UIC Law Review

Volume 19 | Issue 1 Article 4

Fall 1985

Prior Inconsistent Statements as Substantive Evidence: Illinois Takes the Sting out of the Turncoat Witness, 19 J. Marshall L. Rev. 69 (1985)

Mark D. Krauskopf

PRIOR INCONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE: ILLINOIS TAKES THE STING OUT OF THE TURNCOAT WITNESS

"State's witness changes story" is a headline that seems to appear frequently in our nation's tabloids. If the prosecution is relying on a witness' testimony to satisfy a crucial element of the state's case and the witness testifies adversely or inconsistently, the state's proof will fail unless the prosecution can get the witness' prior inconsistent statement[1] admitted as substantive evidence.[2] This situation involving a "turncoat witness"[3] is every prosecutor's recurring nightmare. In many states,[4] the prosecution may not introduce the prior inconsistent statement substantively; its use is restricted to impeaching the credibility of the witness.[5] However, this restrictive

---

1. A prior inconsistent statement, as its name implies, is a witness' statement made at a time before the present trial or hearing that is materially different from his present testimony. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1018 (Chadbourn rev. 1970); New Jersey Developments, *Rule of Evidence 63(1)(a): A Proposed Redraft of New Jersey's Much-Amended Rule on Prior Inconsistent Statements*, 34 RUTGERS L. REV. 777, 777 (1982).

2. Substantive evidence is "[t]hat adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness, or of corroborating his testimony." BLACK'S LAW DICTIONARY 1281 (5th ed. 1979).

When a statement is admitted substantively, the jury may consider it in determining guilt or innocence. However, admissibility must be distinguished from sufficiency. That a statement is substantively admissible does not guarantee that it will be sufficient to satisfy the proponent's burden of proof. Stalmack, *Prior Inconsistent Statements: Congress Takes a Compromising Step Backwards in Enacting Rule 801(d)(1)(A)*, 8 LOY U. CHI. L. J. 251, 267-69 (1977). If the statement satisfies a crucial element of the state's case, its substantive admissibility will allow the state to avoid a directed verdict of acquittal, but the state's proof may not be sufficient to sustain a verdict of guilty. Peeples, *Prior Inconsistent Statements and the Rule Against Impeachment of One's Own Witness: The Proposed Federal Rules*, 52 TEX L. REV. 1383, 1389 n.27 (1974).

3. The phrase "turncoat witness" appears to have been coined by Professor McCormick in his seminal article on the subject. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573 (1947). There are many reasons why a witness might turn coat. The witness may have been bribed, coerced, persuaded, may be lying for reasons unknown, or may have merely concluded that his prior statement was misguided. *Id.* at 575.

4. There are currently 17 states that still follow the so-called orthodox rule: Alabama, Connecticut, Idaho, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia. See 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(1)(A) [09] (1984) and Annot., 30 A.L.R. 4th 414 (1983) for their compilations of the various states' positions.

5. Generally, impeachment is a process whereby a party seeks to discredit a witness in the eyes of the trier of fact. "Impeachment by prior inconsistent statement seeks to prove that the witness either spoke in error or deliberately falsified one of

theory, termed the "orthodox view,"[6] is quickly becoming disfavored. A growing number of states, following the prompting of the Federal Rules of Evidence, have adopted provisions allowing some degree of substantive use of prior inconsistent statements.[7] On July 1, 1984, Illinois became the latest state to join this growing trend.[8]

Ever since the Federal Rules of Evidence were proposed, a constant debate has been waged over the propriety of using prior inconsistent statements substantively.[9] This debate has spawned many

---

the two statements." Graham, *Prior Inconsistent Statements—Impeachment and Substantive Admissibility: An Analysis of the Effect of Adopting the Proposed Illinois Rules of Evidence*, 1978 U. ILL. L.F. 329, 330.

6. The term "orthodox rule," seems to have been fashioned by Dean Wigmore in the first edition of his treatise. The term refers to the common law doctrine relating to prior inconsistent statements which dates back to the origin of our Union. 3A J. WIGMORE, *supra* note 1, at 996 (cases cited therein date back to the early 1800's).

7. The number of states that have either judicially or legislatively adopted rules allowing prior inconsistent statements to be used as substantive evidence has increased dramatically in recent years. Today, 33 states allow some form of substantive use. Federal Rule of Evidence 801(d)(1)(A) has been followed in 12 states. The Federal Rules of Evidence are codified at 28 U.S.C. (1982) (adopted 1975). *See* FLA. STAT. ANN. § 90.801(2)(a) (West 1979); 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(4)(a)(i) (1979); OKLA. STAT. ANN. tit. 12, § 2801(4)(a)(1) (West 1980); ORE. R. EVID. 801(4)(a)(A); S.D. R. EVID. § 19-16-2(1); TEX. R. EVID. 801(e)(1)(A); VT. R. EVID. 801(d)(1)(A); WASH. R. EVID. 801(d)(1)(i); WYO. R. EVID. 801(d)(1)(A) (limited to criminal proceedings only). *See also infra* note 15 for the text of rule 801(d)(1)(A).

In 12 states, the rule provides for substantive admissibility of a prior inconsistent statement if the witness is in court and subject to cross-examination, without regard to whether the prior statement was made under oath. *See* Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982); Watkins v. State, 446 N.E.2d 949 (Ind. 1983); State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 460 U.S. 1103 (1983); ALASKA R. EVID. 801(d)(1)(A); ARIZ. R. EVID. 801(d)(1)(A); CAL. EVID. CODE. § 1235 (West 1966); COLO. R. EVID. 801(d)(1)(A); DEL. UNIF. R. EVID. 801(d)(1); MONT. R. EVID. 801(d)(1)(A); NEV. REV. STAT. § 51.035(2)(a) (1979); N.M. R. EVID. 801(d)(1)(A); WIS. STAT. ANN. § 908.01(4)(a)(1) (West 1975).

Finally, nine states, including Illinois, have adopted compromise positions that allow prior inconsistent statements to be admitted as substantive evidence in certain circumstances. These positions are either more or less stringent than rule 801(d)(1)(A), but they do not allow *all* prior inconsistent statements to be admitted. *See* State v. Garnes, 229 Kan. 368, 624 P.2d 448 (1981); Nugent v. Commonwealth, 639 S.W.2d 761 (Ky. 1982); ARK. STAT. ANN. § 28-1001 (1979); HAWAII R. EVID. 802.1(1); N.J. R. EVID. 63(1)(a); N.D. R. EVID. 801(d)(1)(A); OHIO R. EVID. 801(D)(1)(a); UTAH R. EVID. 801(d)(1)(A).

The variety of provisions that have been adopted run the gamut as to the limitations placed upon admissibility. *Compare* OHIO R. EVID. 801(D)(1)(a) (very limited admissibility) *with* ARK. STAT. ANN. § 28-1001 (1979) (parallels federal rule in criminal cases, and admits all prior inconsistent statements in civil cases) *and* N.D. R. EVID. 801(d)(1)(A) (same) *and* UTAH R. EVID. 801(d)(1)(A) (very broad provision).

8. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984). For the complete text of the new rule, see *infra* text accompanying note 79. *Cf.* HAWAII R. EVID. 802.1(1) (state rule most similar to the Illinois rule).

9. The debate over the use of prior inconsistent statements actually predates the proposal for Federal Rules of Evidence. *See* McCormick, *supra* note 3, at 577. *Compare* State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939) (supporting orthodox rule) *with* United States v. Rainwater, 283 F.2d 386 (8th Cir. 1959) (criticizes orthodox rule). When the Federal Rules of Evidence were proposed, however, the debate

conflicting theories.[10] At one extreme are those who advocate substantive admission of all prior inconsistent statements,[11] provided the witness is present at trial[12] and subject to cross-examination.[13] At the other extreme are those commentators who are still content with the orthodox rule.[14] Compromise positions have been taken between the two extremes, two examples of which are Federal Rule of Evidence 801(d)(1)(A)[15] and the newly enacted Illinois rule.[16]

The new Illinois rule differs substantially from any existing statutory approach. The rule attempts to alleviate the constraints of the orthodox rule by allowing the substantive admission of certain

---

was intensified.

