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Impeachment With an Unsworn Prior Inconsistent Statement as Subterfuge

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NOTES

IMPEACHMENT WITH AN UNSWORN PRIOR INCONSISTENT STATEMENT AS SUBTERFUGE

Picture this: FBI agents investigating a bank robbery follow the trail of the getaway car to an apartment building, where they question the residents. One resident, Mrs. Wilson, says that she saw the car pull up to the building on the day in question and then observed the driver carry a gun and several bundles into the building. "It was Mr. Davis, the man who lives in the next building. I saw him with a gun, and lots of money." The agents quickly apprehend Mr. Davis.

Meanwhile, other agents have arrested a suspected accomplice, Mr. Williams. Security guards observed him loitering near the bank for an extended period just before the robbery, and the agents apprehended him shortly thereafter, as he walked quickly away from the scene. As the agents question him, he indicates his willingness to testify against Davis and says, "I told Davis this morning it was too dangerous; I told him we'd never get away with it." Williams is indicted for bank robbery but is being tried separately. The prosecutor expects Williams to be a prime government witness in Davis's trial.

Before his trial, however, Williams recants his prior statement and now claims that he did not even see Davis the day of the robbery. He confirms to the prosecutors that he will not implicate Davis in Davis's trial. Meanwhile, Mrs. Wilson also experiences a change of heart. The sight of her neighbor, Mr. Davis, being hauled off in handcuffs has caused her to reflect upon what she saw that day. She no longer thinks she saw Davis carrying a gun into the building. In fact, she is not really sure exactly what she saw on the day of the robbery. She tells the United States Attorney that she will not stick to her original story if she is called to the witness stand.

Several months later, Davis is on trial. He does not plan to call either Mrs. Wilson or Mr. Williams; their testimony that they did *not* see him on the day of the robbery is barely relevant at best.

The prosecutor, however, calls them both. He asks Mrs. Wilson, "Did you see the defendant carry a gun and money into his building on the day of the robbery?" He asks Mr. Williams, "On the day you were arrested, did you tell Davis 'We'd never get away with it?' " Both witnesses testify exactly as they have told everyone they would: "No, I did not."

THE PROBLEM

Before the passage of the Federal Rules of Evidence in 1975, the prosecutor probably would have had to accept the witnesses' testimony, because the common law "voucher" rule prevented a party from impeaching his own witness.[1] Under Federal Rule 607, however, a party may impeach his own witness.[2] The next step for the

1. The ancient rule against impeaching one's own witness is of murky origin. Dean Wigmore traced the rule to the rite of "compurgation," in which a trial was little more than a swearing contest between the best "witnesses" each side chose to put on. One's witnesses were "oath-helpers" who were supposed to guarantee the truth of the party's claim. Under those circumstances, attacking the credibility of one's own oath-helper was patently illogical. Thus, the party was said to vouch for the credibility of those he called to support his story. Wigmore noted that "[t]his traditional notion of a witness, that of a person 'ex officio' a partisan pure and simple, persisted as a tradition long past the time when their function had ceased to be that of a mere oath-taker and had become that of a testifier to facts." 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 896, at 659 (Chadbourn rev. 1970). He described the common law voucher rule as a "natural consequence" of the rite of compurgation. *Id.*

On the other hand, Dean Ladd wrote that the voucher rule probably did not originate with compurgation but instead arose because of the transition from an "inquisitorial" method of trial to an adversarial system. Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69, 70 (1936). In the inquisitorial system, in which jurors decided the case based on their own personal knowledge, the opportunity to question one's own witness never arose. As a result, compurgation could have influenced the development of the voucher rule only indirectly. *Id.* As Ladd points out, "Until there were witnesses in the modern sense, there could be no reason for the idea that a party was bound by his witness or that he could not impeach him." *Id.* at 72.

Ladd traced the rule to the changeover from an inquisitorial system to an adversarial one, in which parties offer witnesses against each other: "As the change from the inquisitorial to the adversary system came in criminal cases, we first find the courts declaring that the accused cannot impeach his own witnesses." *Id.* He noted that "[t]he tendency in this country generally has been to accept the rule," *Id.* at 75, but he criticized the courts for accepting the rule on its ancient foundations rather than "searching and testing its merits as a practical device." *Id.* at 76.

2. FED. R. EVID. 607. The rule provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." *See also* FED. R. EVID. 607 advisory committee note:

prosecutor is obvious: he calls the FBI agents to whom the two witnesses made their previous statements and impeaches the witnesses' testimony with their prior inconsistent statements.[3] The solution is simple.

Or is it? The federal courts traditionally have operated under another rule, which prohibits using impeachment as a mere subterfuge to place before the jury otherwise inadmissible evidence.[4] If

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> The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary.

3. The rationale of impeachment with a prior inconsistent statement, of course, is to expose the witness as a person who is capable of making contradictory statements. Technically, the impeaching party does not claim that *either* of the two statements is truthful; impeachment only shows that *one* of them must be untrue, and that the witness should not be trusted in all cases to tell the truth. Dean Wigmore describes the proper use of such impeachment as follows:

> [W]e are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary contradictions by other witnesses). We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other—but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement.

3A J. WIGMORE, *supra* note 1, § 1018, at 995. Indeed, this rationale supports impeachment even when *neither* statement can be believed. Wigmore offers the jury charge of a nineteenth-century trial judge:

> This reminds me, gentlemen of the jury, of a story I heard many years ago of old General Scott (not Winfield), who went from Virginia to Kentucky in very early times, and on his return his friends and neighbors came to see him, and asked him to give them a description of the country. He said he had never seen such forests in his life—oak, chestnut and sugar trees reaching up two and three hundred feet in altitude, and being from fifteen to twenty feet in diameter, and growing so close together that nowhere were these trees more than five or six feet apart from each other. "Now, General," said they, "tell us something about the game in that country." "Well," said he, "I saw deer and elk there whose enormous antlers would measure at least fifteen feet from the tip of one horn to the tip of the other." "Did they frequent these forests, General?" said one of his auditors. "Oh yes," said the General. "Then how did they manage to get through these enormous trees, growing so close together?" "Oh, by h—l, sir," said the General, "that is their lookout and not mine!"

Id., § 1017, at 994.

4. *See, e.g.*, United States v. Hogan, 763 F.2d 697, 702 (5th Cir. 1985) ("[T]he prosecutor may not use such a statement under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible.") (quoting United States v. Miller, 664 F.2d 94, 97 (5th Cir. 1981), *cert. denied*, 459 U.S. 854 (1982)); United States v. DeLillo, 620 F.2d 939, 946 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980);

our hypothetical prosecutor calls Wilson and Williams and asks them about what they saw or did on the date of the robbery, *expecting* to have to impeach them, is he simply impeaching the credibility of his own witnesses, as he is allowed to do under Rule 607, or is he using impeachment as a subterfuge, to get the witnesses' otherwise inadmissible statements before the jury, hoping that the jury will miss the impeachment/substantive evidence distinction?

Before the adoption of Rule 607, courts usually allowed impeachment of one's own witness if the party could show that he had been surprised by the witness's affirmatively damaging testimony.[5] Under this surprise and damage test, a prosecutor could not possibly engage in subterfuge because a showing that the prosecutor knew that the witness would testify inconsistently would negate any surprise. Courts did not have to worry about the subterfuge issue independently.[6]

Rule 607 swept away the old concerns about impeaching one's own witness,[7] but it did not eliminate the separate problem of

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United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975); Kuhn v. United States, 24 F.2d 910, 913 (9th Cir.), *cert. denied*, 278 U.S. 605 (1928).

5. *See, e.g.*, United States v. Coppola, 479 F.2d 1153, 1158 (10th Cir. 1973); Goings v. United States, 377 F.2d 753, 759 (8th Cir. 1967), *appeal after remand*, 393 F.2d 884 (8th Cir.), *cert. denied*, 393 U.S. 883 (1968); Bushaw v. United States, 353 F.2d 477, 481 (9th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966).

6. If a party is not allowed to impeach his own witness, little need exists for a rule preventing the party from using impeachment of his own witness as a subterfuge. Courts *did* allow impeachment under the voucher rule if the party could show surprise and damage, but they did not use the surprise and damage requirement independently to prevent subterfuge. *But see* Graham, *Examination of A Party's Own Witness Under the Federal Rules of Evidence*, 54 TEX. L. REV. 917 (1976). Professor Graham argues that use of the "surprise and damage" test to determine whether to allow impeachment of one's own witness has independent justification, apart from its value in justifying impeachment. Specifically, he argues that courts developed the surprise and damage test to keep juries from considering impeachment evidence substantively. *Id.* at 977. As such, the test serves the same purpose as the rule against subterfuge: keeping otherwise inadmissible evidence from the jury.

7. Besides the rule's basic theoretical justification (i.e., that a party generally presents his witnesses as being worthy of belief), other concerns existed as well. The voucher rule prevented a party from using character evidence to coerce a witness into testifying in the party's favor under the theory that "the power to impeach involves the power to destroy." Ladd, *supra* note 1, at 80. Dean Wigmore described this policy as follows:

> If it were permissible, and therefore common, to impeach the character of one's witness whose testimony had been disappointing, no witness would care to risk the abuse of his character which might then be launched at him by the disap-

preventing impeachment as subterfuge. Rule 801(d)(1)(A) continues to categorize unsworn prior inconsistent statements as hearsay, and thus restricts their substantive use;[8] therefore, the courts now face the dilemma of accepting a party's impeachment of his own witness while at the same time guarding against subterfuge.

Both Mrs. Wilson's and Mr. Williams's prior statements that they saw or spoke to Davis on the day of the robbery are hearsay and thus inadmissible as substantive evidence.[9] As the Federal Rules of Evidence were initially phrased, however, the statements would not have posed a hearsay problem because the Rules did not

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pointed party. This fear of the possible consequences would operate subjectively to prevent a repentant witness from recanting a previously falsified story, and would more or less affect every witness who knew that the party calling him expected him to tell a particular story.

3A J. WIGMORE, *supra* note 1, § 899, at 664.

Of course, as Wigmore noted, this fear affects *every* witness who is subject to impeachment. Opponents of the voucher rule, therefore, failed to accept this justification for the rule, because repentant witnesses were already subject to impeachment by the adversary.

