to raise doubt about that witness' general credibility, cross-examination can only minimally attack the truth of the out-of-court assertion.[48] "[I]t is abundantly clear that in this situation cross-examination of the witness, as a practical matter, is of scarcely more aid in testing the dependability of the alleged out-of-court statement than would be cross-examination of A to test the verity of an alleged statement by B."[49] Thus, when the witness suffers a lapse of memory, the prior statement presents the classic dangers of hearsay.[50]

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47. When a witness has previously described an event there may be no inconsistency in that witness later testifying to an inability to remember that event. Some courts have recognized that there is nothing inconsistent in the fading of human memory. *See* Clifton v. Ulis, 17 Cal. 3d 99, 549 P.2d 1251, 130 Cal. Rptr. 155 (1976); People v. Sam, 71 Cal. 2d 194, 454 P.2d 700, 77 Cal. Rptr. 804 (1969).

48. If the declarant does not remember the incident described in the earlier statement or if the declarant's courtroom testimony is inconsistent with his earlier statement, evidence of that statement may be the only way of proving what is asserted therein. Yet in these circumstances the utility of courtroom cross-examination will often be quite limited. The declarant may fob off any attempt to develop the inconsistencies in or the implausibility of his earlier statements by saying, "I don't remember." He may deal similarly with efforts to secure an admission that his vantage point was obscured or his judgment biased. Whether the declarant's failure of memory is feigned or honest, the jurors are likely to be placed in a situation where they have only a bare accusation or simple description without any of the contextual information crucial to a rational determination of the weight the statement should be accorded. While cross-examination may help clarify ambiguous language and might give the jurors an idea of the declarant's general trustworthiness, the more significant hearsay dangers remain.

R. LEMPERT & S. SALTZBURG, *supra* note 35, at 507-08.

49. Falknor, *The Hearsay Rule and its Exceptions*, 2 UCLA L. REV. 43, 53 (1954). The testimony submitted by the prosecution in such a case has been illustrated by Professors Lempert and Saltzburg:

Situation C: Where the witness denies making an earlier inconsistent statement.

Prosecutor [On direct examination]: Now, can you tell us who sold you the marihuana? W: No, I cannot.

P: Your honor, the witness' statement is inconsistent with his earlier statements on this subject. The prosecution is surprised by this testimony and would like to question him as if on cross-examination in order to clarify certain matters.

J: Go ahead.

P: Do you mean you cannot swear that it was Green who sold you the marihuana? W: No, I cannot.

P: Do you remember giving a statement to a police officer shortly after you were arrested with the marihuana? W: No, I don't. I never gave a statement.

P: You are denying that you ever gave any statement to the arresting officer? W: Yes, I never said anything.

P: That is all, thank you.

P [Questioning Officer Johnson. The circumstances of the arrest have just been described.]: What did you say next? J: I said that he was only a juvenile and if he would cooperate things might go easier for him.

P: What did he say? J: He said, "I bought the dope off of Green. He had hid the baggies under a bush on his folks' property. I gave him the money and he told me where to look."

P: You're sure he identified Green? J: Yes, I'm certain.

P: Thank you, officer.

R. LEMPERT & S. SALTZBURG, *supra* note 35, at 510-11.

50. The confrontation clause may prohibit the admission of the out-of-court assertion under these circumstances because of the extreme limits on the opportunity to cross-examine. The United States Supreme Court in *Green* recognized this fact when it suggested that a witness' lapse of memory might make a critical difference in providing the accused with an opportunity to cross-examine

A better opportunity for cross-examination arguably exists when the witness remembers having made the prior statement, but testifies in a manner inconsistent with his or her earlier statement. However, even in this situation the effectiveness of cross-examination is severely limited.[51] A witness' repudiation of his or her earlier out-of-court version of an event during direct examination simply will not tarnish the truth of that earlier version as would the retraction of direct testimony during cross-examination at the same proceeding.[52] "Only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure."[53] The *manner* in which evidence is presented can be as important as its

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fully and effectively the witness about his or her other out-of-court statements and thus deny the accused confrontation. "Commentators have noted that in such a case the opportunities for testing the prior statement through cross-examination at trial may be significantly diminished." *Green*, 399 U.S. at 169 n.18. For a more extensive discussion of the problem of the forgetful witness, see Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978). In addition, the Court's holding in *Green* would seem to preclude the introduction of the prior statements of a witness who fails to concede making the prior assertion. Delaware v. Fensterer, 106 S. Ct. 292, 295 (1985). *But see* Nelson v. O'Neil, 402 U.S. 622, 629-39 (1971) ("We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments.").

51. In this situation also, the quality of cross-examination of the witness' prior statement and the conditions under which it was made is less than that of a witness' present testimony. For an illustration of the difficulties in such cross-examination, see R. LEMPERT & S. SALTZBURG, *supra* note 35, at 508-11.

52. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971). In *Nelson* codefendant Runnels gave testimony in court favorable to himself and to defendant O'Neil. During cross-examination by the prosecution Runnels denied having made a prior inconsistent and inculpatory statement to the police. The Supreme Court, in holding the prior statement admissible against O'Neil, noted that Runnels' testimony "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced." *Id.* However, this portion of the Court's analysis fails to reflect the realities of cross-examination.

> [T]he repudiation of an earlier story on direct examination is not necessarily equivalent to the retraction of that story on cross-examination.
>
> . . . .
>
> If testimonial repudiation of an earlier out-of-court statement is likely to be less convincing than the repudiation of direct testimony on cross-examination, it is because the jury may not believe that contemporaneous cross-examination would have shaken the earlier out-of-court statement. The crucial factor will be whether the witness can offer a satisfactory explanation for the discrepancy between his out-of-court statement and his courtroom testimony. Absent a convincing explanation, it is not irrational for the jury to believe that "the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy which gave rise to the litigation." However, it does not necessarily follow that we want to allow convictions or judgments to rest largely on out-of-court statements that have been contradicted by sworn testimony. There is something incongruous about resting a verdict on the judgment that someone who cannot be believed under oath was credible in an earlier unsworn statement. In addition, the prior statement may have been elicited by the kind of leading questions which would have been barred on direct examination as unduly suggestive.

R. LEMPERT & S. SALTZBURG, *supra* note 35, at 511-12 (quoting California Law Revision Commission, *Comment on Sec. 1235 of the California Evidence Code* (1965)).

53. New York Life Ins. Co. v. Taylor, 147 F.2d 297, 305 (D.C. Cir. 1945) (quoted with approval in United States v. Inadi, 106 S. Ct. 1121 (1986) (Marshall, J., dissenting)); *see also* United States v. Oates, 560 F.2d 45, 82 n.39 (2d Cir. 1977) ("[I]t has also been argued that the disadvantage

content. When a witness, on cross-examination, recants his or her earlier in-court direct testimony, the trier of fact is present to observe the inconsistencies and may credit the repudiation as the more accurate account of the disputed events. However, this is much less likely to occur when the witness testifies on direct examination inconsistently with his or her out-of-court statement. In the former situation the jury sees the prosecution's witness discredited on cross-examination; in the latter, there is no real discrediting but, at best, merely an explanation of why the witness' earlier statement was inaccurate. The impact of the recantation in the latter situation is much less dramatic than in the former, and therefore the trier of fact will more likely believe the earlier out-of-court assertion rather than the in-court testimony. Professors Lempert and Saltzburg have discussed the difference between these two situations, as illustrated by the facts of *California v. Green*:

> Situation A: Where the witness on direct examination accuses Green of selling marihuana and the cross-examiner gets the witness to repudiate the accusation.
>
> Prosecutor [On direct examination]: And will you tell us who sold you the [marihuana] which was found in your possession? W: It was Martin Green.
>
> P: And how did this sale occur? Did he hand you the marihuana?
>
> W: No, he pointed to some bushes near his parents' house and said I would find the baggies there. I did, I found twenty-nine.
>
> P: Thank you, your witness.
>
> Defense Counsel [On cross-examination]: Is marihuana the only drug you have ever used? W: No, it is not.
>
> D: What other drugs have you used? W: Well, I've dropped acid, that is, used LSD.
>
> D: What are the effects of dropping acid? W: Well, it makes you super high. It changes your sense of things, of time, of space. Your world is different, everything is alive.
>
> D: In short, it distorts your perceptions considerably; isn't that right?
>
> W: Yes.
>
> D: You might be talking to someone and not remember who he is afterwards?
>
> W: Yes.
>
> D: The features of the person you are talking to might be different, you might see a nose exaggerated or proportions changed? W: Yes.
>
> D: Now, when was the last time you had dropped acid before you arranged this marihuana purchase? W: Well, actually I had taken some about twenty minutes before I got the call from Green telling me where to go to pick up the marihuana.
>
> D: LSD distorts the perception of voices does it not? W: It may.
>
> D: You really can't be certain it was Green's voice you heard on the phone, can you? W: No.

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the defendant suffers because of the prosecutor's failure to call the extra-judicial declarant is not ameliorated by the defendant's ability to call the extra-judical declarant as his own witness.").

D: It's quite possible that someone else had called you up, your best friend, for example; yet you might have thought it was Green who called you when the effects wore off? W: Yes.
D: You then went to pick up the baggies. Did you not? W: Yes, I guess so.
D: What do you mean, I guess so? W: Well, I was still high, so fact and fantasy are really mixed up in my mind. If I hadn't had the baggies on me when the police came I wouldn't know what I had done.
D: You really aren't sure where you got the marihuana, are you. W: No.
D: You wouldn't want to swear under oath that Green was your supplier. Would you? W: No.
D: In short, you have no idea where the marihuana came from; isn't that so? W: Yes.

Situation B: Where the witness acknowledges but repudiates and explains his earlier inconsistent statement.
Prosecutor [On direct examination]: Now can you tell us who sold you the marihuana? W: No, I cannot.
P: Your honor, the witness' statement is inconsistent with his earlier statements on this subject. The prosecution is surprised by this testimony and would like to question him as if on cross-examination in order to clarify certain matters.
J: Go ahead.
P: Do you mean that you cannot swear that it was Green who gave you the marihuana? W: No, I cannot.
P: Do you remember giving a statement to a police officer shortly after you were arrested with the marihuana? W: Yes, I do.
P: And that was soon after you purchased the marihuana, at a time when your memory of the event was considerably fresher than it is now. W: Yes.
P: Do you remember giving Officer Johnson, the officer who arrested you, the following statement, "I bought the dope off of Green. He had the baggies under a bush on his folks' property. I gave him the money and he told me where to look." W: Yes, I said that.
P: Thank you.

Defense Counsel [On cross-examination]: You've just testified that you cannot be sure that Green sold you the marihuana, isn't that right? W: Yes, it is.
D: In fact, you have no reason to believe it was Green who sold you the marihuana, do you? W: No.
D: Could you explain why you're unsure about who sold you the marihuana? W: Yes. You see, I had just dropped acid at the time I bought the marihuana. That's LSD. It distorts your perception. You can't be sure of anything. I had this call on the phone telling me about the dope. The voice might have sounded like Green's, but it could have been anybody's. Then I went out to pick the stuff up. But, I was so high I couldn't tell fact from fantasy. When the police came I

thought the police might go easy on me if I could name my supplier, so I just picked Green's name out because I knew him as an acquaintance. But he wasn't a friend.

D: Thank you.

Prosecutor [On redirect examination]: Just one more question. When you were arrested you never told the officer that you had just been taking LSD, did you? W: No.

P: That is all.

Defense Counsel [On recross-examination]: Why didn't you tell the arresting officer you were high on LSD? W: I was afraid I would get busted for that, too.

. . . .

In each of these situations the witness has told two stories. One accuses the defendant of supplying him with marihuana; the other professes an inability to identify the supplier. Yet, the situations are clearly not equivalent. In situation A, the jury sees the prosecution's witness discredited on cross-examination. Here they are likely to discount the accusation entirely. In situation B there is no discrediting of the witness, just an explanation of why his earlier statement was inaccurate. If the jury accepts the explanation it may discount the accusation; if it does not, the later courtroom repudiation will be of little help to the defendant.[54]

Of course, there will be cases in which the witness-declarant will successfully assist the defense in its goal of discrediting that witness' own prior statement. However, such cooperation on the witness' part is not a prerequisite to the prior statement's admissibility or to its potential sufficiency. Although the trier of fact might choose to believe the present explanation and disregard the prior out-of-court statement, there are likely to be additional reasons, such as the declarant-witness' poor demeanor on the witness stand,[55] that persuade the trier of fact to disregard the present testimony. When the trier of fact does not believe the present testimony, that testimony's inconsistencies with the prior

54. R. LEMPERT & S. SALTZBURG, *supra* note 35, at 508-11.

55. *See infra* notes 60-80 and accompanying text.

There are methods by which the defense may lessen the impact of a prosecution witness' incriminatory prior inconsistent statements. Assume, as in the typical case, that the prosecution has called a civilian eyewitness to the alleged crime and that witness has testified in a manner exculpatory to the accused. The prosecution now calls a police officer who testifies that the previous witnesses had, contrary to that witness' present testimony, made prior remarks tending to incriminate the accused. One potentially useful tactic for the defense would be to list, during cross-examination of the police officer, all those questions counsel would have asked the civilian witness had the witness testified consistently with the truth of his out-of-court statement.

For example, assumed that the contested issue is the whereabouts of the accused at 11:00 p.m. on the night a crime occurred near the corner of 5th and Main. An alleged eyewitness testifies that he did not see the accused on the evening in question. Subsequently, however, a police officer testifies that that same witness had, in fact, previously told the officer that he had seen the accused at the corner of 5th and Main at 11:00 on the night of the crime. Cross-examination of the officer should involve questions such as:

Question: Officer, did you ask the previous witness whether he was wearing a watch at the time he allegedly observed the accused?

Answer: No.

Question: Did you ask the witness when he had last seen a clock?

Answer: No.

Question: Did you ask him if he had seen or heard a television or radio program which enabled him to approximate what time he had allegedly seen the accused?

Answer: No.

Question: Did you ask the witness how much he had had to drink that evening?

Answer: No.

Question: Did you ask him whether he had had any marijuana to smoke that evening or had consumed any drugs?

Answer: No.

This line of questioning can be duplicated regardless of the issue the prior statement is submitted to prove. For example, suppose the specific place that the accused was standing just prior to the commission of the offense is relevant and is the subject on which the eyewitness' prior inconsistent statement was submitted. The questioning of the officer who now testifies to the witness' incriminatory prior inconsistent remarks could proceed as follows:

Question: Officer, did you have the previous witness show you where he was standing at the time when he allegedly observed the accused?

Answer: No.

Question: Did you yourself stand exactly where the witness had stood so that you could determine whether there were any shrubs or trees or other obstacles which might have obstructed a clear observation of the area by the witness?

Answer: No.

Question: Did you ask him whether there was any street light or other form of illumination at the time he made his observation?

Answer: No.

Police officers will invariably fail to ask the types of questions about which defense counsel are most concerned. These are simply not the issues that concern the police in the heat of an investigation. Therefore, unless the officer is prepared to perjure himself, chances are very good that each of these questions on cross-examination will be answered in the negative. In some cases, there will be a transcription, tape recording, or other memorialization of the conversation with the alleged eyewitness. If so, defense counsel can be relatively certain of not getting any unexpected affirmative answers, lest the officer subject himself to some obvious impeachment.