10. *See generally* Graham, *supra* note 5 (an objective analysis of a rule similar to the federal rule); Graham, *The Relationship Among Federal Rules of Evidence 607, 801(d)(1)(A), and 403: A Reply to Weinstein's Evidence*, 55 TEX. L. REV. 573 (1977) (criticizes use of Federal Rule 403 as a curb on rule 801(d)(1)(A)); Jeans, *Evidentiary Effects and Tactical Options in the Use of Out of Court Statements*, 47 UMKC L. REV. 145 (1978) (practical proposals for using prior inconsistent statements at trial); Peeples, *supra* note 2 (supports proposed federal rules and suggests amendment to rule 607); Silbert, *Federal Rule of Evidence 801(d)(1)(A)*, 49 TEMP. L. Q. 880 (1976) (analysis of proposed rules); Comment, *Symposium on the Federal Rules of Evidence: Their Effect on Wyoming Practice if Adopted*, 12 LAND & WATER L. REV. 601 (1977) (overview of the federal rule).

11. *See* 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); Stalmack, *supra* note 2, at 251. *See also* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 293 (1972) (rule originally proposed by the Advisory Committee sought to admit all prior inconsistent statements if witness is subject to cross-examination).

12. Under even the most lenient rules for substantive admissibility of prior inconsistent statements, the witness must testify at the trial in which the statement is sought to be admitted. 3A J. WIGMORE, *supra* note 1, at 996.

13. Aside from testifying at the present trial, the witness must be "subject to" cross-examination concerning the statement. *Id. See also infra* notes 95-104 and accompanying text.

14. *See* Blakey, *Moving Towards an Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina*, 13 N.C. CENT. L.J. 1 (1981); Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine*, 26 HASTINGS L.J. 361 (1974); Comment, *Hearsay, Witnesses' Prior Statements, and Criminal Justice in Illinois*, 1974 U. ILL. L.F. 675.

15. Rule 801(d)(1)(A) provides:

> (d) Statements which are not hearsay—A statement is not hearsay if—
>
> (1) Prior Statement by Witness—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statements 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).

Some commentators have lent support to the federal rule. *See, e.g.*, Gamble, Howard & McElroy, *The Turncoat or Chameleonic Witness: Use of His Prior Inconsistent Statement*, 34 ALA. L. REV. 1 (1983) (urges Alabama legislature to adopt federal rules); Perroni, *Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence*, 1 U. ARK. LITTLE ROCK L. J. 277 (1978) (advocates that Arkansas rule should be interpreted like federal rule).

16. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984).

types of prior inconsistent statements.[17] However, the efficacy of any rule governing the substantive use of prior inconsistent statements must be viewed against the goal of allowing the trier of fact to hear as much relevant evidence as possible. This comment will present the new Illinois rule, and analyze the rule's probable effect in light of this goal.[18] It will begin with a brief history of the treatment of prior inconsistent statements, focusing on the rationale underlying both the orthodox rule and the rules allowing substantive use.[19] Previous Illinois law involving prior inconsistent statements will then be outlined briefly.[20] The comment will then examine the probable effect of the new rule and will conclude that although the Illinois rule is a progressive step forward, there is no compelling reason why the legislature should not go farther and admit all prior inconsistent statements as substantive evidence,[21] provided the witness will be subject to effective cross-examination.

THE CONTINUING DEBATE: AN OVERVIEW

The orthodox rule, which limits the use of prior inconsistent statements to impeachment purposes only, evolved because of the perceived hearsay quality of these statements.[22] Hearsay is defined as an out of court statement used to prove the truth of the matter asserted.[23] The hearsay rule excludes out of court statements because the jury cannot determine the credibility of the out of court declarant at the time the assertion was made.[24] Because the definition of a prior inconsistent statement necessarily includes an out of court statement, the orthodox rule forbids its use substantively.[25]

Generally, an out of court statement, as opposed to present tes-

---

17. *Id.* The Illinois rule is more expansive than the federal rule, but does not allow for the admission of all prior inconsistent statements. Compare the Illinois rule with the authorities cited *supra* note 7.

18. *See infra* notes 77-136 and accompanying text.

19. *See infra* notes 22-59 and accompanying text.

20. *See infra* notes 60-76 and accompanying text.

21. *See infra* notes 137-69 and accompanying text.

22. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 251 (E. Cleary 3d ed. 1984). *See also* State of Mississippi v. Durham, 444 F.2d 152, 156 (4th Cir. 1971) (hearsay rule would be violated by substantive admission). The orthodox rule, therefore, must be viewed in conjunction with the common law development of the hearsay rule in the United States since the late 17th century. *Id.*

23. The term "out of court statement" refers to any assertion that was made outside of the current judicial proceeding. Bein, *Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)*, 26 UCLA L. REV. 967, 984 (1979).

24. *Id. See also* People v. Carpenter, 28 Ill. 2d 116, 212, 190 N.E.2d 738, 741 (1963) ("Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.").

25. M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.11 (1981).

timony,[26] suffers from three basic hearsay pitfalls. First, the out of court statement is generally not made under oath.[27] Second, the trier of fact was not able to observe the demeanor of the witness when he made the statement.[28] Third, contemporaneous cross-examination of the witness was lacking when the statement was made.[29] Each of these pitfalls adversely affects the jury's ability to determine the reliability and veracity of the witness. Supporters of the orthodox rule claim that because prior inconsistent statements were necessarily made outside of the current proceedings, they suffer from all three pitfalls.[30] The most emphasis, however, is placed on the lack of contemporaneous cross-examination.[31] Advocates of the orthodox rule argue that effective cross-examination can only occur at the time the statement was made, so that "[i]ts strokes fall while the iron is hot."[32] Moreover, orthodox rule advocates argue that when the witness has recanted prior to trial, subsequent cross-examination is not an adequate substitute and has, in effect, lost all of its efficacy.[33]

The first great judicial blow to the orthodox rule came from Judge Learned Hand in *DiCarlo v. United States*.[34] In *DiCarlo*, a woman testified in front of the grand jury that the defendants had committed a crime.[35] During direct examination at trial, however, she recanted. The prosecution was then given wide latitude to cross-examine her, thereby eliciting many inconsistent statements.[36] Judge Hand's opinion attacked the rationale of the orthodox rule

---

26. If the witness admits the truth of the extra-judicial statement while on the stand in the present trial, the statement is no longer hearsay, but is present testimony and is admissible as direct evidence. 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, 1592 n.75 (1977).

27. Reutlinger, *supra* note 14, at 362.

28. *Id.*

29. *Id.*

30. *Id.*; Stalmack, *supra* note 3, at 255.

31. Graham, *supra* note 26, at 1569. Professor Graham has summarized the position of orthodox supporters by posing the following question: "What is the value of cross-examination that is not conducted contemporaneously with the making of the statement whose truth is in question before the same trier of fact that must determine whether the statement is truthful?" *Id.*

32. State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

33. For example, supporters of the orthodox rule claim that lack of contemporaneous cross-examination allows a witness "time to crystallize and rationalize a false story." Reutlinger, *supra* note 14, at 370. The emphasis placed upon contemporaneous cross-examination seems to rest upon the assumption that to be effective, cross-examination must take place in an adversarial atmosphere. Therefore, unless there is an opportunity to break the witness down, cross-examination really has not occurred. *Id.* at 371. *See also* Graham, *supra* note 26, at 1570.

34. 6 F.2d 364 (2d Cir. 1925).