Advocates of the rule, however, viewed the chance of impeachment by one's own party as a different matter, and argued that it should be prohibited. As Wigmore explained, "[O]f this sort of abuse from the opposite side the witness is even now sufficiently afraid; were he liable to it from either side indiscriminately, the terrors of the witness-box would be doubled." *Id.*

The scope of this Note is limited to impeachment with a prior inconsistent statement. It does not discuss impeachment with evidence of a witness's character. The coercion justification for the voucher rule is not addressed here; however, the mere use of his prior inconsistent statement is unlikely to "coerce" a witness. As Dean Ladd pointed out:

> [T]he consequences of impeachment by this method could not be serious. There is nothing disgraceful about being mistaken and the witness would have the opportunity of correcting and explaining his former statement.
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> . . .There is hardly a slight possibility of coercion by the use of prior inconsistent statements; surely not enough to make application of the control theory plausible.

Ladd, *supra* note 1, at 84-85. In any case, Rule 607 clearly covers *any* impeachment, whether by prior inconsistent statement or by character.

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

9. Neither statement falls within the hearsay exception of FED. R. EVID. 801(d)(1)(A). Each statement is inconsistent with trial testimony, but neither was made at a trial, grand jury proceeding, or deposition. They are not excluded from the definition of hearsay, therefore, and are inadmissible under FED. R. EVID. 802.

Even though the statements are hearsay, they may be admissible under Rule 803. Because this Note is concerned with the circumstances under which a party should not use "otherwise inadmissible" evidence for impeachment, the Note assumes that neither of these statements would qualify under any of the Rule 803 provisions. *But see infra* note 94 and accompanying text.

classify prior inconsistent statements as hearsay.[10] Under the original proposed Rules, therefore, Rule 607 would not have caused any subterfuge problem because an unsworn prior statement would not have been "otherwise inadmissible."

The changes in the definition of hearsay in Rule 801, however, did not go as far as the drafters of Rule 607 had contemplated. The drafters of Rule 607 apparently believed that *all* prior inconsistent statements would be admissible as substantive evidence, thus eliminating any hearsay problem.[11] As eventually adopted, however, Rule 801(d)(1)(A) included unsworn prior inconsistent statements as hearsay, thus rendering them inadmissible as substantive evidence. Because an unsworn prior inconsistent statement can be used for purposes of impeachment, but not as substantive evidence, the old rule against subterfuge took on new vitality. With some prior inconsistent statements remaining "otherwise inadmissible," the operation of Rule 607 in conjunction with Rule 801(d)(1)(A) creates real dangers of subterfuge.

Many commentators have argued that a prior inconsistent statement should be admissible as substantive evidence under certain circumstances.[12] Strong arguments certainly exist for giving unsworn prior inconsistent statements substantive weight. As Dean Ladd has argued, if the declarant is in court and subject to cross-

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10. *See, e.g.*, Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L.J. 3, 7-9 (1975); Graham, *supra* note 6, at 961-62.

11. *See* FED. R. EVID. 607 advisory committee note: "If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1)." This language supports the argument that Congress originally intended to allow all prior inconsistent statements as substantive evidence. When Congress finally adopted Rule 801(d)(1)(A), however, the rule did not exclude all prior inconsistent statements from the definition of hearsay. *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, 1575-82 (1977) [hereinafter Graham, *Employing Inconsistent Statements*]; 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, 574 (1977) [hereinafter Graham, *The Relationship*]; Note, *Impeaching One's Own Witness With A Prior Inconsistent Statement: Ohio and Federal Rules 607 and Hearsay Considerations*, 50 U. CIN. L. REV. 100, 113 (1981).

12. *See, e.g.*, 3A J. WIGMORE, *supra* note 1, at 1018; Bein, *Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)*, 26 UCLA L. REV. 967, 1035 (1979); Ladd, *supra* note 1, at 87.

examination concerning his statement, perhaps no hearsay objection should arise to its admission.[13]

The question of the substantive value of an unsworn statement, however, is different from the question of using impeachment as a subterfuge in the hope that a jury will consider the statement's substance. The resolution of the second question cannot hinge upon the old answer to the first. Congress has made the legislative judgment that unsworn prior inconsistent statements are inadmissible as substantive evidence.[14] Arguments about the *substantive* value of such statements, therefore, have no validity in the discussion of when courts should allow *impeachment* with such statements. Arguing that a prosecutor should be able to engage in subterfuge because the evidence he wants to present to the jury should be admissible anyway completely ignores the fact that Congress has, for whatever reasons, rendered unsworn prior inconsistent statements inadmissible for substantive use. The arguments against allowing impeachment with such statements because of a fear of their substantive use therefore retain much of their vitality.[15]

Of course, *completely* excluding such statements solely because of the fear of their substantive use is not an acceptable solution.

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13. *See* Ladd, *supra* note 1, at 87.

14. FED. R. EVID. 801(d)(1)(A) includes unsworn prior inconsistent statements in the definition of hearsay; *cf.* United States v. Ragghianti, 560 F.2d 1376, 1380-81 (9th Cir. 1977) ("Congress has now spoken to the issue and Congress, not the court, has the final say. There is, after all, a difference between a prior statement obtained from a witness by the police in the course of a criminal investigation, and testimony given under oath in a formal proceeding.") (citation omitted).

15. One of the original justifications for the voucher rule was the fear that the jury would take the impeaching evidence for its substantive value. In their criticism of the voucher rule, many commentators flatly responded to that fear by stating that such evidence should be admissible anyway. The logic is irrefutable; if the evidence should be admissible anyway, impeachment with such evidence should raise no objection based on a fear of substantive use. *See, e.g.*, 3A J. WIGMORE, *supra* note 1, § 1018 at 996; Ladd, *supra* note 1, at 87.

These commentators succeeded; Rule 607 did away with the voucher rule and now allows impeachment. With the concurrent adoption of Rule 801(d)(1)(A), however, Congress has stated explicitly that courts may not give unsworn prior inconsistent statements substantive value. The old arguments against the voucher rule no longer apply to the subterfuge question: To say that those statements *should* have substantive value fails to answer the objection to their use for impeachment in the hope that the jury *will* use them for their substantive value. Congress has said they are not to be so used; it does not answer the question to say that they should be.

Evidence often is admitted with instructions that it be used only for a limited purpose.[16] Indeed, impeachment by the adversary carries the same danger of substantive use, yet courts allow it without fear of such use.[17]

To state the response more accurately, however, impeachment by the adversary is admitted with *some* fear of substantive use, but a *tolerable* fear of such use. Courts consistently take the risk that juries will disregard their limiting instructions, but in some cases we regard such a risk as a tolerable one.

When should we accept that risk? What is it about those instances where the evidence is admitted that convinces us that the risk is tolerable? An honest appraisal of the trial procedure as a whole should demonstrate that the answer does not lie in the evidence itself, but in the sum of circumstances under which it is presented. Such is the basic justification for the rule against subterfuge: The rule is not a judgment about the nature of the evidence as such, but a judgment about the fundamental fairness of the trial procedure. Courts agree that when the prosecutor uses impeachment as a subterfuge to place otherwise inadmissible evidence before the jury, those circumstances require exclusion of the evidence. The issue is neither the evidence's reliability[18] nor its

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16. *See* FED. R. EVID. 105. The rule provides that
> [w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

17. Ladd, *supra* note 1, at 87. As Ladd points out:
> The identical chance of misuse of impeaching statements exists where the witness has damaged the proponent as where the witness has damaged the opponent. Yet in the latter case prior inconsistent statements are universally admitted without fear that the triers may accept the impeaching statements as substantive evidence.

Id.

18. Even when a statement has very good indicators of reliability, courts nevertheless properly refuse to allow the unsworn statement as substantive evidence. *See, e.g.*, United States v. Livingston, 661 F.2d 239 (D.C. Cir. 1981). In that case, the witness denied or failed to recall conversations mentioned in a prior statement which the witness had made to a postal inspector. The defendant argued that the statement should not have been considered substantively because the witness did not make the statement at a hearing, trial, deposition, or other proceeding as required by FED. R. EVID. 801(d)(1)(A). (The statement was, however, made under oath.) 661 F.2d at 241-42. The court agreed:

hearsay nature, but instead the prosecutor's manipulation of the trial procedure. Courts properly do not tolerate such manipulation.

The essential inquiry thus focuses on defining the trial circumstances under which a court should find that such manipulation is actually occurring. Once the question is formed in this manner, inquiries into questions such as the nature of the witness's testimony or the reliability of the impeaching statement obviously fade in significance. Those questions are questions of evidentiary admission. The subterfuge question, on the other hand, is a separate issue—one of fairness in the trial procedure.

Proposals for limiting subterfuge should be evaluated on two basic criteria. First, of course, one must judge any proposal by its effectiveness. Any rule designed to stop impermissible subterfuge, however, must co-exist with Rule 607's clear language sanctioning proper impeachment. In this context, an effective rule should not only prohibit impermissible subterfuge, but also should allow proper impeachment. Second, any rule of law should be closely linked to the essential problem it tries to solve. Because the essence of the rule against subterfuge is manipulation of the trial procedure, one should evaluate proposals for implementing the rule primarily in terms of their principled connection to remedying that problem.

Courts and commentators have taken three main approaches to the problem. The first, offered by Professor Graham, is to reimpose the pre-Rule 607 surprise and damage requirement that restricted impeachment of one's own witness. The second, advocated by Judge Weinstein, is to apply a standard Rule 403 analysis under

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> Here, a postal inspector went to Ms. Hester's residence, asked her questions, took notes, wrote a statement based on her responses, asked her to read a typewritten copy and to make any necessary changes, and then obtained her signature swearing to the accuracy of the statement. We do not think that these circumstances satisfy the Rule's requirement of a trial, hearing, or other proceeding.

Id. at 242 (footnotes omitted). Although the statement had significant indicators of reliability, the court still classified it as hearsay under FED. R. EVID. 801(d)(1)(A) and refused to admit it.