This type of questioning *may* successfully minimize the impact of the prior inconsistent statement by revealing to the jury the untrustworthiness of the out-of-court declaration, particularly if the declarant himself has now come to court and denied the truth of his own prior remarks. Defense counsel would then argue to the jury that, because he was unable to cross-examine the witness at the time the statement was made and the officer did not do this for him, the prior statements should be given very minimal probative weight. This, of course, is an explanation of the rationale that underlies the hearsay rule itself.

Another method through which the defense may discredit the truth of the prior inconsistent statements of the alleged eyewitness is to reveal the circumstances under which the police obtained the witness' prior statements. The witness may not have been treated with "kid gloves" at the time the statements were taken from the witness. In some communities witnesses to a crime may themselves be involuntarily removed to the police station for questioning. Although the defendant may not have a constitutional right to exclude statements obtained under such conditions, revealing to the jury the circumstances under which the prior statements were made may successfully reduce the credibility of those statements.

For example, consider a case in which the police officer testified that he had obtained a voluntary prior statement from a now recalcitrant witness. The defense introduced a police tape recording of the witness' statements obtained through discovery. The tape revealed that the witness had begun making her statement to the police with the following remarks: "Why did you guys grab me off of that bus stop? When are you going to let me go home to my baby?" Answer: "As soon as you tell us what we need to know." Such facts, although insufficient to justify the exclusion of the prior statements on constitutional grounds, may nonetheless adversely affect the credibility of those remarks in the minds of many jurors. Based on an interview with Charles Gessler, Deputy Public Defender, Los Angeles County (October 17, 1986).

This discussion of the tactics a defense attorney might use to minimize the impact of incriminatory prior inconsistent statements is, of course, beyond the scope of this Article. Regardless of the

statement will not aid the accused.[56] In most cases cross-examination will lead to scarcely more than an elaboration of the basis for the witness' present testimony or a more extensive explanation of the reason for the earlier inconsistent version. Thus, in light of the attendant hearsay dangers, this limited cross-examination to test the now recanting declarant's out-of-court credibility presents a weak basis for justifying admission. A fortiori, it can provide little justification for allowing such out-of-court assertions to stand alone as the basis for conviction.

Once the courts permit the substantive admissibility of prior inconsistent statements, however, conviction based solely on them is possible. The spectre of conviction based solely on a prior inconsistent statement clearly concerned many of the drafters of federal rule 801(d)(1)(A).[57] Many commentators attempted to minimize this fear of unjust conviction by pointing out that "[t]hose who fear that a prior inconsistent statement given substantive effect would, in all cases, be enough to sustain a party's burdens of proof fail to recognize the essential difference between admissibility and sufficiency."[58] Apparently, many lower courts that have chosen to sustain criminal convictions based solely on prior inconsistent statements have failed to appreciate this distinction between admissibility and sufficiency.[59] In upholding convictions supported by such a record,

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effectiveness of defense counsel, the question remains what should be done when the jurors choose to return a verdict of guilt in the absence of any other substantial evidence linking the defendant to the commission of the alleged offense.

56. *See* R. LEMPERT & S. SALTZBURG, *supra* note 35, at 511.

57. "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. . . . Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate." S. REP. NO. 1277, 93d Cong., 2d Sess. 16 n.21, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7063 n.21; *see* Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 MICH. L. REV. 1565, 1577 (1977).

Others studying rule 801(d)(1)(A) have also reached the conclusion that such evidence alone should not be sufficient to convict. Professor Edward W. Cleary, the Reporter for the Advisory Committee that drafted the Federal Rules of Evidence, suggested that "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." *See Rules of Evidence: Hearings Before the Subcomm. on Criminal Justice of the House Comm. On Judiciary*, 93rd Cong., 1st Sess. 98-99 (Supp. 1973) [hereinafter *House Comm. on Judiciary*]; *see also Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93rd Cong., 2nd Sess. 51-52 (1974) [hereinafter *Senate Comm. on the Judiciary*].

For further discussion of this point, see Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L.J. 3, 20-24 (1975).

58. Stalmack, *Prior Inconsistent Statements: Congress Takes a Compromising Step Backward in Enacting Rule 801(d)(1)(A)*, 8 LOY. U. CHI. L.J. 251, 267 (1977). Professor Stalmack cites the testimony of Judge Charles Joiner, a member of the Standing Committee on Rules of Practice and Procedure in *Senate Comm. on the Judiciary*, *supra* note 57, at 36, as well as a letter from Professor Edward W. Cleary, Reporter, Advisory Committee on Rules of Evidence, Judicial Conference of the United States, *House Comm. on Judiciary*, *supra* note 57, at 98-99.

59. *See* United States v. Hines, 18 M.J. 729 (A.F.C.M.R. 1984); People v. Ford, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981); People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971); People v. Brown, 150 Cal. App. 3d 968, 198 Cal. Rptr. 260 (1984); Webb v. State, 426 So. 2d 1033 (Fla. Dist. Ct. App.), *petition for cert. denied*, 440 So. 2d 354 (Fla. 1983); State v. Moore, 424 So. 2d 920 (Fla. Dist. Ct. App. 1983); Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982); State v. Igoe, 206 N.W.2d 291 (N.D. 1973); *see also* State v. Mally, 139 Mont. 599, 366 P.2d 868

these courts have not recognized the inherently unreliable nature of many prior inconsistent statements. The unreliable nature of these statements render them inferior to most other types of admissible hearsay.

IV. THE INFERIOR NATURE OF PRIOR INCONSISTENT STATEMENTS

Courts and commentators have yet to recognize the peculiar danger inherent in the substantive use of prior inconsistent statements as compared to other hearsay exceptions. This previously unarticulated danger lies in the unique theory under which prior inconsistent statements gain admissibility. This section of the Article will illustrate that prior inconsistent statements gain their substantive admissibility as a result of a fact that decreases, rather than increases, the prior statements' reliability.

Every witness is subjected to cross-examination so that the opposing party will have a fair opportunity to expose the flaws in the witness' perceptual and narrative abilities, sincerity, and recollection.[60] Absent cross-examination, the truth of a witness' statement may go unchallenged and the inaccuracies unrevealed. A hearsay statement can never be subjected to the same degree of scrutiny through cross-examination as can live testimony.[61] Thus, the opponent may never be able to expose, and the trier of fact never learn, the possible reliability problems of a given hearsay statement. This is true even when the declarant takes the witness stand and relates his or her own prior out-of-court statement.

Although evidence need not be completely reliable to be admissible, the hearsay rule embodies the belief that out-of-court statements submitted to prove their truth normally do not rise to a level of trustworthiness sufficient to permit their admissibility. There are, of course, numerous exceptions[62] to the hearsay rule.[63] These exceptions are based on the teachings of experience or tradition

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(1961) (although sustaining a conviction on other grounds, the court implied that prior inconsistent statements of a witness could serve as a defense).

60. MCCORMICK, *supra* note 20, at 726, 728.

61. Cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. 1974) (quoted with approval in California v. Green, 399 U.S. 149, 158 (1970)).

> Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

Chambers v. Mississippi, 410 U.S. 284, 298 (1973); *see also* Ohio v. Roberts, 448 U.S. 56 (1980) (expressing constitutional preference for live testimony over hearsay statements). *But see* United States v. Inadi, 106 S. Ct. 1121 (1986) (limiting this preference expressed in *Roberts* to the admission of former testimony).

62. Professor McCormick has explained the need for exceptions to the hearsay rule as follows: "[A] problem arises from the wide variation in the reliability of evidence which by definition is classed as hearsay. The traditional solution has been found in recognition of numerous exceptions where it has been thought that 'circumstantial guarantees of trustworthiness' justified departure from the general rule excluding hearsay." MCCORMICK, *supra* note 20, at 753.

63. "A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the

that assertions made under certain circumstances,[64] or by individuals with certain interests,[65] are likely to be more reliable than other types of hearsay. Statements that fall within a hearsay exception are deemed to reach a level of trustworthiness sufficient to gain admissibility despite the absence of contemporaneous in-court cross-examination.[66] Underlying each traditional exception are specific reasons why the otherwise inadmissible, out-of-court assertions are sufficiently reliable to be permitted into evidence.[67]

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absence of the oath and opportunity for cross-examination." Chambers v. Mississippi, 410 U.S. 284, 298-99 (1973). As noted by Professor McCormick:

> In the late 1700's when confrontation provisions were first included in [the] American bill of rights, the general rule against hearsay had been accepted in England for a hundred years, but it was equally well established that hearsay under certain circumstances might be admitted. A fair appraisal may be that the purpose of the American provision was to guarantee the maintenance in criminal cases of the hard-won principle of the hearsay rule, without abandoning the accepted exceptions which had not been questioned as to fairness, but forbidding especially the practice of using depositions taken in the absence of the accused.

MCCORMICK, *supra* note 20, at 750.

64. Federal Rule of Evidence 804(b)(2) provides:

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

FED. R. EVID. 804(b)(2).

65. "Among the most prevalent of these exceptions is the one applicable to declarations against interest—an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made." Chambers v. Mississippi, 410 U.S. 284, 299 (1973). Federal Rule of Evidence 804(b)(3) provides:

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID. 804(b)(3).

66. Of course, there are other hearsay exceptions based on questionable rationales. For example, a dying declaration is considered reliable because tradition tells us that no one is likely to want to risk damnation by dying with a lie on his or her lips. Though dying declarations pose problems of perception or recollection, these problems are outweighed by the high level of sincerity one is believed to manifest "in the hush of [death's] impending presence." Shepard v. United States, 290 U.S. 96, 100 (1933). The sufficiency of this type of extrajudicial statement to convict is also a concern of constitutional dimension but is not addressed in this Article.

67. The pattern of the exceptions as evolved by the decisional process of the common law and generally in effect today divides the hearsay exceptions into two groups. In the first, the availability or unavailability of the declarant is not a relevant factor: the exception is applied without regard to it. In the second group, a showing of unavailability is a condition precedent to applying the exception. The theory of the first group is that the out-of-court statement is at least as reliable as would be his testimony in person, so that producing him would involve pointless delay and inconvenience. The theory of the second group is that, while it would be preferable to have live testimony, if the declarant is unavailable, the out-of-court statement will be accepted. The pattern to a large extent is the product of

Uniquely, there are no such specific reasons that justify the admission of prior inconsistent statements. These statements are not substantively admissible because of circumstances that increase their reliability. Rather, it is the declarant's inconsistent present testimony that makes the prior remarks admissible. However, the prior remarks do not gain increased reliability because of the declarant's present inconsistent testimony. Although it has long been accepted that a prior inconsistent statement may cast doubt on the veracity of the present testimony, it is equally true that the present testimony casts doubt on the accuracy of the prior inconsistent assertion.

For example, assume that an out-of-court assertion offered into evidence to prove its truth does not come within the requirements of any hearsay exception. The hearsay rule dictates that it is inadmissible. The proponent of this otherwise inadmissible prior statement then calls the declarant as a witness. The declarant, rather than affirming the accuracy of the prior assertion, retracts, contradicts, repudiates, or in some other manner disputes its truth. Absent the present inconsistent testimony, the prior statement would be inadmissible. Because of the present inconsistent testimony given under oath, the prior out-of-court statement becomes admissible. The present testimony does not, however, increase the probability of the prior statement's truth. If anything, the reliability of the previous assertion is diminished when the declarant disputes its truth. Thus, this hearsay uniquely gains its admission because of a decrease, not an increase, in trustworthiness.

In addition, many subtle pressures further diminish the trustworthiness of prior inconsistent statements below that of assertions admitted under more traditional hearsay exceptions. Prior inconsistent statements are often made to police officers or testified to before a grand jury. In either instance a less than impartial questioner, such as a police investigator or a prosecutor trying to make his or her case, could maneuver the witness into giving an inaccurate statement. These statements are rarely given in a neutral and unpressured atmosphere.[68] Furthermore, neither the accused nor his or her representatives are present dur-

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history and experience, and, as might be expected of a body of law created by deciding cases as they arose in necessarily random fashion, it is not in all respects consistent. Nevertheless, it has stood the test of time and use, and offers a substantial measure of predictability.

MCCORMICK, *supra* note 20, at 753.

68. For example, the witness-declarant in *Green*, juvenile Melvin Porter, made his initial statements to the police after several days in custody. *See, e.g.*, 4 J. WEINSTEIN & M. BERGER, WEINSTEIN ON EVIDENCE § 801(d)(1)(A)[01], at 801-107 to -108 (1985). The pressures that may be applied during police interrogation are well known. *See* Miranda v. Arizona, 384 U.S. 436 (1966). However, the psychological pressures at grand jury proceedings are less publicized. Critics of grand jury investigations believe that

> the psychological pressure felt by the witness stems from . . . the "star chamber setting" of grand jury interrogation. No person stands more alone . . . than a witness before a grand jury; "in a secret hearing, he faces an often hostile prosecutor and 23 strangers, with no judge present to guard his rights, no lawyer by his side, and often no indication of why he is being questioned."

W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 354 (1985).

ing a police interrogation or grand jury proceeding.[69] Thus, there is no opportunity for cross-examination or qualification in the nature of cross-examination. Although the defense may succeed in exposing the atmosphere in which the prior statement was made, the trier of fact may nonetheless choose to believe that earlier statement. Recognizing these reliability problems, commentators have suggested that a reasonable jury would rarely convict based solely on a prior inconsistent statement.[70]

However, in spite of the low level of trustworthiness possessed by a prior inconsistent statement, the circumstances under which such a statement is presented could mislead the average juror into believing that the statement is reliable and, thus, provide an adequate basis for conviction. If a witness denies having made the prior statement or admits having made it but now denies its truth, the trier of fact may perceive its function as having to choose between this declarant-witness' present testimony and that of another witness who now testifies to the declarant's out-of-court statement. For example, the witness who testifies to the declarant's out-of-court statement in court is very often a police officer or the prosecuting attorney.[71] When choosing between a uniformed symbol of law and order who probably has experience testifying in court and an inconsistent civilian eye-witness who, in many cases, may be implicated in criminal activity, the jury will "intuitively" credit the prior statement recited by the officer.[72] Similarly, when the prior statement was made at a formal pretrial pro-

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69. The presence of the grand jury does little to increase the impartiality of the prosecutor's questioning.

> [T]he notion that a grand jury operates as a significant check on a prosecutor is rather remarkable. Although the "runaway" grand jury is not unknown in our history, anyone with any knowledge of our criminal justice system knows that grand juries routinely return whatever indictment the prosecutor requests. Given the fact that the prosecutor orchestrates the grand jury proceedings and that no opposing attorneys are allowed to participate in them, any other result would be surprising.

United States v. Andrews, 612 F.2d 235, 249 n.2 (6th Cir. 1979) (Keith, J., dissenting); *see also* United States v. Gallo, 394 F. Supp. 310, 314 (D. Conn. 1975) ("The Court of Appeals for this Circuit has expressed particular concern that an indicting grand jury not become a 'rubber stamp' endorsing the wishes of a prosecutor as a result of the needless presentation of hearsay testimony in grand jury proceedings.").