35. *Id.* at 367.

36. *Id.* at 368.

stating that "[t]here is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court."[37] Judge Hand noted that the jury might accept the prior statements for their truth but he found no difficulty with that result.[38] Since then, courts[39] and scholars[40] have attacked the orthodox rule as an undue limitation to the truth seeking process.[41] Moreover, these commentators allege that all probative evidence should be placed before the trier of fact in order to ascertain the truth.[42]

Advocates of the substantive use of prior inconsistent statements during trial, or what is termed the "modern view," reject the claim that prior inconsistent statements suffer from the three hearsay pitfalls.[43] First, the requirement of "oath" is considered to be of little value in ensuring reliability.[44] Second, because the trier of fact can currently observe the demeanor of the witness, nothing is lost simply because the trier of fact was not present when the statement was made.[45] Finally, contemporaneous cross-examination is not necessary because cross-examination at the trial in which the witness is testifying is both efficient and sufficient.[46]

Supporters of the modern view also advance two other reasons for the admissibility of prior inconsistent statements. First, the prior statement is more reliable than the present in-court testimony because it was made closer in time to the event in question.[47] Second, when a prior inconsistent statement is currently used to impeach a

---

37. *Id.*

38. *Id.*

39. *See, e.g.*, United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964) (Judge Friendly allowed substantive use prior to adoption of the federal rules); United States v. Rainwater, 283 F.2d 386 (8th Cir. 1959) (criticizes the orthodox rule); State v. Skinner, 110 Ariz. 135, 515 P.2d 880 (1973) (judicially abolished orthodox rule); State v. Igoe, 206 N.W.2d 291 (N.D. 1973) (same).

40. *See* 3A J. WIGMORE, *supra* note 1, at 996; McCormick, *supra* note 3, at 575-78. *See also supra* notes 10 & 11.

41. Stalmack, *supra* note 2, at 252.

42. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(1)[01] (1984).

43. 3A J. WIGMORE, *supra* note 1, at 996. Because the witness is present and subject to cross-examination, "[t]he whole purpose of the hearsay rule has been already satisfied." *See also supra* note 10.

44. Graham, *supra* note 26, at 1568. Even supporters of the orthodox rule discount the necessity of requiring the statement to have been made under oath. Reutlinger, *supra* note 14, at 363-64.

45. Stalmack, *supra* note 2, at 259; Comment, *Symposium on the Federal Rules of Evidence: Their Effect on Wyoming Practice if Adopted*, 12 LAND & WATER L. REV. 601, 650 (1977). "If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court." DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925).

46. 3A J. WIGMORE, *supra* note 1, at 996-97; McCormick, *supra* note 3, at 576. *See also infra* notes 95-104 and accompanying text.

47. McCormick, *supra* note 3, at 577 ("memory hinges upon recency"). The closer that the statement was made to the event in question, the less chance there is for the witness to falsify his story. Reutlinger, *supra* note 14, at 368.

witness, the jury is instructed to consider the statement only as it relates to the witness' credibility, and not as proof of guilt or innocence.[48] This type of instruction, however, is almost impossible for a jury to follow.[49] The jury will most likely ignore the instruction and impart substantive value to the impeaching statement.[50] Modern view supporters, therefore, also argue that prior inconsistent statements should be admitted as substantive evidence to avoid confounding the jury.

In fashioning a rule governing prior inconsistent statements, a legislative body must consider a number of factors, including the reliability[51] of prior inconsistent statements, the efficacy of subsequent cross-examination,[52] and the desirability of placing as much evidence as possible before the trier of fact.[53] Both Congress and various state legislatures have placed different values on each of these factors. Three basic positions have been advanced. The first position is the orthodox rule, which many states still follow.[54] Another position, which could be called the "extreme modern view," encompasses the admissibility of all prior inconsistent statements when the witness is subject to cross-examination.[55] The third position, that of Federal Rule 801(d)(1)(A),[56] represents a compromise be-

---

48. For example, the Illinois instruction is:

3.11 Impeachment—Prior Inconsistent Statements

The believability of a witness may be challenged by evidence that on some former occasion he [(made a statement) (acted in a manner)] that was not consistent with his testimony in this case. Evidence of this kind may be considered by you only for the purpose of deciding the weight to be given the testimony you heard from the witness in the courtroom.

ILLINOIS SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS (CRIMINAL) 3.11 (1981).

49. Asaro v. Parisi, 297 F.2d 859, 864 (5th Cir.) (this type of instruction renders orthodox rule unrealistic), *cert. denied*, 370 U.S. 904 (1962); People v. Paradise, 30 Ill. 2d 381, 384, 196 N.E.2d 689, 691 (1964)(it is likely that jury will impart substantive weight to the statement notwithstanding the instruction); McCormick, *supra* note 3, at 580.

50. Stalmack, *supra* note 2, at 266. *Contra* Peeples, *supra* note 2, at 1395-96 (conceding that the instruction is confusing, but that is no reason to abandon the orthodox rule).

51. Prior statements, if considered hearsay, contain an inherent unreliability which the hearsay rule seeks to prevent. The rule maker must determine how reliable or unreliable prior inconsistent statements are as a class. Moreover, he should consider whether any of the arguments that orthodox rule supporters put forth have any merit, namely, whether substantive use will lead to "unsavory practices in dealing with witnesses," or whether the lack of contemporaneous cross-examination will lead to unjust results. Bein, *supra* note 23, at 972-73.

52. *Id.*

53. The rule maker should also determine how important it is to present as much evidence as is practicable to the trier of fact, and then determine what limitations, if any, should be placed upon the means chosen to achieve those ends. 4 J. WEINSTEIN & M. BERGER, *supra* note 42, at 801-124.

54. *See supra* notes 4-6 and accompanying text.

55. *See supra* note 11.

56. FED. R. EVID. 801(d)(1)(A). The final, adopted version of this rule was the

tween the two extremes. The federal rule allows substantive admissibility of prior inconsistent statements in limited situations. The limitations are intended to ensure greater reliability and ensure that the statement was actually made.[57]

The new Illinois rule[58] also attempts to balance the rationales underlying the two extreme positions. The Illinois rule attempts to ensure reliability and the making of the statement, while expanding admissibility beyond the situations contemplated in the federal rule.[59] Although the new rule does not allow for substantive use of all prior inconsistent statements, it does represent a much needed expansion over previous Illinois law.

PREVIOUS ILLINOIS LAW

Illinois had always been a consistent and rigid adherent to the orthodox rule.[60] Prior inconsistent statements, therefore, had been limited to impeachment use only.[61] Illinois courts, however, went one step further and developed a judicial rule which even limited the use of prior inconsistent statements for impeachment purposes.[62] This judicial limitation was termed the voucher rule.[63] This

---

result of a compromise between the House and Senate versions initially proposed. *See* Stalmack, *supra* note 2, at 253-55 (criticizing the compromise position adopted).

57. *See* Stalmack, *supra* note 2, at 253-55. The House added the requirement that the prior statement was made at a formal proceeding so that there would be no doubt that the statement was actually made. The formal setting of a judicial proceeding was also thought to increase the reliability of the statement. *Id.*

58. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984). The Illinois rule represents a compromise between Federal Rule 801(d)(1)(A) and the rules allowing substantive admissibility of all prior inconsistent statements.

59. *Id.*

60. *See, e.g.*, People v. Marino, 44 Ill. 2d 562, 256 N.E.2d 770 (1970); Ritter v. People, 130 Ill. 225, 22 N.E. 605 (1889); Moore v. People, 108 Ill. 484 (1884); Hapke v. Brandon, 343 Ill. App. 524, 99 N.E.2d 636 (1951).

61. "Under the Illinois decisions a prior inconsistent statement is hearsay and hence is not admitted as substantive evidence but rather is admitted solely for its impeaching effect upon the credibility of the witness." M. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE § 801.9 (4th ed. 1984).