Of course, the court could have admitted the statement if the statement met the reliability requirements of FED. R. EVID. 803(24). In that instance, however, the court's analysis should have focused openly on substantive admissibility, rather than on reliability as it affects the right to impeach. *See infra* note 94 and accompanying text. The subterfuge inquiry is *not* related to the question of reliability, but to the fairness of the trial procedure.

which the prior inconsistent statement would be admissible for impeachment unless its prejudicial effect substantially outweighs its probative value. The courts have not adopted either view but instead have followed a third approach. They state that a party may not call a witness for the primary purpose of impeaching him. This Note analyzes these suggestions and concludes that none offers the best solution. The Note then suggests a possible alternative, under which a prosecutor could not impeach his own witness with a prior inconsistent statement when he apparently has questioned the witness about the subject matter of the prior statement for the primary purpose of impeachment.[19]

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19. Admission of an unsworn prior inconsistent statement does not raise any confrontation clause issue. In California v. Green, 399 U.S. 149 (1970), the defendant was convicted of a drug violation on the strength of a witness's prior inconsistent statement. The witness made the statement at the defendant's preliminary hearing, during which time defendant's counsel subjected the witness to extensive cross-examination. *Id.* at 151. At the trial, the witness's testimony was read into the record as substantive evidence. A police officer also testified that the witness made similar incriminating statements prior to the preliminary hearing. *Id.* at 151-52. The California Supreme Court reversed the defendant's conviction, holding that use of the prior inconsistent statement violated the defendant's sixth amendment right to confrontation. People v. Green, 70 Cal.2d 654, ____, P.2d 422, 479, 75 Cal. Rptr. 782, 789 (1969), *rev'd*, California v. Green, 399 U.S. 149 (1970).

The United States Supreme Court reversed. The Court noted at the outset that its task was not to choose among various alternatives in hearsay law, but only to consider whether a state violated a defendant's confrontation rights when it decides to allow prior inconsistent statements for their substantive value. *Green*, 399 U.S. at 155. The Court stated that the admission of an out-of-court statement does not violate the defendant's sixth amendment right to actually "confront" an accuser as long as the declarant is testifying at the trial. The Court said that "[v]iewed historically, then, there 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 a witness and subject to full and effective cross-examination." *Id.* at 158.

The Court acknowledged that the prior inconsistent statement standing alone may be susceptible to some of the dangers against which the sixth amendment is supposed to guard. When the witness is subjected to cross-examination at trial, however, those dangers do not rise to a constitutional level: "[T]he inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial." *Id.* at 159.

The Court also found no constitutional problem with such belated cross-examination, adopting Judge Hand's statement in DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925), that if the jury decides on a statement's truthfulness by looking at the witness's *present* demeanor instead of his demeanor at the time he made the prior statement, the jury is still using demeanor as a factor. The Court said that it

> discount[ed] *as a constitutional matter* the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-

PROPOSED SOLUTIONS

Surprise and Affirmative Damage

Under the pre-1975 voucher rule, a party could not impeach his own witness unless the party was surprised by the witness's affirm-

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> court statement. The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement. The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story. The defendant's confrontation rights are not violated, even though some demeanor evidence that would have been relevant in resolving this credibility issue is forever lost.

Green, 399 U.S. at 160 (emphasis added).

Although Justice White wrote his majority opinion in *Green* in language that touched on some of the points of the *evidentiary* discussion concerning the substantive use of a prior statement, he reiterated the Court's role as that of deciding the *constitutional* question: "[W]hether admission of the statement would have violated federal evidentiary rules against hearsay . . . is, as emphasized earlier in this opinion, a wholly separate question." *Id.* at 163 n.15 (citations omitted).

The Court also addressed the admission of the witness's unsworn out-of-court statement to the police officer. The Court found no constitutional distinction between the statement made at the preliminary hearing and the one made under less formal circumstances to the officer, again, as long as the declarant was subject to cross-examination concerning the statement. The Court noted that

> [t]he subsequent opportunity for cross-examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, offhand remark to a stranger, and the carefully recorded testimony at a prior hearing.

Id. at 168.

As an evidentiary matter, and for the purposes of this Note, of course, a major distinction exists between the statement made at the preliminary hearing and the unsworn statement to the officer. FED. R. EVID. 801(d)(1)(A) excludes the former from the category of hearsay, thereby allowing a court to admit it for its truth. The latter is classified as hearsay, and, therefore, is not admissible as substantive evidence.

In *Green*, however, the Court emphasized that the crucial point in the *constitutional* analysis of the admission of any out-of-court statement against a criminal defendant is whether the declarant is subject to effective cross-examination at trial. If he is, the confrontation clause is not implicated by admission of the witness's prior inconsistent statement, even for its substantive value. *See also* United States v. Distler, 671 F.2d 954, 959 (6th Cir. 1981); 3A J. WIGMORE, *supra* note 1, at § 1018.

This Note examines the right of a prosecutor to introduce hearsay evidence. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court considered hearsay restrictions on defendants. In that case, the defendant tried to prove his innocence by introducing three witnesses, each

atively damaging testimony.[20] The surprise and damage rule provided a logical escape from the voucher rule,[21] but it served another function as well: it prevented a party from calling a witness for the purpose of impeaching him in the hope that the jury would give substantive weight to the prior inconsistent statement. Before the adoption of Rule 607, the surprise and damage requirement adequately screened impermissible prosecutorial action. Subterfuge was impossible because if the prosecutor knew before trial that the witness would testify inconsistently, that knowledge would negate any surprise and, therefore, exclude any impeachment. Because of this operation of the surprise and damage requirement, courts did not have to consider the subterfuge issue independent of the right to impeach one's own witness. The adoption of Rule 607, however, means that courts now must consider the subterfuge issue by itself.

Because of this danger of subterfuge, Professor Graham argues that courts should interpret Rule 607 to require re-imposition of the surprise and damage rule when a party wishes to impeach his own witness with a prior inconsistent statement.[22] According to

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of whom proposed to testify to separate statements of another person in which that person incriminated himself in the crime. Mississippi's hearsay rule barred these statements. *Id.* at 292.

The Court held that where the prior statements "bore persuasive assurances of truthworthiness," a technical adherence to the hearsay rule could not deny the defendant his right to put on evidence in his own defense. *Id.* at 302. "Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . .In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

20. *See, e.g.*, United States v. Coppola, 479 F.2d 1153, 1158 (10th Cir. 1973); Goings v. United States, 377 F.2d 753, 759 (8th Cir. 1967), *appeal after remand*, 393 F.2d 884 (8th Cir.), *cert. denied*, 393 U.S. 883 (1968); Bushaw v. United States, 353 F.2d 477, 481 (9th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966).

21. If a witness surprised the calling party and affirmatively damaged his case, one could hardly argue that the party vouched for that witness's credibility. In the years before the adoption of the Federal Rules of Evidence, therefore, most courts allowed impeachment of one's own witness where the party could prove surprise and affirmative damage. *See, e.g.*, United States v. Coppola, 479 F.2d 1153, 1158 (10th Cir. 1973); Goings v. United States, 377 F.2d 753, 759 (8th Cir. 1967), *appeal after remand*, 393 F.2d 884 (8th Cir.), *cert. denied*, 393 U.S. 883 (1968); Bushaw v. United States, 353 F.2d 477, 481 (9th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966).

22. Graham, *supra* note 6, at 978. Graham argues that "courts should interpret rule 607 as continuing to require surprise and damage before the government is permitted to impeach its own witness by prior inconsistent statements that are neither within rule

Graham, Rule 607's broad grant of power to impeach must be read in conjunction with the expressions of congressional purpose evident in the changes made in Rule 801(d)(1)(A).[23] In passing Rule 801(d)(1)(A), Congress made a legislative judgment that unsworn prior inconsistent statements are inherently less reliable than other prior inconsistent statements. Under those circumstances, he argues, assuming that Congress, in passing Rule 607, intended to make those inherently unreliable statements freely admissible as impeachment evidence is illogical.[24] If the purpose of continuing to classify unsworn prior inconsistent statements as hearsay is to keep the jury from using those statements as substantive evidence, then such statements should not be used for impeachment, because of the danger that the jury will use them as substantive evidence despite a limiting instruction.[25]

Graham's argument raises a basic question: If an unsworn prior inconsistent statement is inherently unreliable, why should it be allowed under *any* circumstances, surprise or not? As stated earlier, Graham, like most commentators, is not establishing a substantive rule of admissibility. Instead, he merely states a judgment that the chance of conviction with an unreliable statement outweighs the interests of a fair system of orderly justice in circumstances in which no surprise or damage occurred. The exception to the voucher rule, that impeachment should be allowed when the prosecutor is surprised by the witness's damaging testimony, does

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801(d)(1)(A) nor otherwise admissible as substantive evidence." *Id.* (footnote omitted); *see also* Graham, *The Relationship*, *supra* note 11, at 575; Graham, *Employing Inconsistent Statements*, *supra* note 11, at 1617.

23. Graham, *supra* note 6. Professor Graham argues that "[p]ermitting the Government without limitation to impeach its own witness by introducing prior inconsistent statements that do not meet the requirements of rule 801(d)(1)(A), designed to ensure reliability, would promote the very evil Congress sought to avert by amending proposed rule 801(d)(1)(A)." *Id.* at 977-78.

24. *Id.* As Professor Graham concluded:

> In considering rule 801(d)(1)(A), Congress expressed its unwillingness to permit the admission of all prior inconsistent statements as substantive evidence, in part because of a concern that juries might convict criminal defendants on the basis of unreliable prior inconsistent statements. It certainly follows that Congress did not intend to expand the range of prior inconsistent statements not falling within rule 801(d)(1)(A), as revised, that are receivable in evidence for the limited purpose of impeachment.

Id. at 977 (footnotes omitted).

25. *Id.*

not judge the relative reliability of the impeaching statement. If surprise and damage has occurred, the *reliability* of the prior inconsistent statement does not change; but the defendant's interests in that situation are now less important than the prosecution's *new* interest in a fair, orderly trial. Thus, the evidence is admitted regardless of its reliability.[26]

The surprise and damage approach is open to criticism on several fronts. First, some ambiguity exists about what constitutes affirmative damage.[27] Before the adoption of Rule 607, most courts viewed "affirmative damage" as requiring that the witness's trial testimony directly exculpate the defendant. A neutral "I don't know" or "I don't remember" might not be sufficiently damaging to allow impeachment with the witness's prior statement.[28] If the surprise and damage test for impeachment were re-instituted, however, the damage requirement could be subjected to some judicial tinkering. Because any witness who refuses to tell the same story he told earlier arguably has damaged the state's case, some courts might adopt a different standard for "affirmative damage."