70. "[I]t is doubtful, however, that in any but the most unusual case a prior inconsistent statement alone will . . . support a conviction since it is unlikely that a reasonable juror could be convinced beyond a reasonable doubt by such evidence alone." 4 J. WEINSTEIN & M. BERGER, *supra* note 68 § 801(d)(1)(A)[01], at 801-107.

71. *See* California v. Green, 399 U.S. 149 (1970) (police officer testified to the witness' prior extrajudicial remarks and the prosecutor read portions of that witness' preliminary hearing testimony into record); People v. Ford, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981) (robbery victim having failed to identify positively defendant at trial, prosecutor read transcript of witness' preliminary hearing identification to jury); People v. Chavez, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980) (prosecutor introduced evidence of the witness' preliminary hearing testimony); *In re* Johnny G., 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (1979) (when assault victim could not identify defendant, a police officer testified to victim's prior identification at scene of crime); People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968) (prosecutor read accusatory grand jury testimony of recanting juvenile victim and her mother when both recanted their testimony at trial).

72. "[P]olice officers are generally more credible witnesses than prisoners . . . ." Oregon v. Elstad, 105 S. Ct. 1285, 1323 (1985) (Stevens, J., dissenting). "Particularly in a criminal case, the defendant may have difficulty cross-examining effectively. The attorney may be reluctant to interview the witness before hand because the jury will then get the impression that the witness' story was

ceeding, such as a grand jury, it will often be the prosecuting attorney, or a court reporter, who will read, from an official-looking document, the earlier transcription into the trial record.[73] In either instance, the out-of-court statement gains increased believability because of its recitation in court by a presumably credible person representing authority.[74] It is unrealistic to rely on jurors[75] to develop an accurate sense of reliability under these circumstances.[76] Jurors may not understand, or they simply may not care, that the officer, prosecutor, or court reporter is not attesting to the accuracy of the prior statement, but is testifying merely that it was made. Further, the jury may draw unreliable inferences from its mistrust of the declarant's present demeanor. The declarant's demeanor may have been equally poor at the time he or she made the prior statement, but that earlier demeanor is safely hidden from the critical eyes of the present trier of fact.[77] A witness' unsatisfactory trial demeanor should not provide a sufficient basis to permit conviction solely on that witness' prior unobserved statement.[78]

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changed as the result of pressure or fear." 4 J. WEINSTEIN & M. BERGER, *supra* note 68 § 801(d)(1)(A)[01], at 801-108.

73. *Cf.* California v. Green, 399 U.S. 149 (1970). "By placing the witness on the stand and reading in the confession, the prosecutor, in effect, increased the reliability of the confession in the jury's eyes in view of the witness' apparent acquiescence as opposed to repudiation." *Id.* at 187 n.20 (Harlan, J., concurring).

74. Many variables have been found to be associated with a

> person's persuasive impact. Most important among these are: credibility, attractiveness, and power. People who are perceived to be highly credible, personally attractive, or who are in a powerful position are usually more persuasive when they deliver a message than those lacking these characteristics.

Linz & Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOLOGY REV. 1, 29 (1984); *see, e.g.* Hass, *Effects of Source Characteristics on Cognitive Responses and Persuasion*, in COGNITIVE RESPONSES IN PERSUASION 141 (1981); Kelman, *Processes of Opinion Change*, 25 PUB. OPINION Q. 57 (1961); McGuire, *The Nature of Attitudes and Attitude Change*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 136, 187-94 (1969).

75. The same rules about the insufficiency of the evidence are equally applicable to judge trials as well as jury trials. As the Court noted in Jackson v. Virginia, 443 U.S. 307, 317 n.8 (1979): "The trier of fact in this case was a judge and not a jury. But this is of no constitutional significance."

76. "Hearsay evidence is suspect not merely because it is unreliable, but also because the jury will not always fully appreciate the unreliability of such evidence. This failure to accurately perceive and evaluate the evidence may lead to inaccurate factfinding and therefore justifies exclusion." Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 84 (1984).

77. Whether this problem could be satisfactorily alleviated by the videotaping of the witness' prior statement is not discussed in this Article. For a general discussion of the videotaping of witnesses, see Goldstein, *Using Videotape to Present Evidence in Criminal Proceedings*, 27 CRIM. L.Q. 369 (1985).

78. *See* People v. Casillas, 60 Cal. App. 2d 785, 793-94, 141 P.2d 768, 772 (1943). *Casillas* involved a nonjury trial of the accused for having engaged in incestuous relations with his daughter. On direct examination the daughter testified that defendant had performed intercourse with her. On cross-examination, however, she recanted this direct testimony and stated that it had been her boyfriend, Manuel, who had really committed the acts in question. *Id.* at 788-92, 141 P.2d at 769-71. The prosecution's case rested entirely on the daughter's direct testimony. The trial court found the accused guilty as charged, stating that it was the court's "personal belief" that the prosecutrix' *direct* testimony was the truth. *Id.* at 793, 141 P.2d at 772. In this case the trier of fact had the opportunity to observe the witness' "demeanor" at the time *both* inconsistent statements were made.

The court of appeal, however, reversed the conviction:

> It is at once apparent that in the personal opinion of the trial judge, the prosecutrix told the truth only in that part of her testimony wherein she accused her father of the horrible crimes charged against him. But cases cannot be legally decided upon personal opinions of those charged with that responsibility, and legal decisions must be made upon a judicial

However, the witness' unsatisfactory trial demeanor contrasted with the more credible demeanor of the person relating the witness' prior statement may create an illusion of unwarranted reliability associated with the earlier statement.[79] In such a situation the trier of fact's decision to believe the unobserved out-of-court statement rather than the same person's in-court testimony is based on nothing more than guesswork.[80] Convictions should be founded on competent evidence or reasonable inferences drawn from such evidence. They should not be founded solely on unsupported intuition.

V. RECOGNIZING THE DIFFERENCE BETWEEN ADMISSIBILITY AND SUFFICIENCY

The United States Supreme Court has yet to rule on the sufficiency of a prior inconsistent statement to convict. The Court has recognized, however, that there is a difference between that which the Constitution requires for the admission of these statements and that which is needed to establish their sufficiency. In *California v. Green*[81] the Court determined that the substantive use of prior inconsistent statements does not violate the confrontation clause, so long as the declarant testifies at trial and is available for full and effective cross-examination. Based on the record before it, however, the Court was unable to

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determination based upon legal evidence and recognized rules of law. Neither jurors nor judges, when acting as arbiters of guilt, are permitted to base their decisions upon the existence or nonexistence of facts according to their personal beliefs or experiences, but only upon facts established by legal and competent evidence or upon inferences deducible from such proven facts as authorized by law. The personal opinion of the judge does not necessarily reflect the legal opinion of the court. Personal opinion may, and often times does, disregard law, but judicial determination depends for its accuracy and solidity upon prescribed principles of law and definite rules of procedure. . . . Before we could affirm the judgments of conviction under the state record before us in this case, we would be compelled to completely emasculate the doctrine of reasonable doubt . . . . In whatever light the testimony of the prosecutrix is viewed, it must be conceded that her testimony was, in one part or another, perjurious.

Id. at 793-94, 141 P.2d at 772. The court's analysis could be applied a fortiori to a conviction when a prior inconsistent statement is the only evidence pointing to guilt. The trier of fact can observe the witness' demeanor only during recantation and has no basis of comparison with the demeanor at the time the first statement was made.

79. *See supra* notes 71-76 and accompanying text.

80. *But see* Circuit Judge Hand's opinion in DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925), in which he stated:

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

81. 399 U.S. 149 (1970). The facts of *Green* began with the arrest of sixteen-year-old Melvin Porter for selling marijuana to an undercover agent. A few days after his arrest Porter named Green as his supplier. *Id.* at 151. He repeated this identification at a subsequent preliminary hearing. However, at trial Porter stated that he was uncertain whether Green had supplied him with the marijuana. He testified that he had been on "acid" (LSD) at the time and that its use had inhibited his ability to distinguish between fact and fantasy. *Id.* at 152. As a result, he was unable to remember the underlying events that had provided the basis of his prior statements. The majority opinion in *Green* held the admission of Porter's prior preliminary hearing statements constitutional, *id.* at 165, and, in dicta, the court added that it saw no constitutional problem with substantively admitting other statements Porter had made to the police, *id.* at 170.

reach the question of sufficiency and remanded to the state court for resolution of this issue. Writing for the majority, Justice White noted:

> [O]n remand . . . the California Supreme Court may choose to dispose of the case on other grounds . . . . [F]or example, because of its ruling on [admissibility], the California court deliberately put aside the issue of the sufficiency of the evidence to sustain conviction.[82] . . . [W]e may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking . . . .[83]

Lower courts have shown little consistency in their approach to the sufficiency of convictions based solely on prior inconsistent statements.[84] In *United States v. Orrico*[85] the United States Court of Appeals for the Sixth Circuit confronted that question. In *Orrico* the sole evidence against defendant was the prior grand jury testimony of one witness and the prior written statement of another.[86] At trial neither witness could affirm their prior remarks nor remember much of the events they had previously described.[87] The federal court of appeals interpreted the language in *Green* as a "strong hint that such statements, though constitutionally admissible, nevertheless may not be sufficient by themselves to sustain a conviction."[88] The *Orrico* court found:

> [S]uch evidence might be sufficient . . . , given strong indicia of reliability and an adequate foundation to establish admissibility. But when such evidence is the only source of support for the central allegations of the charge, especially when the statements barely, if at all, meet the minimal requirements of admissibility, we do not believe that a substantial factual basis as to each element of the crime providing support for a conclusion of guilt beyond a reasonable doubt has been offered by the Government.[89]

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82. *Id.*

83. *Id.* at 163-64 n.15.

84. Prior to *Green* several lower courts had generally held prior inconsistent statements alone insufficient to convict. At the time of United States v. Schwartz, 390 F.2d 1 (3d Cir. 1968), prior inconsistent statements were not admissible for their truth. While affirming this traditional rule, the United States Court of Appeals for the Third Circuit added that even if such statements had been admissible to prove their truth, "there is insufficient evidence against defendant." *Id.* at 7; *see also* Eisenberg v. United States, 273 F.2d 127, 130 (5th Cir. 1959) (prosecution's reliance on witness' unsworn, out-of-court statement, which she repudiated at trial, was held insufficient to support the verdict). In Gaddis v. State, 253 Ind. 73, 251 N.E.2d 658 (1969), the only eyewitness to the charged offense testified at trial that he was not certain that defendant Gaddis was the perpetrator. *Id.* at 77-79, 251 N.E.2d at 660-61. However, in the presence of police, approximately one hour after the commission of the alleged crime, the witness had identified defendant as the culprit. *Id.* at 75, 251 N.E.2d at 659. The court concluded that in the absence of any circumstantial evidence connecting defendant to the crime, this prior identification was insufficient to sustain the conviction. *Id.* at 79-80, 251 N.E.2d at 661-62; *see also* People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960) (en banc); *infra* text accompanying notes 109-16. *But see* State v. Mally, 366 P.2d 868 (Mont. 1961) (prior inconsistent statement sufficient to convict). For a discussion of *Mally*, see *infra* note 133.

85. 599 F.2d 113 (6th Cir. 1979).

86. *Id.* at 116.

87. *Id.*

88. *Id.* at 118.

89. *Id.*

Interestingly, *Orrico* is the only federal case since *Green* to deal with the sufficiency of prior inconsistent statements to convict. In the absence of constitutional standards dictated by the United States Supreme Court, however, most state courts have tended to equate sufficiency with admissibility.[90] In *Webb v. State*,[91] for example, a Florida Court of Appeal failed to distinguish sufficiency from mere admissibility. The court held the grand jury testimony of the alleged victim of child molestation sufficient despite the recantation of that testimony at trial when both the child and her mother denied that the assault had ever taken place.[92] At trial the child testified that she had lied before the grand jury and that she had previously confessed the lie to both her teacher and her minister.[93] The teacher and the minister confirmed this earlier recantation.[94] The state conceded that, but for the grand jury testimony, the government's case against the accused would have been insufficient to sustain the conviction.[95] The court, however, without elaboration, concluded that because the grand jury testimony was admissible under Florida law,[96] the conviction was supported by sufficient evidence.[97]

Similarly, in *State v. Igoe*[98] the North Dakota Supreme Court found the grand jury testimony of a witness, later denied at trial, enough in and of itself to sustain the defendant's conviction for the sale of marijuana.[99] The court cited the Proposed Federal Rules of Evidence,[100] allowing the admissibility of prior

90. *See, e.g.*, cases cited *supra* note 59; *infra* note 130 (discussion of State v. Maestas, 92 N.M. 135, 584 P.2d 182 (N.M. Ct. App. 1978)).

91. 426 So. 2d 1033 (Fla. Dist. Ct. App. 1983).

92. *Id.*

93. *Id.* at 1034.

94. *Id.*

95. *Id.* at 1033.

96. *Id.* at 1034.

97. *Id.* at 1035. In State v. Moore, 424 So. 2d 920 (Fla. Dist. Ct. App. 1983), four alleged eyewitnesses at one time had identified defendant Moore as having committed a murder; two of these eyewitnesses had testified against Moore at the grand jury proceedings. Subsequent to defendant's indictment, however, all four witnesses recanted their prior statements. *Id.* at 920. In response to a defense motion to dismiss the grand jury indictment based on the lack of any evidence pointing to guilt, the State argued that there was sufficient *substantive* evidence in the form of the now recanted grand jury testimony. *Id.* at 921. A Florida Court of Appeal agreed that such recanted prior statements were sufficient substantive evidence so that a dismissal of the indictment was not required. *Id.* This holding suggests that such evidence may also have been sufficient to sustain a conviction. The court's decision in *Moore*, however, may have been influenced by the four eyewitnesses to the crime. All four had been prostitutes and had worked for defendant, and one was related to defendant.

98. 206 N.W.2d 291 (N.D. 1973).

99. Although the North Dakota Supreme Court held the prior grand jury testimony sufficient in *Igoe*, the court nonetheless reversed the conviction. Defense counsel had relied on a preliminary trial court ruling that the grand jury testimony would be admissible only for impeachment, not substantive purposes. This reliance resulted in defendant's decision not to testify in his own behalf. *Id.* at 297-98.