62. Use of a prior statement for impeachment purposes must first be predicated upon a finding of inconsistency. *Id.* § 613.2. Moreover, the statement cannot relate to a collateral matter. The witness must first be given a chance to explain or reconcile his prior statement with his present testimony. This must be accomplished by laying a foundation, which involves presenting the witness with his prior statement and the circumstances in which it occurred. Further, if the witness denies the prior statement, the proponent must follow through with proof of the prior statement by extrinsic evidence. 2 S. GARD, ILLINOIS EVIDENCE MANUAL § 23:03 (2d ed. 1979).

63. The voucher rule's premise is that a party is bound by his witness' testimony because when a party calls a witness to the stand he vouches for his credibility. Graham, *supra* note 5, at 352. Moreover, the rule was meant to prevent a party from "proving the witness' prior statement in situations where it appears that its only value to the proponent will be as substantive evidence of the facts asserted." C. MCCORMICK, *supra* note 22, § 38, at 83-84.

rule prohibited a party from impeaching his own witness,[64] but was subject to exception.[65] One such exception was Supreme Court Rule 238. This rule allowed a party to impeach his own witness only when the party calling the witness was surprised by his testimony.[66] The requirement of surprise was intended to disallow impeachment which carried a high probability of being used improperly as substantive evidence.[67] Recently, however, Supreme Court Rule 238 was amended to abolish the requirement of surprise.[68] This amendment brought Rule 238 in line with Federal Rule 607[69] which allows any witness to be impeached by any party.[70] Many commentators have urged that this amendment could only be consistent with a rule which allows admission of *all* prior inconsistent statements.[71]

Notwithstanding the limitations placed upon the use of prior inconsistent statements, the Illinois Supreme Court had a clear opportunity to judicially abolish the orthodox rule in *People v. Collins*.[72] In *Collins*, the state's key witness testified in favor of the defendants. The prosecution then introduced a signed prior

64. C. McCORMICK, *supra* note 22, § 38, at 83-84.

65. The court's witness rule is a way around a voucher rule because instead of having to impeach your own witness, the court will call the witness, thereby allowing both parties an opportunity to impeach. Graham, *supra* note 5, at 360. Another limitation on impeachment in Illinois was the nullification rule. The nullification rule prohibited a party from impeaching any witness if the impeaching statements related directly to the crime charged. *Id.* at 358. Over time, however, the nullification rule lost its impact. *See* People v. Taglia, 113 Ill. App. 3d 260, 446 N.E.2d 1276 (1983); People v. Triplett, 87 Ill. App. 3d 763, 409 N.E.2d 401 (1980).

66. Supreme Court Rule 238 was enacted in 1967 to codify the common law doctrine dealing with surprise testimony from one's own witness. ILL. REV. STAT. ch. 110A, § 238 (1967). Supreme Court Rule 238 provided that the voucher rule would be inapplicable when the court found that the witness' testimony surprised the party calling him. *Id.* Moreover, the courts required the surprised party to show that he suffered affirmative damage besides surprise. Graham, *supra* note 5, at 355. Supreme Court Rule 238, however, was limited to civil cases only. *Id.* at 354 n.131.

67. ILL. SUP. CT. R. 238.

68. ILL. REV. STAT. ch. 110A, § 238 (1983) (as amended April, 1982). The amended rule provides:

> (a) The credibility of a witness may be attacked by any party, including the party calling him.
>
> (b) If the court determines that a witness is hostile or unwilling, he may be examined by the party calling him as if under cross-examination.

Id.

Section (a) of this rule abolishes the voucher rule so that a party may now impeach his own witness. Section (b) is continued from the old rule, and allows a party to question his own witness by leading questions if the court determines that the witness is hostile.

In conjunction with the 1982 amendment to rule 238, Illinois Supreme Court Rule 433 was enacted making Rule 238 applicable to criminal as well as civil cases. ILL. SUP. CT. R. 433. For a current application of rule 238 in a criminal case, see People v. Gonzalez, 120 Ill. App. 3d 1029, 458 N.E.2d 1047 (1983).

69. FED. R. EVID. 607.

70. *Id.*

71. *See infra* notes 152-55 and accompanying text.

72. 49 Ill. 2d 179, 274 N.E.2d 77 (1971).

inconsistent statement of the witness which inculpated the defendants.[73] The supreme court found that the statement was erroneously admitted as substantive evidence,[74] and expressly rejected the modern view.[75] Moreover, the Illinois Supreme Court has consistently reaffirmed the *Collins* holding.[76] Because of this lack of judicial initiative the legislature drafted and passed a new rule allowing the substantive admission of some prior inconsistent statements.

THE NEW ILLINOIS RULE

The Illinois legislature, in an attempt to aid in the truth-seeking process,[77] has abandoned the antiquated orthodox rule in favor of substantive admissibility of prior inconsistent statements in certain circumstances.[78] Chapter 38, section 115-10.1, the new legislative rule, provides:

> In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement—
>
> (1) was made under oath at a trial, hearing, or other proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> (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

---

73. *Id.* at 181, 274 N.E.2d at 80.

74. *Id.* at 194-95, 274 N.E.2d at 85-86.

75. *Id.* at 197, 274 N.E.2d at 86. The Illinois Supreme Court in *Collins* reversed a lower court for admitting into evidence a witness' prior statement to a police officer without a corresponding limiting instruction which the defendant requested. *Id.* The court acknowledged that the orthodox rule has problems, but concluded that substantive admission of prior inconsistent statements would involve greater practical problems. *Id.* at 198, 274 N.E.2d at 87.

76. *See* People v. Smith, 102 Ill. 2d 365, 466 N.E.2d 236 (1984); People v. Pastarino, 91 Ill. 2d 178, 435 N.E.2d 1144 (1982); People v. Bailey, 60 Ill. 2d 37, 322 N.E.2d 804 (1975); People v. Powell, 53 Ill. 2d 465, 292 N.E.2d 409 (1973).

77. 83rd General Assembly, SB 619 (transcript of floor debate May 25, 1983) at 87 (statement of Senator Kustra) ("By enacting this bill, Illinois would move to the forefront of those jurisdictions which are trying to change the rules of evidence to strengthen the truth-seeking process.").

78. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984). See also *supra* note 55 and accompanying text for a discussion of the policy considerations involved in fashioning such a legislative rule.

> 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.
>
> Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.[79]

This rule represents a compromise between the orthodox and modern positions.[80] The rule attempts to appease critics of both positions. It satisfies modern view supporters by expanding substantive admissibility beyond the scope of federal rule 801(d)(1)(A). At the same time, orthodox rule supporters are mollified because the rule adds requirements which ensure that the statement was made while also ensuring the reliability of the statement.[81] Because the new rule will have a substantial impact upon the practice of criminal law in Illinois, a detailed analysis of the rule's provisions is in order.

The Prerequisites

The first part of the Illinois rule parallels rule 801(d)(1)(A), except for two slight distinctions. First, the Illinois Rule is limited to criminal cases, whereas the federal rule applies to both civil and criminal cases.[82] Second, substantive admissibility of prior inconsistent statements is defined as a hearsay exception under the Illinois rule,[83] whereas it is defined as non-hearsay under the federal rule.[84] A statement's non-hearsay status in rule 801(d)(1)(A) is premised

---

79. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984).

80. The Illinois rule is an adaptation of a rule proposed by Professor Michael Graham. Graham, *supra* note 26, at 1592 n.75. Moreover, Professor Graham's article was specifically incorporated into the legislative history of the new Illinois rule. 83rd General Assembly, House of Representatives, (transcript of floor debate Nov. 1, 1983) at E03 (statement of Rep. Cullerton).