Second, the surprise and damage test is too mechanical.[29] A tripwire test such as surprise prohibits impeachment without regard for any of the considerations *supporting* the impeachment of

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26. One writer has argued against the surprise and damage approach in part because its automatic exclusion of evidence rigidly requires the exclusion of prior inconsistent statements that have a high degree of reliability, both as to the certainty of making and accuracy of reporting. Note, *Impeaching One's Own Witness Under Rule 607*, 32 OKLA. L. REV. 393, 397 (1979). Such concerns are justified only when arguing that such highly reliable statements should be admissible for their truth. The subterfuge question should hinge on different considerations. A prosecutor can engage in subterfuge with a reliable statement just as easily as he can with an unreliable one; to argue that impeachment should be allowed when the statement is reliable is in effect to make a subliminal leap into arguing for its substantive admissibility.

Another student writer makes a more honest assessment of the problem in recommending that surprise and damage be the test for impeachment, but that the hearsay exception of Rule 801(d)(1)(A) be broadened to include extremely reliable unsworn prior inconsistent statements. Note, *supra* note 11, at 118.

27. *Cf.* 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, 67 (1976) (describing the difficulty of demonstrating surprise and affirmative damage).

28. *See, e.g.*, United States v. Dunmore, 446 F.2d 1214, 1221 (8th Cir. 1971), *cert. denied*, 404 U.S. 1041 (1972); Bushaw v. United States, 353 F.2d 477, 481 (9th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966).

29. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 607[01], at 607-18 (1985).

one's own witness which originally led to the statutory rejection of the voucher rule. The voucher rule was a blunt instrument prohibiting impeachment except under the very limited circumstances of surprise and affirmative damage. In light of Rule 607's clear language generally sanctioning impeachment, courts should not adopt a test for subterfuge based on the same type of bright-line rule. The drafters of Rule 607 obviously intended to abandon the ancient restrictions that the voucher rule placed on impeachment. Although the courts must guard against subterfuge, they should not exclude *proper* impeachment by such a mechanical and hard-to-meet test as surprise and damage.[30]

When we consider its effectiveness in limiting subterfuge, the failings of the surprise and damage approach are even more clear. If effectiveness depends upon *both* stopping impermissible subterfuge and allowing permissible impeachment the surprise and damage rule obviously falls short in the latter category. For example, under this rule neither of our two hypothetical witnesses would be subject to impeachment with the prior statements, because the prosecution knew in advance that neither would adhere to those statements. Although the surprise and damage rule obviously would prevent introduction of those statements as a subterfuge

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30. In most cases, a prosecutor will have difficulty meeting the surprise requirement. A witness need only notify the prosecution before trial that he has changed his story to avoid impeachment. In these days of extensive pre-trial preparation, witnesses who have changed their stories are unlikely to "surprise" the prosecution in very many cases. *See also* Ordover, *supra* note 27, at 67 ("The demonstration of surprise and affirmative damage was often difficult. If the government knew prior to trial that the witness recanted the statement, no showing of surprise could be made.") (footnote omitted).

A party's right to *properly* impeach a witness should not hinge on such factors. *Cf.* United States v. Webster, 734 F.2d 1191, 1193 (7th Cir. 1984). In *Webster*, the defendant urged the court to adopt Professor Graham's view, which required surprise and damage before the government could impeach its own witness. *Id.* Judge Posner declined, posing the following hypothetical:

> Suppose the government called an adverse witness that it thought would give evidence both helpful and harmful to it, but it also thought that the harmful aspect could be nullified by introducing the witness's prior inconsistent statement. As there would be no element of surprise, Professor Graham would forbid the introduction of the prior statements; yet we are at a loss to understand why the government should be put to the choice between the Scylla of forgoing impeachment and the Charybdis of not calling at all a witness from whom it expects to elicit genuinely helpful evidence.

Id.

under the guise of impeachment, the rule would disallow much legitimate impeachment as well.

Finally, and most importantly, the surprise and damage requirement simply bears little direct relation to the goal of restricting the use of prior inconsistent statements as subterfuge. If surprise and damage *do* exist, justifying impeachment of one's own witness is much easier; however, a prosecutor who calls a witness knowing that impeachment will be necessary is not necessarily attempting to engage in subterfuge. Although a court may infer subterfuge from such knowledge, the relationship between a prosecutor's prior knowledge that impeachment will be necessary and his actual motive in calling the witness is certainly less than direct. Justice requires a rule which takes greater account of all the trial circumstances. If admissibility hinges on simple surprise to the prosecutor, the surprise and damage rule bears an insufficient relationship to the goal it purports to achieve.

Although the surprise and damage requirement prevents subterfuge, the rule developed only as an exception to the voucher rule itself. The surprise and damage rule did not develop independently, and Rule 607's abolition of the voucher rule must affect its justification. The surprise and damage test was developed to allow impeachment of one's own witness under certain limited circumstances. If impeachment is now allowed under more liberal circumstances, the independent vitality of the surprise and damage test is suspect.

Rule 403 Approach

Judge Weinstein rejects the surprise and damage requirement and argues instead for an application of Rule 403: a balancing of probative value against prejudicial effect.[31] This analysis presumably excludes extremely unreliable and incriminating prior inconsis-

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31. FED. R. EVID. 403 states that

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Judge Weinstein argues that

> [i]nstead of placing so much emphasis on the motive of the profferor, an approach more consistent with the underlying policy of the federal rules of evi-

tent statements. The factors determining a statement's probative value apparently would include assurances that the earlier statement was in fact made, the statement's ambiguity,[32] and the statement's general reliability.[33]

Reliability may indeed be an efficient measure of probative value, but in the case of impeaching evidence, the reliability inquiry should be limited to assurances that the prior inconsistent statement was made. It should not depend upon the apparent truthfulness of the prior inconsistent statement. To argue otherwise is to assert that the more value a prior inconsistent statement has as substantive evidence, the more willing courts should be to allow it for impeachment.[34] If, however, courts limit the reliability inquiry to the question of whether the witness actually made the prior statement, impeachment is allowed for the proper reason: to attack the credibility of the witness's trial testimony.[35]

Professor Ordover has argued that Rule 403 creates an adequate barrier to the impermissible use of prior inconsistent statements

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> dence would be to analyse the problem in terms of Rule 403—is the probative value of the impeaching evidence outweighed by its prejudicial impact?

3 J. WEINSTEIN & M. BERGER, *supra* note 29, at 607-17.

32. 3 J. WEINSTEIN & M. BERGER, *supra* note 29, at 607-17.

33. *Id.* Judge Weinstein applied Rule 403 to the facts of United States v. Morlang, 531 F.2d 183 (4th Cir. 1975). In his inquiry into the impeaching statement's probative value, he indicated that courts should consider the statement's reliability:

> If this test were applied to the *Morlang* case, the probative value of the evidence would be quite low. The . . . witness to whom it was allegedly made had spent over half his adult life, back to 1941, in prison for convictions which included grand larceny and breaking and entering, and the statement itself was extremely ambiguous, and did not relate to any of the facts of the case.

3 J. WEINSTEIN & M. BERGER, *supra* note 29, at 607-17; *see also infra* notes 34, 54-58 and accompanying text.

34. *See, e.g.*, United States v. Leslie, 542 F.2d 285 (5th Cir. 1976). In that case, the court based its decision on whether to allow impeachment on the impeaching statement's reliability. Because the prior inconsistent statement met the requirements of FED. R. EVID. 803(24), the court allowed impeachment. *Id.* at 290-91. Judge Weinstein cites *Leslie* for the argument that a statement's substantive reliability should become a part of the analysis in determining an impeaching statement's probative value under Rule 403. 3 J. WEINSTEIN & M. BERGER, *supra* note 29, at 607-19 to -20.

35. Courts often misapply this reliability analysis to the subterfuge question. They should not base the subterfuge inquiry on the impeaching statement's reliability. Of course, if the prior inconsistent statement *is* reliable enough to be admitted under Rule 803(24), then courts *should* admit it as substantive evidence. Courts should state that they are applying Rule 803(24), however, instead of allowing a prior statement's substantive value to enter into the subterfuge analysis.

because the probative value of the prior inconsistent statement is limited to the question of the witness's credibility.[36] Because the permissible use of the impeaching statement is limited to impeaching witness credibility, its probative value will always be low. On the other hand, because the prior inconsistent statement probably will contain damaging statements by the witness or defendant, prejudice will usually be high.[37] Under these circumstances, he argues, Rule 403 usually should bar the evidence.[38] In addition, although he notes that Rule 607 seemingly eliminates the surprise and damage requirement, he argues that surprise and damage should remain a part of the Rule 403 analysis.[39] Where the opposing party can show an absence of surprise, the jury confusion which automatically results should bar the prior inconsistent statement.[40]

Professor Graham has criticized the Rule 403 approach on the grounds that it is too uncertain and will lead to divergent results based upon the views of individual judges.[41] In addition, he argues that the rule will be ineffective, rarely barring impeachment with a prior inconsistent statement. This criticism has two facets. First, Graham notes that a proper Rule 403 analysis should consider the probative value of *both* the prior inconsistent statement *and* the testimony it impeaches.[42] Because the probative value of that trial testimony will usually be very high, the value of impeachment of that testimony will be high as well. Under those circumstances,

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36. Ordover, *supra* note 27, at 66.

37. *Id.* at 70.

38. *Id.* at 72.

39. *Id.* at 70.

40. *Id.* at 73-76. Professor Ordover argues that unsworn prior inconsistent statements are not inherently unreliable, or else the Federal Rules would have excluded them *completely*. *Id.* at 74. Thus, he concludes, the question of allowing impeachment with such statements should hinge in part on the reliability of the statement. *Id.*

This conclusion does not state the situation completely and accurately, however. Although the Federal Rules do not completely exclude unsworn statements, the avenue for their admission on the basis of their *reliability* is Rule 803(24). If a prior inconsistent statement bears substantial guarantees of trustworthiness, perhaps courts should admit it; however, courts should analyze trustworthiness under Rule 803(24), not under Rule 607. *See also supra* notes 34-35.

41. Graham, *The Relationship*, *supra* note 11, at 576.

42. *Id.* at 579.