100. At the time of the *Igoe* decision, the North Dakota Evidence Code did not provide for the substantive admissibility of prior inconsistent statements. Thus, the state court chose to rely on the Proposed Federal Rule of Evidence 801(d)(1)(A) as authority for the substantive use of such statements. In 1981 North Dakota enacted a rule 801(d)(1)(A) of its own that provides for the substantive use of prior inconsistent statements in criminal proceedings so long as the earlier remark was made while the declarant was under oath. Unlike federal rule 801(d)(1)(A), however, the North Dakota rule eliminates the oath requirement if the prior statement is offered in a civil proceeding. N.D. R. EVID. 801(d)(1)(i).

inconsistent statements for their truth, in support of its holding.[101]

An even more disturbing case is the Georgia Supreme Court's decision in *Gibbons v. State*.[102] The court in *Gibbons* upheld a murder conviction based solely on *unsworn* prior inconsistent statements allegedly made to a police officer.[103] Absent the witness' prior inconsistent statements, the state would not have proved all elements of the crime.[104] The court, however, concluded that "[h]ad the State's witness . . . testified as anticipated by the State, all of the essential elements of proof would have been present."[105]

The results in the above cases illustrate the pressing need for a definite standard making evidentiary determinations for sufficiency higher than those for mere admissibility.[106] To conclude that a piece of evidence is sufficient to sustain a conviction simply because it is admissible ignores the quality, or lack thereof, of that evidence.[107] As the Supreme Court noted in *Jackson v. Virginia*:

> Any evidence that is relevant—that has any tendency to make the existence . . . of a crime slightly more probable than it would be without the evidence . . . could be deemed [admissible even if it constitutes only] a "mere modicum" [of evidence]. But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt.[108]

People v. Gould[109] was one of the first modern cases to recognize the distinction between admissibility and sufficiency for a witness' prior out-of-court statement denied at trial. In this case a victim, on several prior occasions, had identified photographs of Gould and his alleged accomplice, Marudas, as the two men who had burglarized her home.[110] At the time of trial, however, she was unable to identify positively either of the two men.[111] The California

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101. *Igoe*, 206 N.W.2d at 297.

102. 248 Ga. 858, 286 S.E.2d 717 (1982).

103. *Id.* at 863-64, 286 S.E.2d at 719-20.

104. *Id.* at 862, 286 S.E.2d at 722.

105. *Id.* at 862, 286 S.E.2d at 720-21.

106. Professor Stalmack, however, adopted a contrary position when he commented: "To say that a prior inconsistent statement alone would in all instances be enough to sustain a party's case is a gross overstatement. This is not an issue that is reductive to a hard and fast rule, but one that should depend upon the circumstances of each case." *See* Stalmack, *supra* note 58, at 267.

107. One student author has commented:

> [T]hose states that follow the Supreme Court version of the rule [allowing the substantive admissibility of prior inconsistent statements, even when the prior statement was not made under oath] very well could convict as happened in *Gibbons*, on the basis of a framework whose main, if not sole, support is an unreliable, unsworn statement given to an officer who investigates the crime.

Comment, *Prior Inconsistent Statements: Conflict Between State and Federal Rules of Evidence*, 34 MERCER L. REV. 1495, 1520 (1983).

108. 443 U.S. 307, 320 (1979).

109. 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960) (en banc). This case predated the adoption of CAL. EVID. CODE § 1235 (West 1966) (the prior inconsistent statements exception to the hearsay rule) and CAL. EVID. CODE § 1238 (West 1966) (the prior identification exception to the hearsay rule.) In *Gould* Chief Justice Traynor judicially created a prior identification exception to the hearsay rule without statutory authority. *Gould*, 54 Cal. 2d at 626, 354 P.2d at 867, 7 Cal. Rptr. at 275.

110. *Gould*, 54 Cal. 2d at 625, 354 P.2d at 866, 7 Cal. Rptr. at 274.

111. *Id.* at 626, 354 P.2d at 867, 7 Cal. Rptr. at 275.

Supreme Court agreed with the trial court's decision to admit these prior photographic identifications as substantive evidence.[112] Consequently, the court held that Gould, who had previously confessed his involvement in the burglary,[113] had been convicted on sufficient evidence.[114]

The evidence against Marudas, however, was weaker than the evidence against Gould. Although Marudas, like Gould, had made an apparently incriminating statement, it was insufficient to be considered a confession. When the police asked Marudas where he had been on the day of the alleged crime, he responded, "I don't know, but by the time I get to court I will have four or five people to place me where I want to be."[115] Although probably suspicious of Marudas' meaning, the California Supreme Court nevertheless held that this statement was insufficient evidence of a consciousness of guilt to connect Marudas to the crime.[116] The court concluded that "[a]n extrajudicial identification . . . at . . . trial is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime."[117] Given the absence of any other such evidence, the court overturned Marudas' conviction.[118]

Surprisingly, both courts and commentators ignored the sufficiency portion of the *Gould* decision for nearly two decades, until the California Supreme Court again discussed the issue in *In re Johnny G.*[119] *Johnny G.* provides an illustration of an unsworn, uncross-examined prior inconsistent statement that both a trial judge and an intermediate court of appeal found sufficient to convict.[120]

Johnny was charged in a juvenile superior court with the assault of Carlos Herrera.[121] At the juvenile criminal proceeding Herrera's testimony, through a Spanish interpreter, tended to exculpate rather than inculpate Johnny.[122] Herrera described two other men as his assailants.[123] Apparently unperturbed by this testimony, the prosecution chose to call the arresting officer as its only other witness.[124] The officer testified that at the scene of the assault he and

112. *Id. Gould* is most noteworthy for having created a prior identification exception to the hearsay rule in California. It also provides clear recognition of the distinction between the admissibility and the sufficiency of such statements.

113. *Id.* at 625, 354 P.2d at 867, 7 Cal. Rptr. at 275.

114. *Id.* at 630, 354 P.2d at 870, 7 Cal. Rptr. at 278.

115. *Id.* at 631, 354 P.2d at 870, 7 Cal. Rptr. at 278.

116. *Id.*

117. *Id.*

118. *Id.*

119. 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (1979) (en banc). While a public defender for the county of Los Angeles, the author of this Article served as counsel for appellant, Johnny G., in both the California Court of Appeal and the California Supreme Court.

120. *Id.* at 545-46, 601 P.2d at 196-97, 159 Cal. Rptr. at 180-81.

121. *Id.* at 545, 601 P.2d at 196, 159 Cal. Rptr. at 180.

122. *Id.* at 545, 601 P.2d at 197, 159 Cal. Rptr. at 181. Although Herrera knew Johnny and had spoken with him only shortly before the attack, Herrera testified that he did not recognize the voice of the assailant who had approached him from the rear. *Id.*

123. *Id.* Although Herrera could describe his two attackers as Latin males between the ages of 18 and 20, he was unable to recognize either of them. He further testified that one of the assailants appeared to be somewhat taller than Johnny, while the other was somewhat shorter. *Id.* Herrera believed that the two men may have been individuals whom he had passed moments before the assault, after leaving Johnny's home. *Id.* at 545-46, 601 P.2d at 197, 159 Cal. Rptr. at 181.

124. *Id.* at 546, 601 P.2d at 197, 159 Cal. Rptr. at 181.

Herrera had carried on a brief conversation in English.[125] He had pointed at Johnny who was standing nearby and the victim responded affirmatively when asked if that was the man who had struck him.[126] The trial court admitted this testimony under the prior inconsistent statement exception to the hearsay rule.[127] On this evidence, the superior court judge found that the prosecution had proven its case beyond a reasonable doubt and the state court of appeal affirmed.[128] The California Supreme Court unanimously reversed, however, agreeing with the appellant that even if these statements were substantively admissible, they could not alone sustain a conviction.[129]

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125. *Id.*

126. *Id.*

127. CAL. EVID. CODE § 1235 (West 1966), unlike the Federal Rules of Evidence, does not require the prior inconsistent statement to be made under oath to be admissible. *See* FED. R. EVID. 801(d)(1)(A) (prior inconsistent statement must have been made under oath).

128. *Johnny G.*, 25 Cal. 3d at 546, 601 P.2d at 197, 159 Cal. Rptr. at 181. Johnny had also appealed the admissibility of the out-of-court statements, arguing that the court should have reconsidered the substantive admissibility of prior inconsistent statements in light of the recent addition of CAL. CONST. art. I, § 15. *Id.* That section provides for a California state right to confrontation independent of the United States Constitution. CAL. CONST. art. I, § 15. In People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971), the court had not yet considered the possibility of deviating from the United States Supreme Court's interpretation of the United States Constitution's sixth amendment right to confrontation.

By the time *Johnny G.* was argued before the California Supreme Court, that court was in the midst of expanding the California State Constitution's application to criminal procedure. In particular, the court had used its own State Constitution to provide independent state grounds for finding unconstitutional procedures that the United States Supreme Court had previously approved. The California Constitution's confrontation clause could thus have provided an avenue for deviation from the United States Supreme Court's interpretation of confrontation as expressed in United States v. Green, 399 U.S. 149 (1970). *See In re* Johnny G., 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (Mosk, J., concurring). However, the majority in *Johnny G.* chose not to reach this issue, but rather chose to find the evidence insufficient to convict. *Id.* at 546-47, 601 P.2d at 197, 159 Cal. Rptr. at 181. The California Supreme Court eventually reached this issue in People v. Chavez, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980), in which the court concluded that, although the State did have the right to create its own interpretation of admissibility under its state confrontation clause, it would follow the United States Supreme Court's interpretation in *Green*. *Id.* at 351-52, 356, 605 P.2d at 411-12, 415, 161 Cal. Rptr. at 772-73, 776.

129. *Johnny G.*, 25 Cal. 3d at 548-49, 601 P.2d at 198-99, 159 Cal. Rptr. at 183. In one respect, *Johnny G.* is slightly different from the typical case discussed in this Article. In *Johnny G.* there was evidence other than the victim's prior inconsistent statement connecting the accused to the crime. The other evidence alone, however, would have been insufficient to sustain a conviction. *Id.* at 548, 601 P.2d at 198, 159 Cal. Rptr. at 182. When the police arrived at the scene, only minutes after the assault, Johnny was standing just a few feet from the bludgeoned victim. In addition, the victim testified that just prior to having been struck, he had visited Johnny's home to drop off some laundered clothing and that one of the people who struck him had said something about missing laundry. *Id.* at 545, 601 P.2d at 196, 159 Cal. Rptr. at 180. Can the prior inconsistent statement, when combined with this otherwise insufficient additional evidence, sustain a conviction? The answer given by the California Supreme Court in *Johnny G.* is no. The California Supreme Court concluded that this additional evidence was not of ponderable legal significance and, therefore, when combined with the victim's alleged prior inconsistent statement, was insufficient to permit a finding of guilt against the accused. *Id.* at 548, 601 P.2d at 198, 159 Cal. Rptr. at 182.

The California Supreme Court's conclusion in *Johnny G.* is consistent with Jackson v. Virginia, 443 U.S. 307 (1974). All determinations of sufficiency have to be tested against the *Jackson* standard. Courts can often point to some modicum of additional evidence suggesting the accused's criminal involvement. For example, in People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960) (en banc), when the accused was asked where he had been at the time the crime had occurred, he responded, "I don't know, but by the time I get to court I will have four or five people to place me where I want to be." *Id.* at 631, 354 P.2d at 870, 7 Cal. Rptr. at 278. This statement may have raised the California Supreme Court's suspicion as to defendant's criminal involvement,

Gould and *Johnny G.*, though correct in their results, offer no analysis of the sufficiency issue. Why was the evidence in each case insufficient? Was the court implicitly holding that convictions based on prior extrajudicial statements are a denial of confrontation or of due process[130] encompassing the right to

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but, just as in *Johnny G.*, the statement was held insufficient to sustain a conviction even when combined with the victim's prior identification. *See supra* text accompanying notes 109-18.

To avoid any potential problem, it is preferable that both the insufficient prior statement and the otherwise insufficient additional evidence be held to constitute zero proof of guilt: zero plus zero equals zero. Thus, when the only evidence of guilt, in addition to an otherwise insufficient prior inconsistent statement, is insufficient, the combination should never justify conviction. At a minimum, there should be a presumption *against* sufficiency when the additional evidence alone would have been insufficient. Any rule providing the trial court with greater discretion would be an invitation to base convictions on insignificant evidence and would negate much of the value of a standard holding prior inconsistent statements, except in unusually trustworthy circumstances, insufficient to convict.

130. The application of the due process clause to the sufficiency of prior inconsistent statements has been hinted at by the New Mexico Court of Appeal. In State v. Maestas, 92 N.M. 135, 584 P.2d 182 (N.M. Ct. App. 1978), the court considered whether the prior inconsistent statements of a complaining witness could provide the sole basis for conviction. Defendant was charged with assaulting the victim, with whom he lived, and abusing her three-year-old son. The direct examination of the victim proceeded in part as follows:

> Question: Do you know who it was that beat you up?
>
> Answer: I think I do.
>
> Question: Who do you think it was?
>
> Answer: I can't answer it—the question.
>
> The Court: Why can't you tell, or why can't you answer the question?
>
> Answer: It's just too hard to answer, your Honor.
>
> The Court: Do you think you can ever answer the question before this jury?
>
> Answer: No.

Id. at 138, 584 P.2d at 185.

After failing in additional attempts to persuade the complaining witness to describe or identify her assailant, the prosecution submitted into evidence statements allegedly made by the victim to her mother, sister, and sister-in-law, identifying defendant as her assailant. *Id.* at 139, 584 P.2d at 185-86. These prior statements were held substantively admissible, *id.* at 142, 584 P.2d at 189, under New Mexico Rule of Evidence 804(b)(6), which makes admissible "[a] statement not specifically covered by any of the foregoing [hearsay] exceptions but having comparable circumstantial guarantees of trustworthiness." N.M. R. EVID. 804(b)(6) (1983). The court found "trustworthiness" in the prior statements having been made within 24 hours of the events described, while the victim's recollections were clear and appeared to have been made in good faith. *Maestas*, 92 N.M. at 142, 584 P.2d at 189.

The court then considered whether these prior statements could provide the sole basis for defendant's conviction:

> [T]he fact that the prior statement is admitted and given substantive effect does not mean that it will suffice as the sole basis for a conviction. The question of the sufficiency of the evidence remains, "for the *due process clause* of the fourteenth amendment may require a minimal standard of evidentiary support to sustain a conviction."

Id. at 145, 584 P.2d at 192 (emphasis added) (quoting with apparent approval 4 J. WEINSTEIN & M. BERGER, *supra* note 68, § 801-76.1).

The court then asked: "Is there sufficient independent or corroborative evidence, circumstantial in nature, that defendant committed the crime?" *Maestas*, 92 N.M. at 145, 584 P.2d at 192. The court answered this question in the affirmative, concluding from "the record as a whole," that

> in addition to the prior statements made, the victim lived with the defendant in his home for a week; that no person bore any unfavorable relationship with the victim that would lead to a severe beating; that defendant presented no witnesses nor any evidence that caused doubt upon the truth of the prior statements made; that no evidence of the defendant's good character was presented. These facts and circumstances corroborate the truth of the prior statements made by the victim. The prior statements made were not the "sole basis for a conviction."

conviction based on proof beyond a reasonable doubt?[131] No such explanation appears in either case.

VI. THE CONFRONTATION CLAUSE AND SUFFICIENCY

Once the United States Supreme Court in *California v. Green*[132] removed the confrontation clause as a barrier to the substantive admissibility of prior inconsistent statements, courts began to sustain convictions based solely on such evidence.[133] Do these convictions violate the precepts of confrontation and due process? The right of cross-examination and confrontation of witnesses is an element of due process.[134] This section of the Article examines the underlying rationale for the creation of the confrontation clause and its possible application through the due process clause to questions of sufficiency.[135]

Id.