81. The Illinois rule contains essentially the same provisions as Federal Rule 801(d)(1)(A), but adds new provisions which are intended to allow the substantive admission of additional types of prior inconsistent statements. These provisions limit those additional types of statements to those which are reliable, and almost certainly made. Hence, the rule is not all-encompassing. It limits substantive admissibility in response to legislative concern over the inherent unreliability of prior inconsistent statements. Graham, *supra* note 26, at 1575-81.

82. FED. R. EVID. 801(d)(1)(A); ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984). The Illinois rule seems to be aimed solely at alleviating the turncoat witness problem in criminal cases. However, the rationale supporting substantive admissibility of prior inconsistent statements applies equally to civil cases. In fact, of the supporters of substantive admissibility, the only ones that distinguish between civil and criminal cases would relax the standards in the civil area because there is no need to safeguard an accused's rights. Graham, *supra* note 26, at 1581 n.45, 1589 n.68.

83. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984).

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

upon the notion that when the witness is currently testifying in court under oath and subject to cross-examination,[85] the underlying rationale of the hearsay rule is satisfied. The Illinois rule, however, creates only an exception to the hearsay rule, thereby implicitly recognizing that prior inconsistent statements do involve some hearsay problems.[86] Aside from these two distinctions, the Illinois rule parallels the federal rule's prerequisites that the witness' prior statement must be "inconsistent"[87] with his present testimony, and that the witness must be "subject to" cross-examination[88] concerning the statement.

As to the requirement of "inconsistency,"[89] Illinois courts will most likely define the term in the same manner it has been defined with regard to impeachment.[90] That definition does not require a direct contradiction, but only a tendency to contradict the witness' present testimony.[91] The question that arises, however, is whether a claim of memory loss is inconsistent with the witness' prior assertion.[92] This situation can arise if the witness cannot recall the statement itself, or cannot recall having made the statement. Determina-

---

85. 3A J. WIGMORE, *supra* note 1, at 996.

86. C. MCCORMICK, *supra* note 22, at 728. Some hearsay may be unreliable. However, hearsay evidence has a wide range of reliability depending upon "the frailties of perception, memory, narration, and veracity of men and women." *Id. Cf.* Bein, *supra* note 23, at 986-89 (classification as a hearsay exception or non-hearsay depends upon the opportunity to cross-examine).

87. *See infra* notes 89-94 and accompanying text.

88. See *infra* notes 95-104 and accompanying text.

89. As to the determination of inconsistency, Wigmore has stated that it "is to be determined, not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent?" 3A J. WIGMORE, *supra* note 1, at 1048 (emphasis in original).

90. No distinction between inconsistency for impeachment and substantive use has been developed in the case law. Jeans, *supra* note 10, at 159.

91. 2 S. GARD, ILLINOIS EVIDENCE MANUAL § 23:07 (2d ed. 1979). *See also* People v. Davis, 106 Ill. App. 3d 260, 263-64, 435 N.E.2d 838, 841-42 (2d Dist. 1982) (inconsistency is found if prior statement reasonably discredits the present testimony). Illinois courts have also recognized that an omission, silence, or opinion testimony could result in an inconsistency. M. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE § 613.2 (4th ed. 1984).

92. Professor Wigmore believes that "where the witness *now* claims to be *unable to recollect* a matter, a former affirmation of it should be admitted as a contradiction." 3A J. WIGMORE, *supra* note 1, at 1059 (emphasis in original). This view is premised on the belief that the witness is lying about his loss of memory, hence a false assertion about forgetfulness is inconsistent with a prior statement. *Id.* at 1061.

Some authorities dispute the basic premise that "inconsistency" should even be considered with respect to substantive admissibility. These scholars believe that the requirement of inconsistency is only a valid consideration for impeachment purposes, not for substantive admissibility. This view is premised on the idea that the inconsistency requirement prevents the use of "those prior statements that are particularly likely to be erroneously considered by the jury for their substantive worth despite limiting instructions." Bein, *supra* note 23, at 1016-17. *See also* Jeans, *supra* note 10, at 160.

tion of this issue under the Illinois rule should be left to the discretion of the trial judge,[93] thereby following the apparent federal interpretation.[94]

The final prerequisite is that the witness be subject to cross-examination. Cross-examination has been termed "the greatest legal engine ever invented for the discovery of truth."[95] That phrase underscores the importance of a cross-examination requirement in any rule governing substantive admissibility of prior inconsistent statements.[96] The phrase "subject to" cross-examination, however, is ambiguous.[97] It could be interpreted to mean that the witness need only be in court. That conclusion, however, would seem incongruous if the witness denies making the statement or alleges that he cannot recall the content of the statement[98] because under those circumstances any ensuing cross-examination would be worthless.[99]

Scholars are split as to whether a prior statement should be admissible when the witness is forgetful.[100] As to the Illinois rule, however, the legislative history seems to settle the point. Both Representative McCracken and Governor Thompson stated that even when "the witness . . . claim[s] that he or she does not recall it, the prior statement would be admissible substantively for the fact find-

---

93. There seems to be general agreement that the trial judge should have broad discretion to determine the inconsistency question. *See* United States v. Thompson, 708 F.2d 1294, 1302 (8th Cir. 1983); United States v. Dennis, 625 F.2d 782, 795-96 (8th Cir. 1980); 3A J. WIGMORE, *supra* note 1, at 1061; Perroni, *Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence*, 1 U. ARK. LITTLE ROCK L.J. 277, 289 (1978).

94. *Compare* United States v. Thompson, 708 F.2d 1294, 1302 (8th Cir. 1983) (witness' insistence that he could not recall is inconsistent with earlier statement) *and* United States v. Distler, 671 F.2d 954, 958 (6th Cir. 1981) ("partial or vague recollection is inconsistent with total or definite recollection") *with* United States v. Palumbo, 639 F.2d 123, 128 n.6 (3d Cir. 1981)(lack of recollection not necessarily inconsistent with prior statement).

95. 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (Chadbourn rev. 1974).

96. 3A J. WIGMORE, *supra* note 1, at 969. *See also* Stalmack, *supra* note 2, at 259-64 (stressing the importance of cross-examination).

97. Stalmack, *supra* note 2, at 262-63.

98. Peeples, *supra* note 2, at 1391. See *infra* note 103 for a definition of a forgetful witness.

99. *Id. See also* Reutlinger, *supra* note 14, at 374. If the witness denies having made the statement, the cross-examiner cannot even get the witness to admit any error. *Id.* at 372.

100. Most commentators distinguish between honest memory loss and feigned memory loss. Whenever memory loss is feigned, effective cross-examination can occur and the statement should be admitted as evidence. C. MCCORMICK, *supra* note 22, at 748; Peeples, *supra* note 2, at 1392-93. However, at least one author claims that this distinction is groundless, and that the better view would be to look at the circumstances surrounding the witness' testimony and determine whether effective cross-examination could occur without regard to whether the memory loss was honest or feigned. Bein, *supra* note 23, at 1020-23.

ers [sic] consideration."[101] It would be unfortunate if the Illinois courts follow this broad interpretation of when a witness is available, especially if the witness is not feigning memory loss,[102] because a truly forgetful witness cannot be subject to effective cross-examination.[103] The better treatment would be to give the trial judge broad discretion in determining whether meaningful cross-examination can take place.[104]

Once the proponent of the prior statement has satisfied the prerequisites of "inconsistency" and "cross-examination," he has two alternative methods from which to choose in order to satisfy the requirements of the rule.[105] He may choose either section c(1)[106] or section c(2).[107]

Alternative c(1)—Made in a Judicial Setting

Section c(1) allows a prior inconsistent statement to be admitted as probative evidence if it "was made under oath at a trial, hearing, or other proceeding."[108] This section is substantially similar to rule 801(d)(1)(A), except that the federal rule also allows the admission of a prior inconsistent statement which was made in a deposition.[109] The Illinois provision does not include a reference to a deposition because it is limited to criminal cases where discovery

---

101. 83rd General Assembly, House of Representatives, (transcript of floor debate Nov. 1, 1983) at B03 (statement of Rep. McCracken). *Accord* Governor's Amendatory Veto Message of SB 619, 1983 Ill. Laws 6475.