Rule 403 rarely would exclude impeachment with the prior statement.[43]

Second, Graham argues correctly that the probative value and prejudicial effect of a prior inconsistent statement will usually vary directly, thus rarely excluding the statement. If the probative value of the prior statement is limited to attacking the credibility of the witness, most prior statements will indeed be very probative of credibility.[44] The more the prior statement varies from the wit-

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43. *Id.* The correlation between the probative value of the witness's testimony and the probative value of *impeachment* of that testimony is related closely to the application of the affirmative damage requirement. *See, e.g.*, United States v. Rogers, 549 F.2d 490 (8th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977). In that case, the prosecutor called a witness who had previously pled guilty to participation in the same crime. The witness, Baker, had made a previous statement incriminating both the defendant and himself. *Id.* at 493. On the stand, Baker said he could not remember identifying the defendant in his statement, that he could not remember the statement, and, furthermore, that he could not even remember the robbery. The prosecutor then called the agent to whom Baker had made his previous statement. The statement, which directly inculpated the defendant, was read into evidence in its entirety. *Id.* at 494-95.

The court held that the impeachment was permissible. It inquired into the relevancy of the witness's in-court testimony, phrasing the question in terms close to "affirmative damage." *Id.* at 496. The court found that when "one of the actual participants" expressed doubt about the defendant's guilt, the prosecutor was entitled to impeach the witness. The court recognized that

> [i]t would be unfair to permit the use of extrajudicial statements to impeach testimony extraneous to the issues of the case, particularly if related statements damaging to the defendant are disclosed to the jury in the process. Courts must be watchful that impeachment is not used as a subterfuge to place otherwise inadmissible evidence before the jury.

Id. at 496-97. In this case, however, because doubt expressed by a confessed participant was not testimony "extraneous to the issues of the case," impeachment was not being used as a subterfuge; the prosecutor merely questioned the witness on an important matter in the case about which he had unique knowledge.

In United States v. Long Soldier, 562 F.2d 601 (8th Cir. 1977), the court had to decide only whether the witness's testimony was "inconsistent" with his previous grand jury testimony for the purpose of substantive admissibility under FED. R. EVID. 801(d)(1)(A). Commenting on the right to impeach one's own witness, however, the court noted that Rule 607 did away with the *surprise* requirement for impeachment, but stated that "since [the witness's] testimony was sufficiently harmful to the government's case, impeachment was proper. . . ." *Id.* at 605 n.3.

44. For example, consider the situation in which a witness merely denies making an earlier statement. In this Note's hypothetical, for instance, the prosecutor asks, "Did you see the defendant carry a gun and money into his building on the day of the robbery?" The witness responds, "No, I did not." If the prosecution is then given the opportunity to prove through the testimony of the FBI agents that Mrs. Wilson did in fact make such a statement, proof of the prior statement is plainly *very* probative of the witness's credibility.

ness's trial testimony, the more probative the statement is on credibility. On the other hand, most such prior statements assumedly will also damage the defendant. Thus, the more probative the statement, the more incriminatory, and hence more prejudicial, it is. Because Rule 403 requires that evidence be excluded only when prejudicial effect substantially outweighs probative value, the rule would rarely exclude impeachment if prejudice and probative value vary directly.[45]

The Rule 403 approach is also open to the criticism that trial judges will give great deference to impeachment in their weighing process merely because of Rule 607's clear language allowing impeachment. When a trial judge conducts his Rule 403 analysis, he might give great weight to Rule 607 and allow impeachment. In such a case, Rule 607 itself becomes part of the "probative value" of any impeaching statement. Because this addition increases overall probative value, prejudicial effect will rarely outweigh probative value so as to exclude impeachment.

Indeed, Professor Graham has suggested that some courts will conclude that a Rule 403 analysis is not appropriate at all in light of Rule 607, and will allow impeachment regardless of the statement's prejudicial effect.[46] He argues that Rule 403 need not be applied to all evidence. Where a specific rule speaks to a certain question of admissibility, one may interpret that rule as completely controlling the analysis. When the question of impeaching one's own witness arises, therefore, a judge might conclude that no Rule 403 analysis is necessary because Rule 607 clearly speaks to the issue and explicitly sanctions impeachment.[47] Some courts have decided the impeachment question in a manner open to that interpretation.[48]

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45. Graham, *The Relationship*, *supra* note 11, at 579-80.

46. *Id.* at 581.

47. *Id.* at 581-82; *cf.* B. GERSHMAN, PROSECUTORIAL MISCONDUCT § 9.7(a) at 9-34 n.204 (1985) (claiming that Rule 607 "permits a party to impeach his own witness without qualification"); NATIONAL PROSECUTION STANDARDS 17.6(C) (National District Attorneys Ass'n 1977) ("The prosecutor should not be prohibited from impeaching a witness for the state.").

48. *See, e.g.*, United States v. Inendino, 604 F.2d 458, 461 (7th Cir.), *cert. denied*, 444 U.S. 932 (1979); United States v. Alvarez, 548 F.2d 542, 543 n.3 (5th Cir. 1977). In both cases, the court used the plain language of Rule 607 to dismiss rather summarily challenges to impeachment.

On its face, however, the Rule 403 approach appears to be a better method of applying the subterfuge rule. As Professor Ordover has recognized, when courts make the Rule 403 analysis, they should limit consideration of a prior inconsistent statement to its impact on the witness's credibility.[49] If courts consistently applied Rule 403 in that manner, it would screen adequately much impermissible subterfuge.

Under the first of the basic criteria for an effective rule, the Rule 403 approach is superior to the surprise and damage requirement because it does a better job of allowing proper impeachment and excluding impermissible subterfuge. For example, applying a Rule 403 analysis to our two hypothetical prior inconsistent statements seems more satisfactory than does applying the surprise and damage test. If we consider only assurances that the statements were in fact made when analyzing probative value, then both Williams's and Wilson's statements probably are very probative of credibility. The witnesses made these statements to FBI agents, who are probably able to verify and reliably communicate the statements. Because the trial testimony of both witnesses consisted of simple denials that they made any statements, extrinsic proof that the witnesses in fact made lengthy statements might be considered very probative of the witnesses' credibility. In terms of prejudicial effect, Mrs. Wilson's statement arguably is not very prejudicial; a mere bystander, not a participant, made the statement. Also, it is not a claim that the defendant actually did anything illegal. We might conclude, therefore, that the statement should be admitted under Rule 403. On the other hand, Mr. Williams's statement might be considered more prejudicial because it comes from an alleged co-participant and more directly links the defendant to actual criminal activity. As a result, the statement might be excluded under Rule 403 because of its incriminatory nature.[50]

Nevertheless, the Rule 403 approach is still open to criticism. As previously mentioned, courts might not apply Rule 403 consistently because of differing views about what to consider in the pro-

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49. Ordover, *supra* note 27, at 70.

50. Note that these results are completely opposite from those that probably would occur if the current "primary purpose" rationale were applied to this case. *See infra* notes 52-77 and accompanying text.

bative value/prejudicial effect equation. In that case, the results in each inquiry would vary dramatically depending upon which factors courts allowed to enter into the equation. In addition, courts seem reluctant to rely solely on Rule 403 and rely instead on the primary purpose rationale.

Most importantly, however, the Rule 403 approach fails the second criterion for effectiveness. Like the surprise and damage rule, it simply fails to place proper emphasis on the prosecution's motives in calling and questioning the witness. The Rule 403 approach bears no principled link to the goals of the rule against subterfuge. In one sense the rule is more effective than the surprise and and damage rule because it will probably allow more *proper* impeachment; however, Rule 403 focuses on the nature of the evidence itself. The essence of the subterfuge rule is the conduct of the party calling the witness and its effect on the fundamental fairness of the trial procedure. The nature of a piece of evidence sometimes may correlate with the prosecution's conduct, but the relationship is not necessarily causative or direct.[51]

Judicial Response

The federal courts have neither retained the surprise and damage test nor completely adopted the Rule 403 approach. The courts generally have continued to rely on the old pre-Rules language prohibiting subterfuge,[52] but now they also must give weight to

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51. *But cf.* Fenner, *Handling the Turncoat Witness Under the Federal Rules of Evidence*, 55 NOTRE DAME LAW. 536 (1980). Professor Fenner argues that any inquiry which focuses on counsel is artificial, because the *real* goal of the rule against subterfuge is to protect the opposing party from the danger of substantive use of untrustworthy material. He states that

> the proper object of this rule is to protect a party from some level of prejudice threatened by untrustworthy material. It is artificial to focus on counsel and his knowledge as a way of protecting the opposing party. We are not trying to save counsel's face or to protect his personal record and the rule should not focus on counsel.

Id. at 539; *see also* 3 J. WEINSTEIN & M. BERGER, *supra* note 29, at 607-17 (rejecting emphasis on the motive of the proferror).

52. *See* United States v. Hogan, 763 F.2d 697, 702 (5th Cir. 1985) ("[T]he prosecutor may not use such a statement under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible.") (quoting United States v. Miller, 664 F.2d 94, 97 (5th Cir. 1981), *cert. denied*, 459 U.S. 854 (1982)); United States v. DeLillo, 620 F.2d 939, 946 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980);

Rule 607's clear language allowing impeachment. The result is a facially attractive rule, but its application allows impeachment under the wrong circumstances and for the wrong reasons.

The rule against subterfuge existed long before the adoption of the Federal Rules of Evidence. Under that rule, a party could not call a witness for the primary purpose of impeaching him with otherwise inadmissible evidence.[53] Although doctrinally sound, the rule is flawed in its application because of the difficulty in determining the prosecutor's "primary purpose" in calling a witness. As the case law developed, this weakness was exposed.

United States v. Morlang,[54] a pre-Rules case, provides perhaps the best example of the operation of the rule against subterfuge. In *Morlang*, the defendant was accused of conspiracy to commit bribery. The government's witness, Wilmoth, had indicated previously that his testimony would not implicate Morlang.[55] On the stand, Wilmoth denied a conversation with a fellow prison inmate in which he incriminated Morlang. The prosecutor then called the inmate, who testified to Wilmoth's statement, which indeed implicated Morlang.[56]

The court reversed Morlang's conviction, stating that "the only apparent purpose in calling [Wilmoth] was to get before the jury the alleged statement made to Crist."[57] The court emphasized that prior to the trial the witness indicated clearly that his testimony would not harm the defendant. In addition, the government apparently did not try to attack Wilmoth's story on any point other than his statement to Crist.[58] Under those circumstances, the court held that the prosecutor had tried to use impeachment as a mere subterfuge.

United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975); Kuhn v. United States, 24 F.2d 910, 913 (9th Cir.), *cert. denied*, 278 U.S. 605 (1928).

53. *See, e.g.*, United States v. Hogan, 763 F.2d 697, 702 (5th Cir. 1985).