The court apparently conceded that, absent this additional circumstantial evidence, the prior statement alone was not sufficient to justify the verdict. Whether this "additional" evidence was in fact sufficient to justify conviction is itself a close question. *See infra* note 133.

131. *See In re* Winship, 397 U.S. 358 (1970).

132. 399 U.S. 149 (1970).

133. *See* United States v. Hines, 18 M.J. 729 (A.F.C.M.R. 1984); People v. Chavez, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980); People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971); People v. Brown, 150 Cal. App. 3d 968, 198 Cal. Rptr. 260 (1984); Webb v. State, 426 So. 2d 1033 (Fla. Dist. Ct. App.), *petition for cert. denied*, 440 So. 2d 354 (Fla. 1983); Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982); State v. Igoe, 206 N.W.2d 291 (N.D. 1973).

MONT. R. EVID. 801(d)(1)(A) and 4 J. WEINSTEIN & M. BERGER, *supra* note 68, § 801(d)(1)(A)[09], at 143, cite State v. Mally, 139 Mont. 599, 608, 366 P.2d 868, 873 (1961), as authority for the proposition that Montana allows convictions based solely on a prior inconsistent statement. However, it is arguable that additional substantive evidence supported the prior statement in *Mally*. In *Mally* defendant was convicted of manslaughter for negligently failing to obtain medical care for his injured wife. Defendant's wife, terminally ill with liver and kidney disease, was left helpless with two fractured arms for a period of two days, while defendant and his brother sat idly by. *Id.* at 600-01, 366 P.2d at 869. Reduced to unconsciousness, she was finally taken to a hospital where she died without ever awakening. The cause of death was diagnosed as a degeneration of the kidneys caused by shock resulting from the untended fractures. *Id.* At trial defendant's brother testified that the deceased had refused medical care. This testimony conflicted with the witness', apparently extrajudicial, earlier statement that defendant had ordered him not to send for a doctor. *Id.* at 601, 608, 366 P.2d at 873, 869. Defendant's conviction seemingly rested in part on his failure to obtain medical aid for his wife. This failure was found to be the proximate cause of her death. *Id.* at 610, 366 P.2d at 874. These facts appear to have been substantiated by medical evidence apart from the prior inconsistent statements of defendant's brother. *Id.*

134. The right to cross-examination is clearly an element of due process. *See* Smith v. Illinois, 390 U.S. 129 (1968); *In re* Oliver, 333 U.S. 257 (1948); Snyder v. Massachusetts, 291 U.S. 97 (1934); Alford v. United States, 282 U.S. 687 (1931); *see also* Manson v. Brathwaite, 432 U.S. 98, 113-14 n.14 (1977) (citing Judge Leventhal's concurring opinion in Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 969 (1969)).

> In essence what the *Stoval* due process right protects is an evidentiary interest. . . . Since the interest protected is in essence an evidentiary one, denial of the retroactive right recognized in *Stoval* and explicated in *Simmons* must depend on the assessment of all the factors and evidence bearing on the identification issue. The presence of other untainted identification testimony, counsel's opportunity to inquire into the circumstances of the challenged identification, and to bring out the facts, are all relevant to the consideration of overall due process fairness to the accused.

Clemons v. United States, 408 F.2d 1230, 1251 (D.C. Cir. 1968) (Leventhal, J., concurring, in an opinion joined in by then Circuit Judge Warren Burger), *cert. denied*, 394 U.S. 969 (1969).

135. Confrontation has often been referred to as an essential feature of the accusatorial, as opposed to inquisitorial, justice system. *See* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 39

The origins of the confrontation clause are somewhat obscure.[136] "The framers of the Bill of Rights never expressed clearly their intended construction of this clause, nor are there any early Supreme Court cases interpreting the provision."[137] It has been suggested, however, that the clause was penned in part as a reaction to the infamous seventeenth century trial of Sir Walter Raleigh.[138] Raleigh was tried, convicted, and eventually beheaded for conspiring with the enemies of the Crown to overthrow the government of the King of England and restore Catholicism as the national religion. The government's case against Raleigh was based entirely on two out-of-court statements—the words of an anonymous English gentleman[139] and the confession of a Lord Cobham (made, some have suggested, under torture).[140] A Portuguese pilot testified that an anonymous English gentleman told him that the new King "shall never be crowned; for Don Raleigh and Don Cobham will cut his throat ere that day come."[141] At a proceeding at which neither Raleigh nor his representative was present, Lord Cobham had allegedly confessed his treasonous conduct and named Raleigh as his accomplice.[142] Cobham, who had subsequently repudiated this confession, was not present at Raleigh's trial.[143]

Was the creation of the confrontation clause merely a response to the dan-

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(1968). Application of due process, apart from the confrontation clause, to convictions based solely on such evidence is treated in section VII of this Article. *See infra* text accompanying notes 170-81.

136. "[T]he Confrontation Clause comes to us on faded parchment." California v. Green, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring). "The recorded debates of the House of Representatives indicates [sic] that the confrontation clause was adopted as a part of the Bill of Rights without debate. The Senate debates from the period are unrecorded." Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1301 n.42 (1985) (citing 1 ANNALS OF CONG. 15-16, 756, 767 (J. Gales ed. 1789)).

137. R. LEMPERT & S. SALTZBURG, *supra* note 35, at 551.

138. *See* Dutton v. Evans, 400 U.S. 74, 86 n.16 (1970) ("It has been suggested that the constitutional provision is based on a common-law principle that had its origin in a reaction to abuses at the trial of Sir Walter Raleigh.") (citing F. HELLER, THE SIXTH AMENDMENT 104 (1951)). *But see* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n.4 (1972) ("No one seems to have been able to write about the right without repeating the claim that the evils of the Raleigh trial led in some way to the Sixth Amendment. . . . My research gives me no reason to suppose that this custom represents anything other than a convenient but highly romantic myth, and I adhere to it for this reason.").

139. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388-89 (1959).

140. The confrontation clause is also acknowledged as having been created to prevent what has been described as the "inquisitional practice of examining witnesses in closed chambers." Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. FLA. L. REV. 207, 211-12 (1984).

141. 2 T. HOWELL, STATE TRIALS 25 (1809).

142. *Id.*

143. In response to Raleigh's adamant request for Cobham's presence so that he might question him, presiding Justice Warburton responded with bewilderment in an argument that may strike a familiar chord today: "I marvel, Sir Walter, that you being of such experience and wit should stand on this point; for so many horse-stealers may escape, if they may not be condemned without witnesses." *Id.* at 18. Raleigh intemperately summed up the crown's case against him: "This is the saying of some wild Jesuit or beggarly priest; what proof is it against me?" *See* 1 D. JARDINE, HISTORICAL CRIMINAL TRIALS 389, 436 (1832). For a more complete account of the trial of Sir Walter Raleigh, see Graham, *supra* note 138, at 100-01 (Professor Graham gathered his account from 2 T. HOWELL, *supra* note 141); 1 D. JARDINE, *supra*, at 389-511; Pollitt, *supra* note 139, at 388-89; H. Stephen, *The Trial of Sir Walter Raleigh*, TRANS. ROYAL HIST. SOC'Y 172 (4th ser. 1919).

gers of admitting out-of-court statements of questionable reliability into evidence or did it also reflect a concern for the possibility of conviction based solely on such evidence?[144] It is reasonable to suggest that the framers were concerned with something beyond the mere evidentiary rules that control the admissibility of out-of-court statements. Although a prior out-of-court statement may be admitted under the minimal constitutional standards applied to admissibility, this does not eliminate the potential unfairness of a conviction when defendants receive only the most minimal opportunity to confront the "witnesses against" them.[145]

Prior to *Green* it was believed that the confrontation clause precluded the substantive admissibility of prior inconsistent statements. After *Green* the admission of a prior inconsistent statement satisfies the confrontation clause when the declarant is available at trial to be subjected to "full and effective cross-examination."[146] However, cross-examining witnesses about their prior inconsistent statements is of minimal use in detecting the truth.[147] Cross-examination provides an opportunity to expose effectively only *some* of the prior statement's

144. Suppose the prosecution calls to the stand the only witness to a crime, and upon inquiry he replies that it was John Doe, not the defendant, who killed Cock Robin. Confronted with an earlier statement accusing the defendant, the witness explains that he has always hated the defendant and accused him in order to cause trouble. On this state of the record the jury convicts, explaining that it chose to believe the earlier statement rather than the in-court testimony of the witness. Aha—Catch 22.

If cross-examination, to quote Peggy Lee, "is all there is" to the Sixth Amendment, then the defendant who has had a procedurally flawless trial has no complaint. Yet unless the Court is as freaked-out on procedure as some of its critics have suggested, it has to recognize that there is a converse to that useful concept of "harmless error." Dare we call it "errorless harm"? I suggest that the confrontation clause, at least in an extended form, requires the jury faced with such a conflict to prefer the confronted over the unconfronted statement. In short, there is more to the confrontation requirement than just cross-examination; it also requires evidence of adequate worth.

Graham, *supra* note 138, at 137-38. Professor Graham suggests that the confrontation clause must require more than just cross-examination, implying that a conviction based on a prior inconsistent statement should be sustained only if there is some evidence of cross-examination of adequate worth. *Id.*

145. Today, admission of out-of-court statements of the type used against Raleigh would not be constitutionally permissible. However, courts have recently validated the constitutionality of admitting at least three forms of previously inadmissible out-of-court statements as substantive evidence. First, the United States Supreme Court has validated the constitutionality of one jurisdiction's modification of the hearsay rule's co-conspirator exception in such a way as to open at least the possibility that statements similar to those in Raleigh's trial might be admitted without violating the confrontation clause. *See* Dutton v. Evans, 400 U.S. 74 (1970). In *Dutton* a plurality of the Court validated a Georgia statute that had expanded that state's co-conspirator exception to the hearsay rule to include not only statements made in furtherance of the conspiracy, as traditionally required, but all statements made by conspirators while attempting to conceal their crime. *Id.* at 78. Second, when witnesses have been unavailable at trial, courts have admitted their prior testimony before a grand jury, a proceeding at which neither the accused nor his or her representatives are permitted to be present, much less provided with an opportunity to cross-examine. Despite the public perception of the independent investigative nature of grand juries, close observers report that such proceedings are generally rubber-stamps for the prosecution. A grand jury that acts independently of the prosecution gains the title of "runaway" grand jury. *See* United States v. Procter & Gamble Co., 175 F. Supp. 198 (D.N.J. 1959); United States v. Procter & Gamble Co., 174 F. Supp. 233 (D.N.J. 1959). Third, the United States Supreme Court will permit the substantive admissibility of a witness' prior inconsistent statements, even when those prior statements were not made under oath or at a formal proceeding. *See* California v. Green, 399 U.S. 149 (1970).

146. *See* California v. Green, 399 U.S. 149, 159 (1970).

147. *See supra* text accompanying notes 40-56.

reliability problems.[148] For example, it does not effectively prevent the trier of fact's misplaced reliance solely on a hunch to favor a police officer's recitation of a prior inconsistent statement over in-court testimony of a declarant-witness with poor trial demeanor.[149] The potential harm to the effective administration of justice inherent in this situation is accentuated when the prior statement constitutes the government's entire case. This scenario is rife with the danger of conviction founded not on reason or fact, but rather on mere intuition.

When the *Green* Court concluded that the opportunity for effective cross-examination is the essential element governing the admissibility of prior inconsistent statements, the Court implicitly held that there is at least a minimal standard of fairness inherent in the confrontation clause. The exclusion of evidence based on a denial of the opportunity to confront is indirectly a rule affecting sufficiency. When evidence is substantively inadmissible, it can never be used to sustain a conviction. However, simply because a prior statement is admissible, it does not necessarily follow that the accused has received a sufficiently fair opportunity to confront when the statement constitutes the prosecution's entire case.

In addition, the original rationale for the admissibility of prior inconsistent statements for impeachment purposes was to prevent the witness' present testimony from misleading the trier of fact. In many jurisdictions today a party is not prevented from submitting into evidence the prior inconsistent statements of his or her own witnesses.[150] When this is the *only* incriminating evidence the jury hears, the present testimony is often given at the behest of the prosecution who uses it merely as the vehicle to introduce the out-of-court version. The prosecution is not the victim of a defense effort to mislead the jury, but rather is the author of the entire scenario because it is the prosecutor who submits both statements into evidence. Neither the search for truth and accuracy nor fairness to the prosecution require that the jury hear the out-of-court statement in this context. If anything, these factors require the opposite result.[151]

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148. *See supra* text accompanying note 54.

149. *See supra* text accompanying notes 55, 71-80.

150. *See* MCCORMICK, *supra* note 20, § 38.

151. Senator Sam Ervin voiced similar concern for the potential of convictions in the absence of an actual accuser in a debate with Professor Cleary during the Senate committee hearing on the passage of federal rule 801(d)(1)(A):

> Senator Ervin: I would throw this thing on the scrap heap of injustice myself. This would authorize a conviction of a man who has no accusor [sic] on the ground that a witness who says the defendant is not guilty of anything has a poor memory or is a liar.
>
> Professor Cleary: The rule requires, Senator, that the testimony of the witness and his prior statement be in conflict.
>
> Senator Ervin: Yes, sir.
>
> Professor Cleary: So that the kind of situation that we have presented here is a witness who has told one story on a former occasion and now at trial tells another story. He is here; he is in open court; he is under oath; he is subject to cross-examination, and as Judge Learned Hand said, let the jury find—
>
> Senator Ervin: You have to find beyond a reasonable doubt in a criminal case that this man told the truth when he was not sworn but told a lie when he was under oath. I think that is an affront to the sixth amendment, the *Green* case, 399 U.S. 149 (1970), to the contrary notwithstanding. To allow a man to be convicted upon an extra-judicial statement of a third person when you have to find that, at the trial, the third person either had

Accuracy and fairness both are protected by the due process and confrontation clauses of the Bill of Rights. The confrontation clause was designed to ensure that criminal defendants would be provided with the opportunity to confront the witnesses against them.[152] It would be unfair to convict an individual absent the opportunity to confront those who claim the individual's guilt. The means by which a defendant usually challenges adverse witnesses is, of course, cross-examination. Without cross-examination the defendant is unable to challenge the accusations of the government's witnesses.[153]

But what does it mean to be a witness against the accused?[154] Not every prosecution witness can be so labeled. Only those witnesses whose in-court testi-

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no memory or was a liar is too dangerous; it is particularly dangerous in crimes that are serious. I think it denies a fair trial.

I admit the Supreme Court of the United States disagrees with me on that, but I think I am right and they are wrong.

Professor Cleary: I might point out in connection with your comments, Senator, that one of the premises which underlies the House rule, although they do not say it, is that they think that this kind of evidence standing alone ought not to be enough to support a conviction. Now, if that is so, this is one of the very rare instances in which an item of evidence, in order to be admissible, has to be sufficient to support a conviction or verdict in a civil case.

Senator Ervin: In order to be admissible, you have got to prove that the witness either had no memory or he is a liar when he is placed under oath.