102. *See supra* note 92. A witness could be feigning memory loss for any number of reasons. He may have been coerced, persuaded, or may have merely decided that he does not want to hurt the defendant. If the witness has honestly forgotten, however, then any cross-examination to occur would be ineffective since the witness could not even attempt to explain the prior statement.

103. As used here, a truly forgetful witness is one who denies having made the statement and claims lack of memory regarding the underlying act. In this situation, the witness would not be "subject to" cross-examination. 4 J. WEINSTEIN & M. BERGER, *supra* note 42, at 801-131 to 801-132. Moreover, this situation would be of questionable constitutional validity. California v. Green, 399 U.S. 149, 168-69 (1970) (this specific issue left open by the Court). For a discussion of the sixth amendment problems in conjunction with prior inconsistent statements, see Graham, *The Confrontation Clause, The Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978).

If the witness acknowledges having made the statement but claims loss of memory as to the underlying fact, then effective cross-examination can probably occur. 4 J. WEINSTEIN & M. BERGER, *supra* note 42, at 801-120.

104. The trial judge will be in the best position to observe the witness and determine whether subsequent cross-examination would be fruitful. *See* 5 J. WIGMORE, *supra* note 95, at 57.

105. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984).

106. *See infra* notes 108-15 and accompanying text.

107. *See infra* notes 116-35 and accompanying text.

108. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984).

109. FED. R. EVID. 801(d)(1)(A). *See also supra* note 15 (text of federal rule).

depositions are not used.[110]

It is clear under section c(1) that if the prior inconsistent statement was made at a previous trial or hearing, it will be admitted. The question that arises, however, is in regard to the parameters of the term "other proceeding." The Illinois courts will most likely interpret that phrase as it has been used in the federal courts. The federal interpretation of "other proceeding" includes grand jury proceedings,[111] preliminary hearings,[112] and immigration interrogations.[113] Many scholars, however, have urged that the term "other proceeding" should include administrative proceedings, coroner's inquests, and any proceeding that is substantially similar to those already listed.[114] Illinois courts should adopt this broad interpretation of "other proceeding" to ensure an expansive reading of the statute so that the truth can be ascertained. However, even if the prior statement was not made at a previous trial, hearing or other proceeding, it may still be admissible under section c(2) of the Illinois rule.[115]

Alternative c(2)—Personal Knowledge

Section c(2) was enacted for reasons that are twofold. First, in response to criticism that Federal Rule 801(d)(1)(A) is too restrictive, section c(2) attempts to broaden the types of inconsistent statements that are admissible.[116] Second, to appease advocates of

---

110. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984); ILL. SUP. CT. R. 212. Illinois does provide for the use of evidence depositions which can be used in criminal cases. Use of an evidence deposition is predicated on court approval, and admissibility of the deposition depends upon the unavailability of the deponent. If the deponent is available and his present testimony is inconsistent with his deposition, the prior statement can be used to impeach his credibility. ILL. SUP. CT. R. 212 & 414. However, because the Illinois rule on prior inconsistent statements does not include a reference to depositions, statements contained in evidence depositions cannot be used substantively.

111. *See* United States v. Hemmer, 729 F.2d 10, 17 (1st Cir. 1984); United States v. Russell, 712 F.2d 1256, 1258 (8th Cir. 1983) (per curiam); United States v. Murphy, 696 F.2d 282, 284 (4th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); United States v. Woods, 613 F.2d 629, 636 (6th Cir.), *cert. denied*, 446 U.S. 920 (1980); United States v. Morgan, 555 F.2d 238, 242 (9th Cir. 1977).

112. Graham, *supra* note 26, at 1578 n.40 (noting that preliminary hearing or grand jury testimony would be admissible in criminal cases).

113. United States v. Castro-Ayon, 537 F.2d 1055, 1057 (9th Cir.), *cert. denied*, 429 U.S. 983 (1976).

114. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 42, at ¶ 801-111 ("should be broadly interpreted to include situations where there is some kind of judicial or quasi-judicial proceeding"); Graham, *supra* note 26, at 1579 n.44 (advocates broad interpretation of the term "other proceeding"); Steigmann, *Prior Inconsistent Statements as Substantive Evidence in Illinois*, 72 ILL. B. J. 638, 640 (1984) (both coroner's inquests and administrative hearings clearly within the rule).

115. ILL. REV. STAT. ch. 38, § 115-10.1(c)(2) (Supp. 1984).

116. The Illinois rule expands the substantive admissibility of prior inconsistent statements beyond those that were made in a formal proceeding.

the orthodox rule, section c(2) attempts to limit admissibility to statements that were almost certainly made[117] and have a strong indicia of reliability.[118]

In order to enhance the reliability of statements deemed admissible, section c(2) requires that the witness' statement must relate to circumstances the subject matter of which is within that witness' personal knowledge.[119] To be within the personal knowledge of a witness, the witness must have observed,[120] and not merely have heard, the subject matter underlying the statement.[121] This requirement increases reliability because it excludes those statements usually termed "double hearsay,"[122] unless the witness also had personal knowledge of the event underlying what was overheard.[123]

The requirements of section c(2) do not end with a mere showing of personal knowledge. The section adds three additional requirements, any one of which must be met to make a statement admissible.[124] These subsections ensure that no unacknowledged oral statements will be admitted.[125] Moreover, these subsections almost

---

117. The rule incorporates requirements of proof so that the proponent must show that it is more probable than not that the statement was made. Graham, *supra* note 26, at 1590. These requirements were drawn in response to legislative concern, at least in Congress, that fabricated statements might be used by unscrupulous attorneys or investigators. *Id.* at 1582. *See also* New Jersey Developments, *supra* note 1, at 793 (New Jersey rule has similar provisions).

118. The requirement of personal knowledge contained in section c(2) of the Illinois rule is intended to increase the reliability of the statement. This is said to occur because a witness with personal knowledge of the event can be effectively cross-examined as to the statement so that the truth can be ascertained. Graham, *supra* note 26, at 1584.

119. ILL. REV. STAT. ch. 38, § 115-10.1(c)(2) (Supp. 1984).

120. Steigman, *supra* note 114, at 640.

121. An example would more clearly demonstrate the personal knowledge requirement. Assume that *X* gives a statement, implicating *Y*, to the police and it is tape recorded. Later, at trial *X* testifies inconsistently with his previous statement.

Situation 1: *X*, while at home, looked through the window, saw *Y* shoot someone, and also heard *Y* say, just before he fired, "You shouldn't have double crossed me." The personal knowledge requirement has been satisfied, and *X*'s prior statement, as to what he saw and heard, is admissible as substantive evidence.

Situation 2: *X*, while at home, heard someone say, "You shouldn't have double crossed me," heard a shot fired, and a few minutes later saw *Y* run by the window with a gun in his hand. In this situation *X* has no personal knowledge because he did not observe the underlying event. Therefore, his prior inconsistent statement would not be admitted, unless it was to show that he saw *Y* carrying a gun.

122. Graham, *supra* note 26, at 1586-88. *See also* FED. R. EVID. 805.

123. Under the Federal Rules of Evidence, rule 602 covers the requirement of personal knowledge. The advisory comment to that rule, however, renders it inapplicable to rules 801 and 805. Hence, under rule 801(d)(1)(A), the declarant need only have personal knowledge of the making of the statement, and not the underlying subject matter. FED. R. EVID. 602 and 801(d)(1)(A).