54. 531 F.2d 183 (4th Cir. 1975).

55. The court noted that "[t]he government freely admits that it was in no way surprised when Wilmoth's testimony did not implicate Morlang." *Id.* at 188 n.11.

56. Crist, the inmate, testified that Wilmoth told him, "One of us had to take the rap so the other one could stay out and take care of the business." *Id.* at 188 n.11.

57. *Id.* at 190.

58. The court noted twice that the prosecutor apparently limited his purpose in calling Wilmoth to eliciting testimony that he had never made an incriminating statement to a fellow inmate. *Id.* at 188, 190.

Morlang was the subterfuge rule's last gasp before the passage of Rule 607. Even with Rule 607's explicit language allowing impeachment, however, the courts clung to the rule against subterfuge. The "primary purpose" test continued to develop after the adoption of the Federal Rules and appears to be binding precedent in all circuits which have considered the subterfuge question.[59] The courts' application of the subterfuge rule, however, demonstrates clearly that the "primary purpose" test does not fulfill its purported goals. Under the current application of the primary purpose test, a witness with little to add to a case cannot be impeached, but a witness with other connections to the case is subject to impeachment. These results bear little connection to the fundamental goals of the rule against subterfuge.

In *United States v. Crouch*,[60] for example, the witness previously had told an FBI agent that the defendant asked her to "get rid of the truck" which the defendant had allegedly used in the robbery. On the stand, the witness denied making the statement. The prosecutor then called the agent to testify to her statement.[61] On appeal, the court held that the trial judge should not have allowed the impeachment. Drawing on several pre-Rules cases establishing the rule against subterfuge, including *Morlang*, the court held that the government had impeached its own witness impermissibly. The "primary purpose" test was satisfied when the witness was called to testify only on the limited issue of Crouch's phone call to the witness. The court had little trouble saying that the witness had been called as a subterfuge, because "there was little else of relevance in her testimony."[62]

Courts have applied the primary purpose rationale in other cases with similar results. In *United States v. Fay*,[63] the defendant, who was on trial for assault, called the victim's mother to testify. The mother had stated previously that the victim told her that she was going to the defendant's house and "fight like hell." The defendant admitted that he knew the mother would deny making the earlier

59. *See* United States v. Hogan, 763 F.2d 697, 702 (5th Cir. 1985).
60. 731 F.2d 621 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 778 (1985).
61. *Id.* at 622. No limiting instruction was asked for or given.
62. *Id.* at 624.
63. 668 F.2d 375 (8th Cir. 1981).

statement, but proposed to impeach her testimony with the prior inconsistent statement.[64]

The court upheld the trial judge's exclusion of the impeaching testimony. It applied the "purpose" rule from *Morlang* and found that, under the circumstances, it could not say that the defendant called the mother for any purpose other than impeaching her with her own prior inconsistent statement. The defense attorney apparently questioned the victim's mother only on the victim's alleged statement that she was going to "fight like hell." Because the mother was questioned on that issue only, the court apparently had no difficulty holding that the defendant's "primary purpose" in calling the mother was to impeach her. Because the subterfuge rule prohibits such impeachment, the trial court properly excluded the testimony.[65]

According to this line of cases, courts will not allow an attorney who calls a witness with little to add to a case to impeach that witness with a prior inconsistent statement. Under these cases, a court could rule that the attorney called such a witness for the primary purpose of impeachment, and that the attorney thereby used impeachment as an impermissible subterfuge.

This result has a very strong facial appeal. If the prosecutor knows before trial that a witness called to testify on one or a small number of issues will not adopt his prior statement, then a court easily may assume that the prosecutor intended to impeach the witness to get otherwise inadmissible testimony before the jury. A full consideration of the primary purpose test, however, requires an analysis of cases in which courts allowed impeachment.

Courts have allowed impeachment when the only apparent factual distinction from the *Crouch* line of cases was that the witness was involved more closely in the case. Under those circumstances, courts apparently are simply more comfortable finding that the prosecutor did not call the witness, who can offer testimony on a variety of issues, for the "primary purpose" of impeachment.

In *United States v. Miller*,[66] for example, the witness, Crawford, previously had made a statement to the FBI incriminating the de-

64. *Id.* at 378-79.
65. *Id.* at 379; *see also* Whitehurst v. Wright, 592 F.2d 834, 839-40 (5th Cir. 1979).
66. 664 F.2d 94 (5th Cir. 1981), *cert. denied*, 459 U.S. 854 (1982).

fendant. On the stand, however, he denied the defendant's guilt. The prosecutor introduced Crawford's prior statement to indicate to the jury those areas in which the prior statement differed from his in-court testimony.[67]

One of the most obvious distinctions between *Miller* and *Crouch* was that in *Miller* the witness was not just a passerby, a next-door neighbor, or some other person relatively uninvolved in the case. Crawford was "the hub" of the theft ring for which the defendant was on trial, and already had testified at the trial of Miller's co-conspirator.[68] Under those circumstances, Crawford obviously had a great deal to add to the case. The court was reluctant to say, therefore, that the prosecutor had called him for the "primary purpose" of impeaching him with his prior statement. The court thus held the impeachment permissible.[69]

In *United States v. DeLillo*,[70] the defendant stood accused of conspiracy to commit fraud and bribery. The impeachment issue centered around the testimony of two of the defendant's employees, one of whom implicated the defendant. One employee testified that DeLillo had stated that he did not care what had to be done to stop an investigation of his construction work. The other employee testified to the same conversation, but denied that DeLillo had made the incriminating statement. The prosecutor then introduced a tape recording of a conversation between the two witnesses in which the second witness confirmed the first's version of the story.[71]

The defendant objected to the impeachment, basing his objection on the subterfuge rule. The court affirmed the conviction, noting that the prosecutor did not question the second witness on a limited issue, but elicited testimony on many issues of importance to the case. Under those circumstances, the court could not say that the government called him for the primary purpose of impeachment.[72] The court approached the primary purpose test in the same way that the court in *Miller* did: because the prosecutor

67. *Id.* at 97.
68. *Id.*
69. *Id.* at 97-98.
70. 620 F.2d 939 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980).
71. *Id.* at 946.
72. *Id.* The court stated that

had questioned the witness on so many issues, the defendant could not argue reasonably that the prosecutor called the witness with the "primary aim" of impeaching him with an inadmissible prior inconsistent statement.

A recent district court case from California provides another example of the "primary purpose" rule. In *United States v. Ogorodnikova*,[73] the prosecutor called an alleged participant in the defendant's espionage activity. The witness, Miller, was an FBI agent accused of passing a secret "positive intelligence guide" to the defendant. The witness had made an earlier statement to some of his fellow FBI agents incriminating both himself and Ogorodnikova. He later repudiated that statement and informed the prosecutor before trial that he would deny passing any secret documents.[74]

Citing *Crouch* and *Morlang*, the defendant argued that impeachment with the agent's prior statement should not be allowed. She argued that because he knew that the witness would give testimony inconsistent with his prior statement, the prosecutor was engaging in an impermissible subterfuge by nevertheless calling the witness and questioning him concerning the statement.[75]

The trial court denied the defendant's motion to exclude the impeaching testimony. Under the "primary purpose" rationale, the court found that the prosecutor had not called the agent for the primary purpose of impeachment. Because Miller was a co-participant, he had other testimony to offer as well, including evidence on his other meetings and contacts with the Ogorodnikovs. His testimony on those issues was important to the government's case, and

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> [b]eyond doubt, Monahan was not called to the stand by the government as a subterfuge with the primary aim of getting to the jury a statement impeaching him. Monahan's corroborating testimony was essential in many areas of the government's case. Once there, the government had the right to question him, and to attempt to impeach him . . . about those aspects of his testimony which conflicted with Gorman's account of the same events.

Id.

73. No. CR 84-972(A)-Kn (C.D. Cal. filed Oct. 12, 1984).

74. Memorandum of Defendant at 1, United States v. Ogorodnikova, No. CR 84-972(A)-Kn (C.D. Cal. filed Oct. 12, 1984) (copy on file at *William and Mary Law Review* office).

75. *Id.* at 2-8.

once he took the stand impeachment of any inconsistencies in his story was permissible.[76]

When we analyze the primary purpose rationale in terms of effectiveness and doctrinal validity, we see that it is at least a better alternative than either the surprise and damage test or the Rule 403 approach. The primary purpose test allows much permissible impeachment and screens some impermissible subterfuge. It also is linked more directly to the real goals of the rule against subterfuge and hence is more doctrinally sound than either of the other alternatives. By focusing primarily on the purpose of the prosecutor, rather than on surprise or on the nature of the impeaching statement, the primary purpose rationale places the emphasis of the subterfuge inquiry where it belongs: on the prosecutor and his actions as they affect the fairness of the trial procedure.

Despite its advantages over the other two tests, however, courts should abandon the primary purpose test as currently interpreted. As the cases show, the inquiry into the prosecutor's intentions is based chiefly on how much the witness has to say. If a prosecutor calls the witness to testify on a variety of issues, the courts assume that the prosecutor's motives in inquiring into an earlier statement must be pristine and allow impeachment. If a witness has little connection with the case other than his prior statement, however, the courts assume that the prosecutor must have ulterior motives for inquiring into the statement. To hinge a determination of the prosecutor's "motives" on whether the witness has a lot to say

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76. The court stated that

> [i]t is quite clear that the Government is not calling Mr. Miller to the stand merely for the purpose of gaining admission of otherwise inadmissible evidence. The testimony of Mr. Miller is relevant to the proof of accusations that the Government has brought against the Ogorodnikovs and will certainly be elicited for this purpose.

Motion for Reconsideration of Court's Ruling re Government's Impeachment of Richard W. Miller at 11, United States v. Ogorodnikova, No. CR 84-972(A)-Kn (C.D. Cal. filed Oct. 12, 1984) (copy on file at *William and Mary Law Review* office).

The impeachment issue in *Ogorodnikova* involved the use of Miller's unsworn prior statement to his fellow FBI agents that he had passed secret documents to Ogorodnikova. In an interesting subsequent development, Miller's own trial for espionage resulted in a mistrial when two jurors voted against conviction, partly because they did not believe Miller's prior statement to his fellow agents. One juror told a reporter that Miller "was browbeaten and swayed by the interrogation. He would have signed anything put in front of him." *Painful Stalemate*, TIME, Nov. 18, 1985, at 51, col. 2.

makes no sense, yet courts seem to consider that very factor when ruling on impeachment as subterfuge. When courts determine a prosecutor's "primary purpose" in calling a witness by weighing how much a witness has to add to the case, they lose the trail which leads to the ultimate resolution of the subterfuge question.