Professor Cleary: In the last or maybe the next to last sentence in the opinion in the *Green* case, the Supreme Court of the United States pointed out specifically in connection with its remand that the Supreme Court of California might wish to consider the question of sufficiency of the evidence. As a matter of fact, when the case went back, the Supreme Court of California did examine the evidence, and it looked at all the surrounding circumstances, and concluded that there was ample evidence to sustain the conviction. They reached that conclusion unanimously.

Senator Ervin: My quarrel with the Supreme Court is that they did not hold that there was a violation of the sixth amendment, which gives the accused in all criminal cases the right to be confronted by his accusors [sic]. He has no accusor [sic] at all under this rule.

Professor Cleary: Well, this same question, of course, can be raised in connection with all hearsay evidence introduced in a criminal case. Mr. Justice Harlan, if you recall, at one time, and it may have been in the *Green* case—

Senator Ervin: All exceptions to the hearsay rule that I know anything about are based upon the probability that the extra-judicial statement was true, and not necessarily on the basis that the witness is lying when he is under oath.

I do not believe I can convince you and I know you cannot convince me. To me it is the heart of the rule to say a man has to be confronted by his accusors [sic] in all criminal cases, and he cannot be convicted when he has no accusor [sic].

J. BAILEY, III & O. TRELLES, II, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 51-52 (1980).

152. *See* Chambers v. Mississippi, 410 U.S. 284, 297-98 (1973).

153. " 'The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*' " Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (quoting 5A WIGMORE, *supra* note 61, § 1395, at 150).

154. Professor Kenneth Graham has suggested that a person is a witness against the accused if that person's statements are necessary for the prosecution's case to survive a motion for judgment of acquittal. *See* Graham, *supra* note 138, at 138. Professor Peter Westen has criticized this proposal by suggesting, *inter alia*, that it relegates "the right of confrontation to a minor role, because the prosecution almost always possesses enough 'direct' testimony to survive a motion for acquittal." Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1188 n.11 (1979). However, even if we accept Professor Graham's test for defining "witnesses against" the accused, the test would still appear to preclude conviction based solely on a witness' prior inconsistent out-of-court statements. *See* Graham, *supra* note 138, at 137 n.185. Professor Westen similarly notes: "To be sure, a defendant cannot be convicted *solely* upon such evidence. Rather, in addition to such evidence, the state

mony tends to incriminate the defendant, as opposed to those whose testimony is favorable to the defense or simply neutral to the case, are truly witnesses against the accused. Simply because a person was once an accuser does not mean that that person remains an accuser forever and for all purposes. Although a witness' *prior* statement may point to the defendant's guilt, the witness' inconsistent *present* testimony may serve to exculpate the defendant.

This analysis is consistent with the majority's holding in *California v. Green*.[155] In *Green*, because the government witness in question did not incriminate the accused, the prosecution was required to use the witness' prior inconsistent statements against Green. In such a situation the "witness against" the defendant is not the witness presently on the stand giving neutral or exculpatory testimony. Rather, the "witness against" the accused is the out-of-court declarant. That accuser is presently unavailable as a result of having allegedly changed his or her story. The prosecution, being unable to offer "live" incriminating testimony, submits the declarant-witness' out-of-court statements into evidence. The *Green* Court held that the prosecution successfully met its obligations "to attempt" to introduce its evidence in the preferred form of live testimony by calling its witness, Melvin Porter, to the stand. When Porter's live testimony failed to incriminate Green, the State was forced to resort to the witness' prior inconsistent statements because the incriminating evidence was unavailable in a better form.[156] Thus, the "live" Porter was, in effect, unavailable as a "witness against" the defendant. It was the earlier "out-of-court" Porter who was the "witness against" Green. The memory of Porter's prior statement, as related in court by another witness to that statement, incriminated the defendant.[157]

The majority opinion in *Chambers v. Mississippi*[158] is consistent with this definition of "witness against" the accused. The facts of *Chambers* are the mirror image of the facts of *Green*. Chambers, charged with killing a police officer, argued that the killing had in fact been committed by one Gable McDonald.[159] After an unsuccessful attempt to have the court order McDonald called as a prosecution witness, the defense called McDonald as its own witness and submitted McDonald's prior sworn written confession to the murder into evidence.[160] On cross-examination by the State, however, the witness professed his

must present such additional evidence as sufficient, when combined with other items, to support a finding of guilt beyond a reasonable doubt." Westen, *supra*, at 1194 n.40.

155. 399 U.S. 149, 164-70 (1970).

156. *See* Westen, *supra* note 154, at 1191.

157. This interpretation of "witness against" the accused is consistent with Justice Harlan's concurrence in *Green*. Professor Westen summarized Justice Harlan's concurrence by stating that the key to Harlan's definition of "witness against . . . is a person who is available to give his incriminating evidence in the form of live testimony in open court, under oath, and subject to cross-examination." Westen, *supra* note 154, at 1188-89. This definition presupposes that the witness will incriminate the accused during his or her testimony. Although Justice Harlan repudiated his own approach to confrontation in his subsequent opinion in Dutton v. Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring), many commentators have chosen to follow Harlan's approach as expressed in *Green*, 399 U.S. at 187. *See* Westen, *supra* note 154, at 1203 n.72.

158. 410 U.S. 284 (1973).

159. *Id.* at 289.

160. *Id.* at 291.

innocence, offered an alibi, and noted his previous repudiation of his earlier confession.[161] On redirect examination, the defense offered several unsworn self-incriminatory statements allegedly made by McDonald to various civilian witnesses. The trial court blocked these defense attempts because they called for hearsay and also involved an attempt by Chambers, not permitted under state law, to impeach his own witness.[162] Before the United States Supreme Court, Mississippi sought to justify the trial court's decision by arguing that the witness McDonald was not "adverse" to Chambers and, therefore, not a "witness against" the accused within the meaning of the confrontation clause.[163] The State argued that the constitutional right of confrontation of witnesses was not implicated because McDonald did not "point the finger" at Chambers.[164] On this point the Supreme Court concluded that the "availability of the right to confront and to cross-examine those who give damaging testimony against the accused" could not constitutionally be controlled by a "narrow and unrealistic definition of the word 'against.' "[165] The Court noted:

> [T]he State's proof at trial excluded the theory that more than one person participated in the shooting. . . . To the extent that McDonald's confession tended to incriminate him, it tended also to exculpate Chambers. And, in the circumstances of this case, McDonald's retraction inculpated Chambers to the same extent that it exculpated McDonald. It can hardly be disputed that McDonald's testimony was in fact seriously adverse to Chambers.[166]

Thus, the Court viewed McDonald's in-court testimony as "against" the accused, and his prior out-of-court inconsistent statements as favorable to the accused.

In the typical prior inconsistent statement situation discussed in this Article and exemplified by *Green*, the prosecution calls the witness to the stand. The witness then gives testimony that is neutral or even favorable to the defense. The same witness also has previously made out-of-court statements that are favorable to the prosecution and adverse to the defense. The prosecution is then permitted to submit those prior statements into evidence in its case in chief. By analogy to *Chambers*, the witness' present testimony in this situation is not "against" the defendant but rather is "against" the State. Thus, it is the witness' prior inconsistent statement, as submitted by the State, that is truly "against" the accused; it is this out-of-court statement that the accused must be given an opportunity to confront adequately, and yet it is this "witness" who is not really present.

As illustrated above, when the prosecution's witness does not affirm the truth of his or her prior statements, cross-examination can only emphasize the differences between those out-of-court statements and the witness' present testi-

161. *Id.*
162. *Id.* at 292-93.
163. *Id.* at 291-92, 297.
164. *Id.* at 292, 297.
165. *Id.* at 297-98.
166. *Id.* at 297.

mony in what will probably be an ineffectual attempt to convince the jury to favor the in-court testimony.[167] Furthermore, because the defendant may agree with the witness' present in-court testimony, defense counsel can hardly proceed to cross-examine with the ferocity of typical cross-examination. The defendant's goal is not to attack the witness' present reliability, but rather to attack that witness' credibility on a prior unobserved occasion. Without an adverse witness, cross-examination loses much of its character and effectiveness. Although the *Green* Court found that noncontemporaneous cross-examination is sufficient to allow admission of a prior inconsistent statement without doing violence to the confrontation clause,[168] the Court was careful not to hold a prior inconsistent statement sufficient to convict under the due process clause.[169]

Thus, the goals of fairness and accuracy inherent in the confrontation and due process clauses mandate that a prior inconsistent statement is sufficient to convict only if the accused has an opportunity to cross-examine the declarant *at the time* the prior statement was made or when the declarant was still affirming its truth. Only under these circumstances can confrontation and cross-examination be meaningful for the defense. If the standard for effective cross-examination is not higher for sufficiency than for admissibility, Sir Walter Raleigh's trial may soon have contemporary counterparts.

VII. THE DUE PROCESS CLAUSE AND SUFFICIENCY

The Court in *California v. Green*[170] noted that aside from the confrontation clause considerations, the due process clause might prevent convictions when there is no evidence other than the prior inconsistent statement.[171] This is a recognition of the long-established principle that due process prohibits conviction on evidence that is insufficient to prove the case beyond a reasonable doubt.[172] A quarter of a century before *Green*, the Court in *Bridges v. Wixon*[173] held that a government witness' prior unsigned, unsworn statements were substantively inadmissible. The Supreme Court expressed the fear that to admit such evidence "would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded."[174] Although this type of out-of-court statement may be substantively admissible today, the same "notions of fairness" discussed in *Bridges* should preclude conviction based on it alone.

A conviction based on insufficient evidence can violate due process in one of

167. *See supra* text accompanying notes 40-41.
168. California v. Green, 399 U.S. 149 (1970).
169. *Id.* at 153.
170. 399 U.S. 149 (1970).
171. *Id.* at 163 n.15, 170.
172. *See* Jackson v. Virginia, 443 U.S. 307 (1979); *see also In re* Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").
173. 326 U.S. 135 (1945).
174. *Id.* at 153-54.

two ways. First, when the evidence is *quantitatively* insufficient, even if reliable, it is not enough to lead a "reasonable" trier of fact to conclude that the defendant is guilty beyond a reasonable doubt.[175] Second, when the evidence is *qualitatively* insufficient it is so unreliable that a conviction based solely on it would deny the defendant a fair trial.[176] The evidence in this second category, *if reliable*, would be quantitatively sufficient to prove the elements of the case beyond a reasonable doubt; it is the unreliability of the evidence that violates due process.

Conviction based solely on a prior inconsistent statement falls in the second category. Testimony's reliability is determined in part by the ability of the defendant to cross-examine and thereby test the credibility of the witness.[177] As discussed earlier, absent the ability to cross-examine the declarant at the time the prior statement was made or at a time when the declarant was still affirming the statement's truth, cross-examination is severely limited and the trustworthiness of the statement is questionable.[178] If the only evidence against the accused is of highly questionable reliability, then conviction could be an inaccurate result. As demonstrated above, the possible effectiveness of defense counsel's cross-examination to reveal the unreliability of prior inconsistent statements is minimal. It is minimal because cross-examining a witness who has already recanted the very statement defense counsel seeks to attack is problematic.

The Supreme Court could not have been unmindful of this problem. The Court in *Green* recognized that the level of required effectiveness varies with the stakes.[179] Although cross-examination in a case like *Green* is potentially effective enough to justify admissibility, a much higher level of effectiveness must be required when the entire case turns on the prior inconsistent statement. To convict solely on an unconfronted, out-of-court statement that the declarant has now repudiated, recanted, or forgotten is to convict without due process of law.

A conviction may, of course, be based solely on the testimony of one of several conflicting witnesses. This differs, however, from a conviction that rests solely on a trier of fact's choice to believe the out-of-court assertion of a declarant who is now in court and testifying inconsistently with his or her prior statement. In some situations it would be reasonable for a trier of fact to find the prior out-of-court statement the more reliable and accurate account of the event described. For example, the trial record could reveal a reasonable factual basis of ponderable legal significance[180] from which a trier of fact could legitimately

175. *See* Jackson v. Virginia, 443 U.S. 307 (1979); *In re* Winship, 397 U.S. 358 (1970); Thompson v. Louisville, 362 U.S. 199 (1960); Nixon v. Herndon, 273 U.S. 536 (1927).

176. *See* Manson v. Brathwaite, 432 U.S. 98 (1976); Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968); Stoval v. Denno, 388 U.S. 293 (1967); Turner v. Louisiana, 379 U.S. 466 (1965); *In re* Oliver, 333 U.S. 257 (1948). Justice Harlan in *Green* "recognized that evidence of identification—always a critical issue in a criminal trial—should not be received if the circumstances of a pretrial confrontation were so infected by suggestiveness as to give rise to an irreparable likelihood of misidentification." California v. Green, 399 U.S. 149, 186 n.20 (1970) (Harlan, J., concurring).

177. *See supra* notes 40-67 and accompanying text.

178. *See supra* notes 40-56 and accompanying text.

179. *Green*, 399 U.S. at 170.

180. "The determination of the degree of a crime is, of course, generally left to the discretion of the jury. Upon appeal, the reviewing court is bound to view the evidence most

infer that the prior statement is the more accurate account. If so, the due process goals of reliability and accuracy would be sufficiently met. However, without a specific factual basis in the record to justify believing the prior accusation over the present testimony, a verdict based solely on the prior statement would be supported only by suspicion, hunch, guess, or intuition. A verdict based on intuition is not founded in fact or reason and does not satisfy due process.[181]

VIII. PROPOSED SUFFICIENCY STANDARD

Concerned with the possibility of conviction based solely on a prior inconsistent statement, Justice Harlan, concurring in *California v. Green*,[182] suggested that he "would not permit a conviction to stand where the 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."[183] Justice Harlan would have thus required both an opportunity to cross-examine and a judicial determination of reliability.

Justice Harlan's requirement of cross-examination can be met in two ways. First, the prior statement could have been subject to cross-examination at the time it was made. When combined with sufficient other indicia of reliability, this would provide an adequate constitutional safeguard. Second, Justice Harlan apparently would have been satisfied if the declarant, although not subject to cross-examination at the time the prior statement was made, is present in court and questioned concerning the out-of-court remarks. This second situation, however, is not the true equivalent of the first. As discussed earlier in this Article,[184] the quality of cross-examination possible of a witness' prior inconsistent state-

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favorably in support of its judgment. . . . But the jury's discretion is not absolute. . . . 'Implicit in our duty to determine the legal sufficiency of evidence to sustain a verdict is our obligation, in a proper case, to appraise the sufficiency' " . . . . [I]t is not enough for the respondent simply to point to "some" evidence supporting the finding . . . . "The critical word in the definition is *'substantial'*; it is a door which can lead as readily to abuse as to practical or enlightened justice." . . . [T]he term "clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." . . . In resolving that contention the appellate court is required to determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. . . . Accordingly, in determining whether the record is sufficient in this respect the appellate court can give credit only to "substantial" evidence, i.e., evidence that reasonably inspires confidence and is "of solid value" . . . . [T]his test has perhaps most frequently been invoked in holding insufficient the evidence of identity purporting to connect the defendant with the crime . . . .