124. ILL. REV. STAT. ch. 38, § 115-10.1(c)(2)(A), (B) and (C) (Supp. 1984).

125. An unacknowledged oral statement will not satisfy any of the requirements to the Illinois rule, and is considered too unreliable to be admitted as substantive evidence.

guarantee that the statements were made.[126]

Recordation or Acknowledgement

Subsections c(2)(A) and c(2)(C) both require proof of recordation.[127] The statement must have either been written or signed,[128] or accurately recorded on an electronic means of sound recording.[129] Both requirements are meant to ensure that the statement was actually made. In furtherance of that goal, these subsections require the proponent of the statement to "prove" that it was either written, signed or electronically recorded. This proof must be accomplished by a preponderance of the evidence.[130] Moreover, subsection c(2)(A) requires the proponent to prove, again by a preponderance of the evidence, that the alleged inconsistent statement of the declarant is exactly the same as the statement contained in the writing.[131]

Subsection c(2)(B)[132] is the final alternative for section c(2) admissibility. If, while the witness is on the stand during trial, he acknowledges having made the statement,[133] or had already acknowledged making the statement during a previous trial, hearing or other proceeding,[134] the statement will be admitted substantively.[135] The reason for this provision is that a statement which is acknowledged by the witness himself guarantees that it was made.

In Illinois, therefore, a prior inconsistent statement that meets the provisions of the new statute is admissible as substantive evi-

126. *See supra* note 117.

127. ILL. REV. STAT. ch. 38, § 115-10.1(c)(2)(A), (C) (Supp. 1984).

128. Subsection (c)(2)(A) requires that the statement was either written or signed by the witness. Hence, this subsection would not be fulfilled by a written document prepared by another and not signed by the witness. It is questionable, however, whether an individual's signature should even be considered to guarantee reliability or trustworthiness. New Jersey Developments, *supra* note 1, at 792.

129. ILL. REV. STAT. ch. 38, § 115-10.1(c)(2)(C) (Supp. 1984). As to other uses of recording devices in and out of court, see generally Comment, *Judicial Administration—Technological Advances—Use of Videotape in the Courtroom and the Stationhouse*, 20 DEPAUL L. REV. 924 (1971); Comment, *Role of Videotape in Criminal Courts*, 10 SUFFOLK U.L. REV. 1107 (1976).

130. Graham, *supra* note 26, at 1590-91. Professor Graham alleges that requiring the proponent to prove that the statement was made, is reasonable because the witness is already in court and testifying under oath, which raises a presumption of validity to the witness' in-court testimony. *Id. Cf.* FED. R. EVID. 903 (authentication).

131. Graham, *supra* note 26, at 1591. The proponent need only prove "exactness" as to that part of the writing that he seeks to use subtantively. *Id.*

132. ILL. REV. STAT. ch. 38, § 115-10.1(c)(2)(B) (Supp. 1984) (acknowledgement).

133. The acknowledgement need only refer to the making of the statement and not to the truth of the statement itself. *Id.*

134. If the witness acknowledged making the statement at a previous judicial proceeding, then subsection (c)(2)(B) would be satisfied even if the witness presently denies that fact or denies the truth of the statement. Graham, *supra* note 26, at 1590.

135. ILL. REV. STAT. ch. 38, § 115-10.1(c)(2)(B) (Supp. 1984). The statement must also meet the personal knowledge, cross-examination and inconsistency requirements to be admissible.

dence. There is no doubt that the Illinois rule is an improvement over the restrictive orthodox rule, and it also seems to be better than rule 801(d)(1)(A).[136] The Illinois rule does not arbitrarily limit admissibility to those statements made in a judicial proceeding, but extends admissibility to various other situations. This extension helps place more evidence before the trier of fact, which aids in the truth seeking process. The only question that remains is whether this new rule is the best method of dealing with substantive admissibility of prior inconsistent statements.

Did The Legislature Go Far Enough?

The debate between advocates of the orthodox rule[137] and supporters of the modern view[138] centers around the reliability of prior inconsistent statements.[139] The Illinois legislature has decided that prior inconsistent statements should only be admitted substantively in certain limited situations. Inherent in that position is the idea that prior inconsistent statements possess hearsay characteristics which render the statements largely unreliable so that their use must be limited to predetermined categories.[140] Most of the jurisdictions that have adopted provisions for substantive use of prior inconsistent statements share this view.[141] If, however, the basic goal of a criminal trial is to ascertain the truth, there is no legitimate reason to exclude any probative evidence unless it is too prejudicial to the opponent.

The rationale in support of the modern view is that in-court cross-examination of a witness under oath, obviates most, if not all, of the hearsay dangers associated with prior inconsistent statements.[142] Placing arbitrary limits on the use of those statements, however, belittles the modern view's rationale. The Illinois rule, although more expansive than rule 801(d)(1)(A), still places arbitrary limitations upon the substantive use of prior inconsistent statements. Moreover, the Illinois rule is still subject to most of the criticisms that have been levied against the federal rule.

Criticisms of the Illinois Rule

One such criticism is that a prior unrecorded oral statement is

136. Fed. R. Evid. 801(d)(1)(A).
137. *See supra* notes 4-6, 22-33 and accompanying text.
138. *See supra* notes 34-50 and accompanying text.
139. *See supra* notes 51-53 and accompanying text.
140. *See supra* note 57 and accompanying text.
141. The only jurisdictions that do not place severe limitations on the use of prior inconsistent statements as substantive evidence are collected in *supra* note 7.
142. 3A J. Wigmore, *supra* note 1, at 969; C. McCormick, *supra* note 22, at 745.

still inadmissible.[143] This would be so even if the same statement had been made by five different witnesses who have all "turned coat."[144] The same would be true if a number of people all "overheard" the same statement but had no personal knowledge thereof.[145] When overwhelming corroboration such as this is evident, there is no justifiable reason to exclude the prior statement.[146]

Another criticism concerns the trier of fact's inability to comprehend tendered jury instructions.[147] One of the most cogent arguments against the orthodox rule is that when a jury is instructed not to give substantive effect to a prior inconsistent statement admitted for impeachment purposes only, the jury would not understand such verbal "gymnastics" and would attach substantive weight to the statement anyway.[148] Under the Illinois rule, a jury could face an even more perplexing problem.[149] It is quite likely that, of two prior inconsistent statements presented at trial, only one will meet the rule's criteria for substantive admissibility, while the other is relegated to impeachment use.[150] In such a situation, the jury will be instructed to give substantive effect to one statement and not the other. If jury confusion under the orthodox rule was a source of discontent to scholars, the confusion that may develop under the Illinois rule should be a cause of even greater concern.[151]

When the federal rules were adopted, many scholars pointed out the incongruity between Federal Rules 801(d)(1)(A) and 607, regarding when impeachment evidence by prior inconsistent state-

---

143. Many would not call this a criticism, but if the ultimate goal in a criminal trial is the determination of the truth then even unacknowledged oral statements that are subject to cross-examination should be admitted.

144. A claim of unreliability could scarcely be made if a number of witnesses had all made the same or similar statements but then all changed their story. One commentator has suggested that corroboration can easily be applied in this situation. Stalmack, *supra* note 2, at 268. Corroboration should not, however, be applied to the question of admissibility, instead all prior inconsistent statements made by a witness subject to cross-examination should be admitted and the trial court should then look to the corroborating evidence in determining sufficiency. *Id.* at 269.

145. This situation, just as the situation in note 144 *supra*, shows how the personal knowledge requirement places an undue restriction on substantive admissibility.

146. Stalmack, *supra* note 2, at 268-69.

147. *See supra* notes 48-50 and accompanying text.

148. See 3A J. WIGMORE, *supra* note 1, at 1007 and C. MCCORMICK, *supra* note 22, at 746, and authorities cited therein.

149. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984).

150. The provisions of the Illinois rule make this result likely. If one of the prior inconsistent statements was in writing while the other was verbal and unacknowledged, only the written one will be admitted substantively.