This problem stems from the language of the test itself. Asking whether the witness was *called* for the primary purpose of impeachment sets the standard for impermissible subterfuge too high. Under this test, before a trial judge can exclude impeachment as subterfuge, he must make a determination that the prosecutor called a witness for no other apparent purpose than impeachment with his prior inconsistent statement on one issue. If a witness is able to testify on more than one issue, a trial judge will hesitate to make such a determination, which could be easily overturned on appeal. Thus, impeachment is allowed regardless of the prosecutor's real motives in impeaching the witness.

This test also has another obvious practical flaw. If the test for impeachment is whether the witness testifies on more issues than just his prior inconsistent statement, prosecutors will simply inquire into more issues.[77] When the defendant protests that the prosecutor is using impeachment as a subterfuge, the prosecutor need only point out that he clearly has not called the witness only for the purpose of impeaching him: he called the witness for his testimony on the other matters as well. Because the witness testifies on more than one issue, the trial judge allows the impeachment without any real consideration of the prosecutor's actual motives.

SUGGESTED ALTERNATIVE

By placing its emphasis on the prosecutor, the primary purpose rationale goes further than other suggested alternatives toward a proper resolution of the subterfuge question. Unfortunately, that approach does not go quite far enough. The primary purpose rationale prevents a prosecutor from *calling* a witness for the primary purpose of impeaching him with otherwise inadmissible evi-

77. With such a strategy, of course, relevancy becomes a concern. Under FED. R. EVID. 401, however, *any* prosecutor should be able to devise a sufficient relevancy hypothesis to support enough varied questions to meet the "primary purpose" test as it is currently applied.

dence. Courts should shift the inquiry slightly, and forbid impeachment of one's own witness where the witness apparently was *questioned* on a certain issue for the primary purpose of impeachment.

As the primary purpose rationale has developed, the courts focus on factors that have little or no direct relation to the goal of the rule against subterfuge. The primary purpose rationale properly places the emphasis on the prosecutor's conduct, but by inquiring into the amount of evidence a witness has to add to the case, the test allows too much impermissible impeachment. The number of issues upon which the witness will testify is too indirectly related to the prosecutor's real motives in impeaching a witness to be an effective measure of impermissible subterfuge. In addition, trial judges may hesitate to find that a witness was *called* for the primary purpose of impeachment. Consequently, the test should be whether the prosecutor has *questioned* the witness on a particular issue for the primary purpose of impeaching the testimony with a prior inconsistent statement.

If trial judges had more latitude to inquire into reasons for impeachment, more courts would deny impermissible impeachment when they think it is taking place. A rule that does not require judges to determine a prosecutor's primary purpose in calling a witness will provide that latitude. Trial judges would be better able to allow impeachment when proper, and exclude it when improper. This approach would not only link the determination more closely to the real goals of the rule against subterfuge but also would be more practically effective because it allows more permissible impeachment and excludes more subterfuge than the primary purpose rationale.

What factors should guide a judge's inquiry into the prosecutor's motives in questioning a witness? The task is to determine the circumstances under which the prosecutor is most likely questioning the witness for the primary purpose of impeachment with a prior inconsistent statement. A trial is a dynamic set of complex and interrelated situations. When certain of these factors coalesce during a trial, a court reasonably should conclude that the prosecutor is using impeachment with the hope that the jury will take the impeaching statement for its substantive value. In those circum-

stances, courts should be more willing to deny impeachment as impermissible subterfuge.

One factor should be the prosecutor's need for the impeaching statement apart from its value in attacking the witness's credibility. If the statement damages the defendant and contains information that is very important to the prosecutor's case, a court should conclude that the prosecutor's primary motive in inquiring into the issue was more likely to be subterfuge. On the other hand, if the prior inconsistent statement contains evidence that is already before the jury or otherwise cumulative, then a court could conclude reasonably that the prosecutor is motivated less by a desire to get the prior inconsistent statement before the jury. In such a case, impeachment would be proper.

Another factor should be the extent to which the witness has indicated previously that he will contradict his prior statement. This factor would not operate in the simple way that the former surprise test worked but instead would vary as the witness more cogently and consistently stated an intent to tell a different story on the stand. Under this part of the subterfuge determination, surprise would operate only as an element of the more broad inquiry into the prosecutor's motives in questioning a witness on a limited issue. As the parties and the court become more certain that the witness will disavow his prior statement, placing the prior inconsistent statement before the jury appears more likely to be the prosecutor's real motive. If, on the other hand, the witness has made only a few ambiguous statements about his intent to cling to his prior statement, then impeachment by and examination of his prior inconsistent statement probably constitutes valid impeachment rather than impermissible subterfuge.

A recent case illustrates how this factor might operate. In *United States v. Hogan*,[78] the court claimed to be applying the standard "primary purpose" test and not a test of simple surprise; however, the decision can only be explained as applying some of the elements of surprise in a primary purpose rationale context. In *Hogan*, the defendants were accused of smuggling drugs into the country from Mexico. The chief prosecution witness was Carpenter, whom Mexican officials had arrested after he piloted one de-

78. 763 F.2d 697 (5th Cir. 1985).

fendant's plane to an alleged rendezvous. At that time, Carpenter gave statements to Drug Enforcement Administration agents that implicated both defendants in the smuggling scheme.[79] Mexican authorities held Carpenter for 28 months. After his release, the prosecutor called Carpenter to testify before a federal grand jury. In his testimony, he refused to implicate the Hogans, and claimed that his confession to the DEA agents had been coerced and fabricated.[80] At the Hogans' trial, the prosecution called Carpenter. At a voir dire examination out of the jury's presence, Carpenter denied any involvement in the smuggling operation and repeated his claim that the earlier confession had been coerced. He then repeated this testimony before the jury. The defendants cross-examined, and elicited assertions that the Hogans were not involved in the scheme. The prosecution then called several DEA agents and embassy officials, who refuted Carpenter's story of coercion.[81]

The court reversed the defendants' convictions. It agreed with the government that Rule 607 generally allows impeachment of one's own witness, but held that the prosecution had run afoul of the rule against subterfuge.[82] The court emphasized the fact that Carpenter already had testified twice under oath that he had fabricated his earlier confession.[83] Under those circumstances, the court found that the prosecution could not have had any other motive in calling the witness than to impeach him with the inconsistent confession.

The court applied the primary purpose rationale very differently than it had been applied previously. The court found the fact that the witness already had testified inconsistently persuasive. Carpenter's importance in the smuggling operation—a fact which in cases such as *Crouch*, *DeLillo*, and *Ogorodnikova* was the determining element—made little difference. The court noted Carpenter's importance as a witness but concluded that impeachment was imper-

79. *Id.* at 699.

80. *Id.* at 699-700.

81. *Id.* at 700-01. The opinion did not clearly state whether the agents actually testified to Carpenter's earlier statement. The court, however, later referred to the prosecution impeaching the witness with his prior inconsistent statement. *Id.* at 703. The prosecution probably did introduce evidence of Carpenter's prior statement at that time.

82. *Id.* at 701-03. Limiting instructions were neither requested nor given. *Id.* at 702.

83. *Id.* at 703.

missible because the prosecution clearly knew what the witness would say on the stand.[84]

To that extent, *Hogan* is directly inconsistent with cases such as *Crouch* and *DeLillo*, in which the court emphasized how much the witness had to add to the case. In *Hogan*, the witness would have indeed had a great deal to add to the case had he testified consistently with his earlier confession.[85] The court, however, found that the primary purpose test had been satisfied merely because the prosecution had definite advance warning of the witness's current story. The government argued that the court was re-establishing the surprise requirement, but the court denied it.[86] The court distinguished the situation of a witness who merely recants an earlier incriminating statement from Carpenter's situation, in which he had not only changed his story but told the new version before a grand jury and in voir dire.[87] Although no "surprise" would exist in either case, impeachment would be proper only in the former.

The *Hogan* approach would be a useful element in the subterfuge inquiry. The more consistently the witness maintains that his trial testimony will be inconsistent with his prior statement, the less willing a court should be to allow impeachment with that statement. Instead of treating surprise as a fixed point beyond which no impeachment is permissible, a court should analyze the prosecutor's knowledge of the witness's intention to testify inconsistently in terms of a spectrum. As the prosecution becomes more certain that the witness will refuse to adopt his prior statement, the court should be more inclined to disallow impeachment with that statement.

In their subterfuge inquiry, courts also should consider the consequences of impeachment on the prosecutor's case. If a prosecutor

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84. *Id.* The court did not lean toward imposing a "surprise" requirement, however. The court stated explicitly that surprise "is not a necessary prerequisite to impeaching one's own witness under FRE 607." *Id.* at 702. Because the witness had already so firmly refuted his previous statement, however, the court held that the prosecution could have had no other primary purpose in calling the witness than impeaching him.

85. Carpenter piloted the plane used in the alleged smuggling operation. Mexican authorities arrested Carpenter, and he spent more than two years in Mexican jails for his part in the scheme. *Id.* at 699. Obviously, he could have offered at least as much to the case as Mr. Monahan in *DeLillo* or Mr. Miller in *Ogorodnikova*.

86. *Id.* at 702.

87. *Id.* at 702-03.

wishes to impeach a witness who has given both helpful and harmful testimony, a court should scrutinize more carefully the prosecutor's request to impeach the witness with a prior inconsistent statement.

For example, suppose that a witness testifies on five issues. She helps the prosecutor on four of these issues and hurts him on one. The prosecutor wishes to impeach her with her prior inconsistent statement on that one issue. If the general effect of impeachment would be to ask the jury not to believe the witness on all of the five issues, a court should question the prosecutor's motives in impeaching the witness. If impeachment with a prior inconsistent statement would carry collateral negative consequences for the prosecutor, then the court should hesitate to allow such impeachment.

Many authorities see no theoretical problem with a party placing a witness on the stand and then asking the jury not to believe certain portions of that witness's testimony. As Dean Wigmore has noted, to deny impeachment is in most cases to "suppress a portion of the truth."[88] If a party believes that his witness is lying or otherwise mistaken about one issue, he should be allowed to expose inaccuracies in the witness's testimony, and impeachment of the witness's credibility is one of the most effective means of doing so.