People v. Bassett, 69 Cal. 2d 122, 137-39, 443 P.2d 777, 786-88, 70 Cal. Rptr. 193, 202-04 (1968) (citations omitted).

181. A verdict not founded on fact or reason violates the principles laid down in Jackson v. Virginia, 443 U.S. 307 (1979).

182. 399 U.S. 149 (1970).

183. *Green*, 399 U.S. at 186 n.20 (Harlan, J., concurring). "It will, of course, be the unusual situation where the prosecution's entire case is built upon hearsay testimony of an unreliable witness. In such [a] circumstance the defendant would be entitled to a hearing on the reliability of the testimony." *Id.* After reviewing many of the recent cases discussed in this Article, the reader may choose to question Justice Harlan's belief that only in the "unusual" situation will the prosecution's entire case be based on the hearsay testimony of an unreliable witness.

184. *See supra* text accompanying notes 40-58.

ment is radically different than that possible of a witness' present testimony.[185] Absent the opportunity to cross-examine contemporaneously, a defendant may not receive sufficient confrontation to permit conviction based solely on such evidence.[186]

Justice Harlan's additional requirement that the out-of-court assertion be judged reliable before it can be held sufficient,[187] though a valid concern, does not alone eliminate the problem.[188] It leaves unanswered the question of what standard should be applied in determining reliability.[189] Given the constitu-

185. For elaboration of the difficulty in questioning a witness about the witness' prior statements, see *supra* text accompanying note 54.

186. *See supra* text accompanying notes 8-14, 57-59, 134-81.

187. The recent military case of United States v. Hines, 18 M.J. 729 (A.F.C.M.R. 1984), allowed a conviction based partially on signed, prior out-of-court statements. In a prosecution for defendant's alleged assaults on his stepdaughters, the two alleged victims and their mother honored subpoenas to appear at trial, but refused to testify. *Id.* at 730. The court martial permitted the use of typed sworn statements signed by the mother and two children describing the defendant's criminal conduct, under MIL. R. EVID. § 804(b)(5). The court found these prior statements sufficient to support a finding of guilt. *Id.* at 744. The court concluded that this evidence was sufficient because the defense had not submitted evidence to contradict the inculpatory statements in question. *Id.* at 743-44.

Hines appears to run contrary to many of the reasons that the courts and commentators have traditionally given for the creation of the rules against hearsay and the confrontation clause. In Mattox v. United States, 156 U.S. 237 (1895), the Court held that "[t]he primary object of the [confrontation clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . ." *Id.* at 242. In *Hines* defendant was convicted despite the refusal of the only witnesses against him to testify at trial. These witnesses' prior out-of-court signed statements were the sole evidence used to convict defendant on five of the six specifications.

The problem with a conviction based on such evidence was recognized in Douglas v. Alabama, 380 U.S. 415 (1965). In *Douglas* the Court held that a defendant's inability to cross-examine a prosecution witness who had refused to testify precluded, as violative of the confrontation clause, the substantive use of that witness' prior extrajudicial statement. *Id.* at 419-20. Placing the burden on the defendant to contradict statements he or she is unable to cross-examine because of a witness' refusal to testify violates this same principle. However, the confrontation clause provided little obstacle to the *Hines* court when it held the evidence both admissible and sufficient to convict.

188. In search of a workable standard for determining sufficiency, one commentator has suggested a requirement of corroboration:

> [A] court could examine the record for any circumstantial or direct evidence presented in support of the prior inconsistent statement to sustain the verdict . . . . [A] court could consider such factors as whether the prior inconsistent statement was given under oath at some kind of formal proceeding or whether the statement was written, signed, recorded, or acknowledged by the witness.

Stalmack, *supra* note 58, at 269-70.

This requirement appears to be a viable test for determining admissibility, but not for determining sufficiency. For example, the latter point, which suggests that a signature or acknowledgment of the statement might increase the prior statement's trustworthiness, obscures the difference between the two separate issues that arise every time a prior inconsistent statement is admitted into evidence. The proponent of such evidence, as with all hearsay statements, must convince the trier of fact both that the out-of-court statement was made by the declarant and that it should be believed. The signing or acknowledgement of the prior statement is one additional factor increasing the likelihood that the prior statement was made by the declarant. However, this adds little to the trier of fact's ability to determine whether the prior statement was an accurate account of the event it attempted to describe. Traditionally, cross-examination is the manner in which the reliability of statements is tested.

189. Professor Blakey notes that in the absence of specific standards to determine whether a particular prior inconsistent statement alone is sufficient to convict, lower courts have been allowed great discretion. Blakey, *supra* note 57, at 23. In particular, Professor Blakey points to the California Supreme Court's decision in People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971). This was an opinion rendered after the United States Supreme Court returned California v.

tional rights at stake and the inherent untrustworthiness of such evidence, a clear and definite standard is needed to determine what constitutes sufficient reliability.

What is needed is a sufficiency guideline that requires both contemporaneous cross-examination and a specific test for determining reliability. The goals of accuracy and fairness that underlie confrontation and due process can be met by the following standard: A conviction can be based solely on a prior inconsistent statement only if the statement was subject to cross-examination by the defendant at the time it was made, or when the witness was affirming its truth, *and* there is some reasonable factual basis appearing in the record to credit the prior statement over the present in-court testimony. Two California cases illustrate the application and workability of this standard.

In *People v. Chavez*[190] a member of an East Los Angeles street gang, the "L.A. Clovers," was charged with having fired rifle shots at members of a rival gang, the "Hazards."[191] The only evidence submitted to establish Chavez's guilt as the "shooter" was the prior inconsistent statements of a member of the "Hazards," Gregory Angel.[192] Angel had identified Chavez to the police and subsequently confirmed his extrajudicial identification at a pretrial preliminary hearing.[193] At trial, however, Angel denied having seen the person who fired the shots.[194] The pretrial statements were admitted into evidence and Chavez was convicted.[195]

The California Supreme Court agreed that the prior statements Angel made to the police officers were analogous to those held insufficient in *In re Johnny G.*[196] However, in *Chavez*, unlike in *Johnny G.*, the witness' positive identification had been repeated under oath and while subject to cross-examination at a preliminary hearing. This "sworn testimony at a formal, judicially-conducted preliminary examination clearly provides a more substantial basis . . . than the extrajudicial identification in *Gould*, [and in] *Johnny G.* . . ."[197]

Furthermore, in *Chavez* there was an explanation for the witness' inconsistent trial testimony. As the California Supreme Court noted, Angel had from the beginning indicated his unwillingness to testify in court because no one had been hurt by the shooting. On the witness stand, "Angel forthrightly conceded that he had told the district attorney just a few days before the trial that he did

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Green, 399 U.S. 149 (1970), to the state court for consideration of issues left undecided. The California court's decision in *People v. Green* suggested that future convictions based solely on a prior inconsistent statement were to be allowed *only* if the trial judge believes the prior inconsistent statement to be true. This decision to leave almost complete discretion in the trial court, Professor Blakey concludes, "provides no real protection against convictions based solely upon prior inconsistent statements." Blakey, *supra* note 57, at 23-24.

190. 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980).

191. *Id.* at 339, 605 P.2d at 404, 161 Cal. Rptr. at 765.

192. *Id.* at 342, 605 P.2d at 406, 161 Cal. Rptr. at 767.

193. *Id.* at 342-43, 605 P.2d at 406, 161 Cal. Rptr. at 767.

194. *Id.* at 342, 605 P.2d at 406, 161 Cal. Rptr. at 767.

195. *Id.* at 351, 605 P.2d at 411, 161 Cal. Rptr. at 772.

196. 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (1979) (en banc).

197. *Chavez*, 26 Cal. 3d at 364, 605 P.2d at 420, 161 Cal. Rptr. at 781.

not want to testify because he felt that the whole matter 'should be settled in the streets' rather than in court."[198]

In addition, the court noted that the defense had failed to discredit Angel's identification when given an opportunity to cross-examine him at the preliminary hearing.[199] Thus, the court was properly concerned with finding an explanation for the inconsistencies between the witness' preliminary hearing testimony and his recantation at trial. Given Angel's statements to the District Attorney and his testimony at trial, it was clear that the witness had changed his version of the story because he wanted the dispute to be settled in a different forum, and not because the prior statements were inaccurate. Angel's recantation of his preliminary hearing identification did not denigrate the veracity of that prior identification. The court's decision to find the evidence in *Chavez* sufficient was correct because the prior statement was subject to cross-examination at the time it was made *and* there was sufficient evidence in the record, the witness' stated reason for his reluctance to testify, for a reasonable trier of fact to credit the reliability of the prior statement over that of the in-court testimony.

Similarly, in *People v. Ford*[200] the California Supreme Court sustained a conviction for robbery based solely on the prior inconsistent statement of the victim merchant who had been the sole witness to the crime.[201] Although the victim had positively identified Ford to the police and later at a pretrial prelimi-

198. *Id.*

199. *Id.* Subsequently, the California Supreme Court in *In re* Miguel L., 32 Cal. 3d 100, 649 P.2d 703, 185 Cal. Rptr. 120 (1982), suggested in dicta that when a conviction is based solely on a prior inconsistent statement, it "may stand if the extrajudicial statement was reiterated by the witness under oath at a preliminary examination or other judicial proceeding, and there was evidence from which the factfinder could credit the witness's prior testimony over his or her failure to confirm the extrajudicial statements at trial." *Id.* at 106, 649 P.2d at 706, 185 Cal. Rptr. at 123.

To date, even California's lower courts have refused to follow this dicta. In People v. Brown, 150 Cal. App. 3d 968, 198 Cal. Rptr. 260 (1984), for example, the California Court of Appeal ignored the language of *Miguel L.*

In *Brown* the only evidence of defendant's guilt of grand theft was an eyewitness' alleged prior statements made during a police interview and subsequently repudiated by that witness at the pretrial preliminary hearing. *Id.* at 971, 198 Cal. Rptr. at 261-62. At trial the witness continued to deny any knowledge of defendant Brown's involvement in the crime and testified that she in fact had never identified him to the police. *Id.* The state court of appeal found that the circumstances gave sufficient reliability to the prior statements made to the police and that a conviction could be based solely on them. In doing so, the court of appeal limited *Miguel L.*, concluding that it was merely an application of CAL. PENAL CODE § 1111 (West 1954), a statute which provides that the testimony of an *accomplice* is *never* alone sufficient to convict. *Id.* at 972, 198 Cal. Rptr. at 262. The *Brown* court's explanation of the real meaning of *Miguel L.* is particularly questionable because it is well-established under California law that CAL. PENAL CODE § 1111 is inapplicable to juvenile cases, and *Miguel L.* was a juvenile case. *See In re* Mitchell P., 22 Cal. 3d 946, 587 P.2d 1144, 151 Cal. Rptr. 330 (1978), *cert. denied*, 444 U.S. 845 (1979); *In re* Frederick G., 96 Cal. App. 3d 353, 157 Cal. Rptr. 769 (1979), *cert. denied*, 446 U.S. 934 (1980); *In re* R.C., 39 Cal. App. 3d 887, 114 Cal. Rptr. 735 (1974).

Failing to even cite *In re* Johnny G., 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (1979) (en banc), the *Brown* court sustained the conviction apparently without concern that to do so was contrary to the clear dictates of the California Supreme Court in *Miguel L.* Even if the prior statements in *Brown* had been made under circumstances suggesting that they could be believed over the inconsistent trial testimony, the witness' earlier remarks were not made at any formal judicial proceeding, nor taken under oath or subjected to cross-examination. The reliability surrounding the prior statement should be a relevant factor only when the prior statement was made at a judicial proceeding.

200. 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196, *cert. denied*, 455 U.S. 1003 (1981).

201. *Id.* at 212, 635 P.2d at 1177, 178 Cal. Rptr. at 197.

nary hearing, he could not affirm his identification while testifying at trial.[202] In fact, during trial he testified that he had never been completely certain that Ford was the man who had robbed him[203] and added that he had identified defendant at the preliminary hearing because the presiding municipal court magistrate had told him that he "had" to make a decision.[204] After reviewing the preliminary hearing transcript, however, the state supreme court concluded that the witness had not been coerced into the earlier identification.[205] In addition, the court found substantial internal inconsistencies in the witness' trial testimony.[206] These circumstances, combined with evidence of a pretrial meeting between the witness and the accused, gave the jury a reasonable factual basis to elevate the untainted preliminary hearing testimony above the reasonably discredited trial testimony. Thus, the court, as it had in *Chavez*, found the witness' prior statement sufficient to sustain the conviction.

The court in *Ford*, however, went on to note that even if the witness' "explanation of his testimony at the preliminary hearing had been plausible, the jury was not bound to believe it and disbelieve his prior testimony: inconsistencies in identification evidence are for the jury to resolve."[207] The court added that the prior inconsistent identifications made in *People v. Gould*[208] and *In re Johnny G.*[209] were insufficient to sustain convictions because both had been made "in circumstances that cast serious doubt on their accuracy and trustworthiness."[210] In *Ford* the prior identification "was made in a formal judicial proceeding, under oath and subject to cross-examination."[211] This, the court

202. *Id.* at 212-13, 635 P.2d at 1177, 178 Cal. Rptr. at 197.

203. *Id.* at 214, 635 P.2d at 1178, 178 Cal. Rptr. at 198.

204. *Id.*

205. *Id.*

206. To begin with, in the circumstances of this case the repudiation itself provided the jury with a basis on which it could have discredited Lane's trial testimony in favor of his preliminary hearing testimony. Lane gave two different explanations of the latter testimony, and each could have aroused the jury's suspicions. First, under questioning by the court Lane claimed he positively identified defendant at the preliminary hearing only "Because the judge told me I had to make a definite decision. She said I couldn't say 'looked like,' I had to say yes or no. In my mind I wasn't completely decided whether that was the man or not." Second, under cross-examination by defense counsel Lane denied he had identified defendant as the man who had robbed him, and claimed he meant only to say that defendant resembled the police photograph he had previously selected. But not only did these claims seen inconsistent with each other, they were apparently refuted by the transcript of the preliminary hearing read to the jury: from that transcript the jury could have found that the magistrate did not in fact coerce Lane into making a positive identification against his will, and that the identification was not in fact based on the photograph of defendant but on Lane's recollection of the actual events "at the time of the robbery." And from these findings, the jury could well have inferred, as in *Chavez*, that the reason for the witness's failure to make a positive identification at trial was simply that in the interim he had become reluctant to testify against this defendant. Indeed, the evidence reveals that defendant and his wife had a discussion with the witness prior to trial.

Id. at 214-15, 635 P.2d at 1178-79, 178 Cal. Rptr. at 198-99.

207. *Id.* at 215, 635 P.2d at 1179, 178 Cal. Rptr. at 199.

208. *See supra* text accompanying notes 109-18.

209. *See supra* text accompanying notes 119-29.

210. *Ford*, 30 Cal. 3d at 215, 635 P.2d at 1179, 178 Cal. Rptr. at 199.