151. It is much more difficult for a jury to distinguish between treating one inconsistent statement substantively and treating the other for impeachment purposes, than it is for them to treat all inconsistent statements for impeachment purposes. This is because the dual treatment is illogical. *See* Stalmack, *supra* note 2, at 273.

ment may be used substantively.[152] The problem arose as a result of a congressional compromise which predated the adoption of rule 801(d)(1)(A). Since then, commentators have urged that one of two solutions be implemented to alleviate the problem.[153] One solution would be to amend rule 607, and reinsert the requirements of surprise and affirmative damage.[154] The better solution, however, would be to amend rule 801(d)(1)(A) to allow substantive admissibility of almost all prior inconsistent statements.[155]

With the recent amendment to Illinois Supreme Court Rule 238,[156] which eliminated the surprise requirement, Illinois is faced with the same incongruous situation. The remedy is to either reamend Supreme Court Rule 238, or amend the new rule on substantive admissibility, to admit all prior inconsistent statements.[157]

A Proposal

As already noted, the best device to counteract any hearsay danger is effective cross-examination.[158] The trier of fact should have an opportunity to view not only the witness' present testimony but also the witness' current reaction to statements previously made. From this observation, the trier of fact can better discern the truth. Hence, any prior inconsistent statement should be admitted if the witness can be subject to effective cross-examination.[159] With that proposition in mind, this comment proposes the following

---

152. *See, e.g.*, Graham, *supra* note 26, at 1567; Ordover, *supra* note 11, at 69.

153. This problem arose because rule 607 was proposed to complement an earlier version of federal rule 801(d)(1)(A) which would have admitted almost all prior inconsistent statements. If all prior inconsistent statements are admissible substantively then no jury confusion could ever result. When rule 801(d)(1)(A) was actually adopted, in its narrowed form, many commentators urged that rule 607 was inconsistent because rule 801(d)(1)(A) no longer allowed for the admission of all prior inconsistent statements. Hence, by allowing any party to impeach his own witness, the chance that a jury will use the evidence substantively will still exist; the exact result that the original proposals sought to alleviate. For a discussion of the circumstances surrounding the adoption of rule 801(d)(1)(A), see Graham, *supra* note 26, at 1575-82; Ordover, *supra* note 11, at 65-66; Stalmack, *supra* note 2, at 252-54; Comment, *Symposium on the Federal Rules of Evidence: Their Effect on Wyoming Practice if Adopted*, 12 Land & Water L. Rev. 601, 652-55 (1977).

154. Surprise and affirmative damage were required to be shown before allowing a party to impeach his own witness. This requirement was thought to eliminate impeachment by those prior inconsistent statements to which the jury would most likely impart substantive value. Graham, *supra* note 26, at 1612. The abolishment of the "surprise" requirement in rule 607 was predicated upon "the supposition that all prior inconsistent statements would be substantively admissible." *Id.* at 1612-13. However, the congressional compromise which resulted in rule 801(d)(1)(A) upset the underlying rationale of rule 607. *Id.*

155. Stalmack, *supra* note 2, at 271-73.

156. Ill. Sup. Ct. R. 238.

157. *See supra* notes 154-55 and accompanying text.

158. *See supra* notes 95-96 and accompanying text.

159. *See supra* notes 7 and 11.

amendment to replace section 115-10.1:[160]

> Admissibility of Prior Inconsistent Statements. Unless justice requires otherwise, in all criminal[161] cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to effective cross-examination concerning the statement.

Under this proposal, almost all prior inconsistent statements will be substantively admissible. The requirement of inconsistency under section (a) should be interpreted broadly so that a tendency to contradict would be sufficient.[162] Section (b) requires that effective cross-examination be available. The trial judge should be given discretion in deciding whether the witness will be subject to "effective cross-examination," thereby eliminating any hearsay problems. Insertion of the word "effective" should be interpreted to exclude prior statements which the witness does not recall making, unless the trial judge is satisfied that the witness is feigning loss of memory[163] or is otherwise satisfied that effective examination can take place.[164] Aside from the requirements of inconsistency and effective cross-examination, this proposal adds the phrase "unless justice requires otherwise" as a prerequisite to admissibility. This phrase gives the trial judge broad discretion to determine when to exclude a statement because it is too prejudicial or unreliable.[165]

This proposal is intended to advance the idea, succinctly stated by Weinstein, that a "jury is more apt to arrive at a sound factual determination if it is given as much available data as possible, including evidence of what a key witness said on prior occasions."[166] Moreover, this proposal alleviates the three criticisms that have been levied against both the federal and Illinois rules. First, unre-

---

160. ILL. REV. STAT. ch. 38, § 115-10.1 (Supp. 1984).

161. This proposal is limited to criminal cases because the Illinois legislature does not seem disposed to apply a rule on substantive admissibility to civil cases. *See supra* note 82.

162. *See supra* notes 89-94 and accompanying text.

163. *See supra* note 102 and accompanying text.

164. *See supra* notes 103-04 and accompanying text.

165. The trial judge, being in the best position to observe the witness and the circumstances surrounding the attempted introduction of the prior inconsistent statement, should have broad discretion so that he could exclude a statement for being either more prejudicial than probative, irrelevant or untrustworthy. *Cf.* CALIF. EVID. CODE § 1235 (1966).

166. 4 J. WEINSTEIN & M. BERGER, *supra* note 42, at ¶ 801-124 n.4. "Moreover, the witness who has told one story aforetime and another today has opened the gates to all vistas of truth which the common law practice of cross-examination and re-examination was invented to explore." C. MCCORMICK, *supra* note 22, at 746. Hence, there is no reason to exclude any evidence from the trier of fact, which can be effectively cross-examined.

corded oral statements will be substantively admissible unless overly prejudicial.[167] Second, confusion over jury instructions is practically eliminated.[168] Finally, this proposal is consistent with Supreme Court Rule 238.[169] In this way, rather than specifying predetermined categories, many prior inconsistent statements otherwise inadmissible under the Illinois rule, will be admitted unless clearly prejudicial.

CONCLUSION

The Illinois legislature should be commended for taking the first step to modernize at least one evidentiary rule.[170] The new Illinois rule is both an improvement over the previously followed orthodox rule, and goes a step beyond Federal Rule 801(d)(1)(A). However, the rule still unnecessarily limits the types of statements admissible as substantive evidence. Illinois courts can minimize the limitations within the new rule by broadly interpreting its provisions. However, in order to completely remedy the situation and to reinforce the idea that the search for truth should be the paramount goal in a criminal case, the legislature should amend the rule to allow for substantive admissibility of all prior inconsistent statements that are not overly prejudicial. An amendment of this type should, once and for all, eliminate the ill effects of the "turncoat" witness in Illinois.

Mark D. Krauskopf

---

167. *See supra* notes 143-46 and accompanying text. Under this proposal, any prior statement is admissible if it is inconsistent and the witness will be subject to effective cross-examination. However, the trial judge could exclude an unrecorded oral statement if the circumstances indicate that the prior statement is clearly unreliable.

168. *See supra* notes 147-51 and accompanying text. Because almost all prior inconsistent statements will be admissible as substantive evidence, it is unlikely that a jury would have to distinguish between prior inconsistent statements to be used to discredit, and those admitted as evidence.

169. *See supra* notes 152-57 and accompanying text. Because almost all prior inconsistent statements will be admitted substantively, the former "surprise" requirement of Supreme Court Rule 238 would not be needed. There would no longer be any reason to fear that the jury will improperly impart substantive value to the statements, because these prior inconsistent statements would now properly be admitted as substantive evidence.

170. Illinois has yet to adopt an independent code containing rules of evidence, although the idea has been explored. *See* Graham, *supra* note 5. Instead, the legislature seems to act only when the judicially created rules of evidence are adverse to their desires.