A conflict exists, however, between Wigmore's position that impeachment *in general* should be allowed in such circumstances, and the classic view about the role of impeachment with a prior inconsistent statement.[89] As already noted, such impeachment is not designed to convince the jury of the truth or falsity of either of the two statements; it is limited to showing the jury that the wit-

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88. 3A J. WIGMORE, *supra* note 1, § 904 at 675. As Wigmore observed:

> In most cases, the contradiction will deal with only one item in the whole story of the witness; and there is no reason why the party should not get the benefit of the witness' testimony on the remaining points and yet show him mistaken in this one item; such a course is in no way dishonest, and to forbid it is to impose a captious and purposeless restriction and to suppress a portion of the truth.

Id.

89. *See supra* note 3.

ness is a person who is capable of telling inconsistent stories on the same matter, and therefore is less deserving of credibility.

If the proper use of impeachment with a prior inconsistent statement is so limited, one can make a reasonable argument that logical flaws exist in allowing a witness to testify on several issues but allowing his impeachment on only one issue with a prior statement. In doing so a prosecutor would say to the jury, in effect, "Listen to what my witness has to say on all these issues. Now, see that he is capable of lying about any of them."[90] Wigmore's position makes much more sense with other forms of impeachment such as testing memory or perception; however, freely allowing impeachment with a prior inconsistent statement is logically inconsistent. If impeachment with the witness's prior inconsistent statement would carry collateral negative consequences for the prosecutor's case, a court should hesitate to allow such impeachment.

Ironically, this factor would operate in a manner completely opposite from the current primary purpose rationale. Under the suggested alternative, the more a witness adds to the prosecutor's case, the more likely it is that impeachment with a prior inconsistent statement would be improper. If a witness testifies on several issues, and so impeachment with a prior inconsistent statement would carry collateral negative consequences for the remainder of the prosecutor's case, courts might not allow impeachment. Under the current primary purpose rationale, however, the more a witness adds to a case, the more likely a court is to sanction impeachment.[91]

A comparison of the suggested alternative's operation in a typical case with that of the current primary purpose rationale reveals the alternative's superiority. In *United States v. Ogorodnikova*,[92]

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90. *Cf.* Note, *supra* note 11, at 115 ("It truly makes no sense to put a witness on the stand and ask the jury not to believe his testimony; the proponent would be asking the jury to treat the witness's testimony as a nullity and he would have proved nothing."). *But see* Fenner, *supra* note 51, at 538. Professor Fenner argues that courts should exclude an offer of impeachment as irrelevant in such a situation: "If counsel asserts the truth of all the witness' testimony except that regarding 'A' and he knows in advance that he will impeach the witness' testimony regarding 'A,' then, under that counsel's own theory, the initial inquiry into 'A' is not relevant." *Id.*

91. *See supra* notes 52-77 and accompanying text.

92. No. CR 84-972(A)-Kn (C.D. Cal. filed Oct. 12, 1984); *see also supra* notes 73-76 and accompanying text.

for example, although Miller had testimony to offer on many issues, that probably did not affect the prosecutor's motivation to inquire into his prior inconsistent statement on the one issue in question. The prosecutor almost certainly asked Miller about his earlier statement with the intention of impeaching him if he denied its substance. In that regard, the prosecutor in *Ogorodnikova* probably had motivations no different from those of the prosecutor in *United States v. Crouch*,[93] in which the court disallowed impeachment. Under the proposed alternative, which focuses on the prosecutor's motives in inquiring into a particular issue, the court probably would not have allowed impeachment in *Ogorodnikova*.

Because the existence of subterfuge is a function of the individual prosecutor's motives in each case, courts must have the authority to make individual determinations based on the varying dynamics of each case. When applied to our two hypothetical prior inconsistent statements, the proposed alternative's results depend not upon the nature of the two statements, nor upon the mechanical elements of surprise and damage, but upon the prosecutor's actions and the dynamics of the trial.

For example, Mrs. Wilson merely indicated to the prosecutor that she is not willing to say for sure that it was Davis she saw that day. She has said that if she is put on the stand, she will tell what she believes to be the truth: that she is not sure what she saw. In that case, if she can be cross-examined on that testimony, then introduction of her prior inconsistent statement probably would be proper impeachment, regardless of the fact that she testifies on no other issue. If, on the other hand, Mr. Williams clearly, emphatically, and continually indicates that his trial testimony will in no way implicate Davis in the robbery, then inquiring into his prior inconsistent statement is probably improper—again, regardless of how many other issues about which he testifies.

CONCLUSION

The Federal Rules of Evidence clearly establish a party's right to impeach his own witness. The judicial doctrine that prohibits impeachment as subterfuge, however, calls into question the extent to

93. United States v. Crouch, 731 F.2d 621 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 778 (1985); *see also supra* notes 60-62 and accompanying text.

which a party may exercise that right freely when he wishes to impeach his own witness with an otherwise inadmissible unsworn prior inconsistent statement. Courts face the dilemma of having to comply with Rule 607's clear language sanctioning impeachment while guarding against impermissible subterfuge.

Courts and commentators have offered several suggestions about how to deal with this dilemma, but none offer a solution adequate in terms of both effectiveness and doctrinal validity. The surprise and damage rule would certainly stop impermissible subterfuge, but would also cut off much proper impeachment. The Rule 403 approach does a better job of allowing proper impeachment, yet it also allows too much impermissible subterfuge. The primary purpose rationale in current use by most courts appears to be a better solution, but its application prevents a proper resolution of the subterfuge question. Most importantly, none of these suggestions place the emphasis on the motives of the prosecutor, where it belongs.

The prosecutor's motives are at the very heart of the subterfuge problem; a proper solution must recognize that and develop its focus accordingly. Courts should analyze the subterfuge problem by asking whether the witness was questioned on the subject matter of his prior statement for the primary purpose of impeachment with that statement. Such an approach places the emphasis on the prosecutor and narrows the inquiry to the specific prior statement at issue.

In a subterfuge determination, courts should consider such factors as the prosecutor's need for the substance of the prior statement, the extent to which the witness has demonstrated a clear intent to tell a different story on the stand, and the collateral negative consequences of impeachment with the prior inconsistent statement. Because the presence of subterfuge depends upon the vagaries of differing prosecutors, witnesses, and other trial circumstances, judges must have the freedom to weigh these various factors as they see fit. If, after a full inquiry into the prosecutor's motives in questioning a witness on a certain issue, the court concludes that the witness was questioned for the purpose of impeachment with an unsworn prior inconsistent statement, the court should exclude such impeachment as subterfuge.

A more strict application of the rule against subterfuge will not deprive a party of the valid use of all unsworn statements in every case. The suggested rule still would allow inquiry into the prior inconsistent statement's reliability, but that inquiry now would take place in a more principled context. Instead of using the statement's reliability to determine whether the prosecutor properly impeaches his witness, the parties could argue and the court could decide whether the prior inconsistent statement is reliable enough to be admitted as substantive evidence under Rule 803(24).[94] If a prior inconsistent statement is extremely reliable, perhaps courts should admit it; however, that inquiry should be distinct from the prosecutor's motives in *impeaching* a witness. If a prosecutor wants to get a prior inconsistent statement before the jury, courts should decide the reliability issue under Rule 803(24) rather than allow the statement's reliability to enter into the subterfuge analysis.

Other options exist as well. One option is to amend Rule 801(d)(1)(A) to allow for substantive admissibility of all prior inconsistent statements.[95] Another option is simply to abandon the rule against subterfuge, and allow parties to impeach witnesses freely, even when done with the hope of the jury taking the impeaching evidence for its substantive value. This proposal, however, would require abandoning one of the foundations of our trial procedure: the notion that courts should not convict people on the basis of unsworn testimony.[96]

The question of how to treat unsworn statements of course involves compelling considerations on both sides. In any case, a strong argument exists for admitting impeaching evidence. If a trial is supposed to determine the truth of the issue, courts generally should allow a party to bring that truth to the jury as best he

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94. FED. R. EVID. 803(24).

95. *See supra* note 12; *see also* Graham, *Employing Inconsistent Statements*, *supra* note 11, at 1589; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192 (1948); Note, *supra* note 11, at 118.

96. *See* Bridges v. Wixon, 326 U.S. 135, 153-54 (1945) ("So to hold 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.") (citations omitted); *see also* P. ROTHSTEIN, FEDERAL RULES OF EVIDENCE, at 185 (Nov. 1984) (stating that while impeachment of one's own witness may be helpful, "it must be considered in light of the judicial system's notions of fairness.") (discussing United States v. Morlang, 531 F.2d 183 (4th Cir. 1975)).

can. That would include permitting impeachment of a witness whom the party suspects is lying on the stand. As Dean Wigmore noted, "[t]he exclusion of the evidence would be unjust . . . in depriving the party of the opportunity of exhibiting the truth. . . ."[97]

This argument's foundation, however, conflicts with other basic assumptions about the trial process. In effect, Wigmore argues that the search for truth is important enough to accept the risk of the jury using the statement substantively. This argument assumes, however, that the party is introducing the statement as a part of the search for truth. When that is *not* the case—when the party is merely introducing the prior inconsistent statement to get it before the jury in the hope that they will use it as substantive evidence, the "search for truth" rationale is no longer valid. Under those circumstances, courts should not allow the prosecution to impeach because no "search for truth" exists to outweigh the fear of substantive use by the jury.

If courts continue to apply the rule against subterfuge, they must analyze the problem in terms of its essential character. A proper solution would require courts to examine the prosecutor's motives in questioning and impeaching a witness. Implicit in such an examination is the requirement that courts have the freedom to conduct that inquiry adequately. The problem is not one of evidentiary admission, and thus does not turn solely on evidence-based elements such as reliability, prejudice, or probative value. The question is one of the fundamental fairness of the trial procedure, and the prosecutor's actions as they affect it. Courts should conduct the subterfuge inquiry accordingly.

Don Johnsen

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97. 3A J. WIGMORE, *supra* note 1, § 903 at 672. Dean Wigmore continued:

> The only real danger that is to be apprehended [with impeachment] is that the contradictory statement may be taken by the jury as substantive testimony in the place of the statement on the stand; but this, though involving the hearsay rule, is not a serious enough disadvantage to outweigh the above considerations, and can be guarded against by proper instructions.

Id.