211. *Id.*

stated, was sufficient evidence of reliability to support a conviction.[212]

These comments by the court are disturbing and based on questionable reasoning. Triers of fact are permitted to choose between the conflicting testimony of separate witnesses. To allow a conviction based solely on a choice between conflicting statements by the same witness, however, is a different matter. Is the opportunity to confront the witness at the pretrial hearing enough alone to satisfy *both* confrontation and due process? When, as in *Ford*, the prior statement was made in a formal proceeding, under oath and subject to cross-examination, it is arguable that the accused has been given all the safeguards demanded by the confrontation clause. Ford, for example, was provided with an opportunity to confront the "witness against" him at a time when that witness alleged Ford's criminal complicity. The due process clause, however, remains unsatisfied in this situation. Unless the trial record reveals some reasonable factual basis to credit the prior unobserved statement over the same witness' present testimony, a conviction based solely on such a statement is mere guess work or intuition.[213] The California Supreme Court in *Ford* would not only leave triers of fact free to disbelieve the sworn statement made in their presence and to accept as true a statement made by the same witness out of their presence, but would also allow convictions to stand although based solely on this decision.[214]

Arbiters of guilt should not be permitted to find proof beyond a reasonable doubt based on such a record. Even former testimony may be insufficient to convict, particularly when the declarant now testifies, under oath and subject to cross-examination, in a manner inconsistent with those prior statements and which, if believed, would result in an acquittal. Absent a reasonable factual basis to credit the prior statement over the present testimony, neither judge nor jury should be permitted to convict solely on their intuition that a witness is now lying under oath, but was sincere when the earlier statements were made.

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212. *Id.* The California Supreme Court's standard, proposed by way of dicta in *Ford*, is that if the prior statements were made under some circumstances not clearly devoid of any indicia of reliability, they are sufficient to support a conviction. This standard, however, is similar to that required for mere *admissibility*. In Ohio v. Roberts, 448 U.S. 56 (1980), the United States Supreme Court held that for a hearsay statement to be admitted without violating the confrontation clause, it must have been made under circumstances possessing "indicia of reliability." *Id.* at 66; *see also supra* note 129 (discussion of prior inconsistent statements combined with otherwise insufficient additional evidence). Therefore, when the California court notes that the prior statement will not be sufficient to convict if made under untrustworthy circumstances, it is only stating the obvious, because an untrustworthy statement should not even be admissible under the confrontation clause. When the prior statement was made at a proceeding in which there was an opportunity for the defendant to cross-examine the witness, *Roberts* provides that there is sufficient confrontation so that the testimony will be admissible at the defendant's subsequent trial. *Roberts*, 448 U.S. at 73. Thus, the statements in *Ford* and *Chavez*, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980), were both constitutionally admissible. However, simply because the statements were admissible does not mean that they were automatically sufficient to convict. Even when the prior statement was made with sufficient guarantees of trustworthiness to gain admissibility, a higher standard should be required for sufficiency.

213. *See supra* text accompanying notes 77-80, 178-81.

214. When the prior inconsistent statement provides the sole basis for conviction, the California Supreme Court has concluded that the conviction will not be overturned unless the record reveals that the prior statement was made under untrustworthy circumstances. *See supra* text accompanying notes 207-12; note 212.

IX. CONCLUSION

Once prior inconsistent statements became substantively admissible, the spectre of conviction based solely on such statements became a reality. Several jurisdictions today permit conviction based solely on prior inconsistent statements without clearly articulated concern for the constitutional rights that such convictions may violate. The meanings of the due process and confrontation clauses of the United States Constitution should not fluctuate depending on the jurisdiction in which a case is tried. A definite national standard must be established. The potentially low level of reliability unique to prior inconsistent statements demands that safeguards be established to ensure that a defendant can be convicted only when there is a fair opportunity for the defendant to confront adverse witnesses *and* there is reliable evidence pointing to guilt. The standard suggested in this Article, that the prior inconsistent statement must be made at a time when the declarant was subject to some form of cross-examination by the defendant *and* that there must be a reasonable factual basis in the record for a trier of fact to credit the prior statement over the present in-court testimony, would avoid the dangers inherent in conviction based solely on prior inconsistent statements.

APPENDIX

Section I

Currently 15 states have adopted FED. R. EVID. 801(d)(1)(A) virtually verbatim: FLA. STAT. ANN. 90.801(2)(a) (West 1979); IDAHO R. EVID. 801(d)(1)(A); IOWA R. EVID. 801(d)(1)(A); ME. R. EVID. 801(d)(1)(A); MINN. R. EVID. 801(d)(1)(A); NEB. REV. STAT. § 27-801, Rule 801(4)(a)(i) (1975); N.H. R. EVID. 801(d)(1)(A); N.J. STAT. ANN. § 2A: 84A, Rule 63(1)(a) (West Supp. 1986); OKLA. STAT. ANN. tit. 12, § 2801(4)(a)(1) (West 1978); ORE. REV. STAT. § 40.450, Rule 801(4)(a)(A) (1984); S.D. R. EVID. 801(d)(1); TEX. R. EVID. 801(e)(1)(A); VT. R. EVID. 801(d)(1)(A); WASH. R. EVID. 801(d)(1)(i); W. VA. CODE R. EVID. 801(d)(1)(A).

Another 6 states follow the Federal Rule with some modifications. HAWAII R. EVID. 802.1(1) is comparable to the Federal Rule, but reorganizes a number of the provisions. The Hawaii rule provides for the substantive use of prior inconsistent statements as an exception to the hearsay rule, rather than as an exemption from the hearsay rule. The Hawaii rules also provide that the prior statement, even if not made under oath, can still be substantively admitted if it was

> (B) Reduced to writing and signed or otherwise adopted or approved by the declarant; or
>
> (C) Recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement . . . .

Id. 802.1(1)(B), (C).

The Illinois Code of Criminal Procedure substantively admits prior inconsistent statements in criminal but not civil cases when the prior statement was either made under oath or, though not made under oath, it is a statement that

> narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
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> (A) the statement is proved to have been written or signed by the witness, or
>
> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or
>
> (C) the statement is proved to have been accurately recorded by a tape recorder, videotape, recording, or any other similar electronic means of sound recording.

ILL. ANN. STAT. ch. 38, para. 115-10.1(2) (Smith-Hurd Supp. 1986). Massachusetts, which has traditionally followed the orthodox rule, has proposed Rules of Evidence that would incorporate verbatim FED. R. EVID. 801 (d)(1)(A). Although the Massachusetts Supreme Court has declined to adopt these Proposed Rules as a whole, it has invited parties to cite the rules in their briefs

before the court. Commonwealth v. Daye, 393 Mass. 55, 66, 469 N.E.2d 483, 491 (1984). In one case the Massachusetts high court held

> a prior inconsistent statement is admissible as probative if made under oath before a grand jury, provided the witness can be effectively cross-examined as to the accuracy of the statement, the statement was not coerced and was more than a mere confirmation or denial of an allegation by the interrogator, and other evidence, tending to prove the issue is presented.

Id. at 69, 469 N.E.2d at 495-96; *see also* N.D. R. EVID. 801(d)(1)(i) (oath required in criminal but not civil proceeding). OHIO R. EVID. 801(D)(1)(a) specifically requires that the declarant's statement must have been made under oath and "subject to cross-examination by the party against whom the statement is offered." *Id.* This additional requirement would prohibit the use of a prior inconsistent statement as substantive evidence, for example, in a grand jury proceeding against a criminal defendant, because this testimony would not be cross-examined. However, a witness' prior statement "of identification of a person soon after perceiving him" is substantively admissible "if the (c) circumstances demonstrate the reliability of the prior identification," even if the prior statement was not made under oath and subject to cross-examination at the time it was made. *Id.* 801(D)(1)(C). WYO. R. EVID. 801(d)(1)(A) is identical to the Federal Rule but limits substantive admissibility to criminal proceedings.

Section II

A total of 19 states provide, either by statute or case law, for the substantive use of prior inconsistent statements but have omitted the requirement of the Federal Rule that the prior statement be given under oath—some of these states require other reliability ensuring safeguards. The 19 states are: ALASKA R. EVID. 801(d)(1)(A); Beavers v. State, 492 P.2d 88, 92-93 (Alaska 1971); Van Hatten v. State, 666 P.2d 1047, 1049-50 (Alaska Ct. App. 1983); ARIZ. R. EVID. 801(d)(1)(A); State v. Cruz, 128 Ariz. 538, 540, 627 P.2d 689, 691 (1981); State v. Acree, 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978); ARK. R. EVID. 801(d)(1)(i) (no oath requirement except if offered in a criminal proceeding); CAL. EVID. CODE § 1235 (West 1966); COLO. R. EVID. 801(d)(1)(A); People v. Mulligan, 193 Colo. 509, 517, 568 P.2d 449, 455-56 (1977); State v. Whelan, 513 A.2d 86, 92, 200 Conn. 743, 753-54 (1986) (prior signed written inconsistent statement admissible as substantive evidence when declarant testifies at trial based upon personal knowledge and is subject to cross-examination); DEL. R. EVID. 801(d)(1)(A); Gibbons v. State, 248 Ga. 858, 862-63, 286 S.E.2d 717, 721 (1982); Patterson v. State, 263 Ind. 55, 57, 324 N.E.2d 482, 484 (1975) (prior statements were admissible where "neither [witness] denied giving the statements attributed to her, nor did either profess ignorance of such statements"); KAN. STAT. ANN. § 60-460(a) (1982) (allowing for the substantive admission of all prior statements made by persons "present at the hearing and available for cross-examination with respect to the statement," including the prior inconsistent statements of a witness); State v. Holt, 228 Kan. 16, 21-22, 612 P.2d 570, 576 (1980); Jett v.

Commonwealth, 436 S.W.2d 788, 792 (Ky. 1969); MICH. R. EVID. 801(d)(1) (The Michigan Evidence Code fails to provide for an exception for prior inconsistent statements. However, rule 801(d)(1) does provide for the admissibility of prior identifications when the identifying party is now on the stand for cross-examination. This exception appears to permit the introduction of prior identifications into evidence even when the witness either fails to confirm or recants the original identification at trial. This would allow such prior inconsistent identifications into evidence even if not made under oath or subject to cross-examination. A large percentage of the cases involving prior inconsistent statements involve inconsistent identifications.); MONT. R. EVID. 801(d)(1)(A); State v. Woods, 662 P.2d 579, 584 (Mont. 1983); State v. Creekmore, 196 Mont. 187, 192, 640 P.2d 439, 442 (1982); State v. Dolan, 620 P.2d 355, 358-59 (Mont. 1980); NEV. REV. STAT. § 51.035(2)(a) (1985); Kaplan v. State, 99 Nev. 449, 452, 663 P.2d 1190, 1192-93 (1983); Dorsey v. State, 96 Nev. 951, 953, 620 P.2d 1261, 1262 (1980); Levi v. State, 95 Nev. 746, 748-49, 602 P.2d 189, 190 (1979); N.M. R. EVID. 801(d)(1)(A); State v. Maestas, 92 N.M. 135, 144, 584 P.2d 182, 190-91 (N.M. Ct. App. 1978); State v. Vialpando, 93 N.M. 289, 297, 599 P.2d 1086, 1094-95 (N.M. Ct. App.), *cert. denied*, 93 N.M. 172, 598 P.2d 215 (1979); Commonwealth v. Brady, 507 A.2d 286 (Pa. 1986) ("[O]therwise admissible prior inconsistent statements of a declarant who is a witness in a judicial proceeding and is available for cross-examination may be used as substantive evidence to prove the truth of the matters asserted therein." *Id.* at 70. The court did note, however, that the prior inconsistent statement in *Brady* "was rendered under highly reliable circumstances assuring that they were voluntary, knowing and understanding." *Id.* at 71.); State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982), *cert. denied*, 460 U.S. 1103 (1983); UTAH R. EVID. 801(d)(1)(A) (specifically permitting the use of prior statement as substantive evidence when the prior statement is inconsistent with the witness' present testimony or the witness denies making the statement or claims no memory of the statement); WIS. STAT. ANN. § 908.01(4)(a)(1) (West 1974); Haskins v. State, 97 Wis. 2d 408, 420, 294 N.W.2d 25, 34 (1980); Vogel v. State, 96 Wis. 2d 372, 386, 291 N.W.2d 838, 845 (1980); Virgil v. State, 84 Wis. 2d 166, 181, 267 N.W.2d 852, 859 (1978).

Section III

The remaining 10 states and the District of Columbia adhere to the orthodox, pre-Federal Rules view that prior inconsistent statements of witnesses cannot be admitted as substantive evidence: *Ex parte* Harris, 428 So. 2d 124 (Ala. 1983); Isbell v. State, 57 Ala. Crim. App. 444, 449, 329 So. 2d 133, 138, *cert. denied*, 295 Ala. 407, 329 So. 2d 140 (1976); Brooks v. United States, 448 A.2d 253, 259 (D.C. 1982); Turner v. United States, 443 A.2d 542, 549 (D.C. 1982); State v. Thibodeaux, 380 So. 2d 59, 62 (La. 1980); State v. Mosley, 360 So. 2d 844, 845-46 (La. 1978); State v. Ray, 259 La. 105, 113, 249 So. 2d 540, 543 (1971); Hall v. State, 292 Md. 683, 687, 441 A.2d 708, 711 (1982); Davis v. State, 431 So. 2d 468, 471 (Miss. 1983); Sims v. State, 313 So. 2d 388, 391 (Miss.

1975); State v. Davis, 566 S.W.2d 437, 450 (Mo. 1978); Powell v. Norman Lines Inc., 674 S.W.2d 191, 197 (Mo. App. 1984); People v. Raja, 77 A.D.2d 322, 325, 433 N.Y.S.2d 200, 202 (1980) (Although New York currently follows the orthodox view, in 1982 a new Proposed Code of Evidence was developed. NEW YORK STATE LAW REVISION COMM'N, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK (1982). Rule 803(a)(1) allows prior inconsistent statements into evidence without requiring the prior statement to be under oath. However, if it is a criminal case, then the statement must be signed by the witness or made under oath subject to penalty of perjury.); State v. Mack, 282 N.C. 334, 339-40, 193 S.E.2d 71, 75 (1972); State v. Erby, 56 N.C. App. 358, 361, 289 S.E.2d 86, 88 (1982); State v. Sinclair, 45 N.C. App. 586, 589, 263 S.E.2d 811, 814-15, *rev'd on other grounds*, 301 N.C. 193, 270 S.E.2d 418 (1980); State v. Vargas, 420 A.2d 809, 812 (R.I. 1980); State v. Roddy, 401 A.2d 23, 25 (R.I. 1979); State v. Quattrocchi, 103 R.I. 115, 124, 235 A.2d 99, 104-05 (1967); Martin v. State, 584 S.W.2d 830, 833 (Tenn. Crim. App. 1979); Cassady v. Martin, 220 Va. 1093, 1099, 266 S.E.2d 104, 107 (1980); Neblett v. Hunter, 207 Va. 335, 340, 150 S.E.2d 115, 119 (1966); Williams v. Commonwealth, 193 Va. 764, 770, 71 S.E.2d 73, 76 (1952); Thornton v. Downes, 177 Va. 451, 459, 14 S.E.2d 345, 351 (1941).