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## An Introduction to the Oklahoma Evidence Code: Hearsay

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# TULSA LAW JOURNAL

Volume 14

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## AN INTRODUCTION TO THE OKLAHOMA EVIDENCE CODE: HEARSAY†

Walker J. Blakey\*

I. INTRODUCTION—AN OVERVIEW OF THE NEW HEARSAY SYSTEM .....	637
II. SECTION 801—HEARSAY, NONHEARSAY, NOT HEARSAY AND EXCEPTIONS BY DEFINITION .....	638
A. <i>How to Read Section 801</i> .....	638
B. <i>True Nonhearsay</i> .....	643
C. <i>Admissions of a Party-Opponent</i> .....	644
1. Introduction—The Nature of Admissions of a Party-Opponent .....	644

† This article is the second in a series to be published in the TULSA LAW JOURNAL which will comprehensively examine the Oklahoma Evidence Code in its entirety. The next article will discuss the hearsay exceptions in Sections 803 and 804 of the Code. This article draws upon the author's work on a proposal for rules of evidence for North Carolina which was supported by the North Carolina Law Center, and upon work on a book tentatively titled AN INTRODUCTION TO THE FEDERAL RULES OF EVIDENCE. I must thank Dean Frank T. Read and Professor Ralph C. Thomas of the University of Tulsa College of Law for their assistance in dealing with Oklahoma law and my colleague Henry Brandis, Jr. for his critique of this article. I received assistance on work which is incorporated into this article from Marilyn O. Adamson, now a member of the Oklahoma Bar, Katharine Hershey, now a member of the State of Washington Bar, Michael R. Ferrell, now a member of the North Carolina Bar, Katherine McArthur Schwartz and Mary E. Lee.

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2. Personal and Adoptive Admissions of a Party-Opponent .....	645
3. Admissions by Agents and Employees of a Party-Opponent .....	649
4. Admissions by Co-conspirators of a Party-Opponent .....	651
5. Foundation Requirements for Vicarious Admissions of a Party-Opponent .....	652
6. The Code Does not Provide any Exception for Statements by Persons in Privity with a Party .....	653
D. <i>Prior Inconsistent Statements by a Witness</i> .....	655
1. Introduction—The Three Theories Involved in Section 801(4)(a)(1) .....	655
2. Substantive Use of Sworn Prior Inconsistent Statements .....	659
3. Impeachment Use of Prior Inconsistent Statements .....	661
4. Difficulties Caused by the Requirement that the Prior Statement Be Inconsistent .....	661
5. Are Prior Inconsistent Statements Inferior Evidence Even if Admitted As Substantive Evidence? .....	665
6. Difficulties That Might Be Caused By the Requirements that the Witness Be Subject to “Cross Examination” Concerning the Statement .....	676
E. <i>Use of Prior Consistent Statements As Either Substantive or Rehabilitative Evidence</i> .....	677
F. <i>Oklahoma Did Not Adopt a Hearsay Exception for Statements of Identification</i> .....	680
G. <i>Nonassertive Conduct</i> .....	681
1. Introduction .....	681
2. Determining Whether Conduct Was Intended as an Assertion .....	683
3. Weighing the Probative Value of Nonassertive Conduct .....	685
H. <i>The Oklahoma Evidence Code Does Not Create A Hearsay Exception for “Implied Assertions” Based Upon Assertive Conduct</i> .....	686

## I. INTRODUCTION—AN OVERVIEW OF THE NEW HEARSAY SYSTEM

Sections 801 through 806 of the Oklahoma Evidence Code<sup>1</sup> provide an elaborate and almost completely comprehensive system for the admission or exclusion of various kinds of hearsay evidence. The system is almost an exact duplicate of the one created by the draftsmen of the Federal Rules of Evidence because Oklahoma Evidence Code Sections 801 through 806 follow the corresponding Federal Rules of Evidence very closely. Although most of the ideas involved in this hearsay system are familiar ones, the overall effect of the new system is to enlarge greatly the opportunities for the introduction of hearsay evidence. The new system not only creates new hearsay exceptions but also frequently enlarges the old exceptions it restates. It is hard to weigh the simplification produced by the relatively clear reorganization of the old exceptions against the complications introduced by the new exceptions and the enlargements of old exceptions. It is probably fair to say, however, that hearsay has always been and remains a complex part of the law of evidence.

The organization of the hearsay system is helpful. Section 801 defines hearsay, and Section 802 provides for the exclusion of hearsay "except as provided by law." Section 803 states twenty-four express exceptions to the rule against hearsay which apply regardless of whether the declarant who made the hearsay statement is available as a witness. Section 804(B) adds five additional express exceptions which apply only if the declarant who made the hearsay statement is unavailable as a witness. Section 804(A) gives an elaborate and generous list of situations in which a declarant is to be considered to be unavailable as a witness. Section 805 provides that statements involving multiple layers of hearsay within hearsay may be admitted if an exception to the rules against hearsay can be found for each layer. Finally, Section 806 permits the credibility of a hearsay declarant to be attacked or defended.

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1. Oklahoma Evidence Code, ch. 285, 1978 Okla. Sess. Laws 801 (to be codified as OKLA. STAT. tit. 12, §§ 2101 to 2107, 2201 to 2203, 2301 to 2305, 2401 to 2411, 2501 to 2513, 2601 to 2615, 2701 to 2705, 2801 to 2806, 2901 to 2903, 3001 to 3008, and 3101 to 3103). In this article all citations as well as textual references to the Oklahoma Evidence Code will be called by section numbers as they appear in the Senate Bill, since these numbers are largely the same as the numbers of the corresponding federal evidence rules and the numbers of the rules in the proposed Oklahoma Evidence Code. The codification uses the same numbering system but adds 2,000 to each number, thus a citation or textual reference to § 401 indicates codification at OKLA. STAT. tit. 12 § 2401 (Supp. 1978). In addition, textual references to the Code refer to the Oklahoma Evidence Code as enacted, although the full name is also used where needed for clarity.

The hearsay system is not as simple as the foregoing suggests. One major complication is created by the final exception in both Sections 803 and 804. Sections 803(24) and 804(B)(5) contain identical language creating an exception for a statement "not specifically covered by any of the foregoing exceptions" if the statement meets several requirements, the most important of which is a requirement of "equivalent circumstantial guarantees of trustworthiness." These two exceptions are frequently called the "open ended" or "catch-all" exceptions.<sup>2</sup> Conversely, a number of hearsay exceptions created by this hearsay system do not appear in Sections 803 and 804. Section 801, which defines hearsay, contains several provisions which this article will call "exceptions by definition." Section 703 creates a partial exception to the hearsay rules for hearsay statements relied upon by an expert witness which are "of a type reasonably relied upon by experts in the particular field." Sections 405, 608 and 609 permit the use of some evidence of reputation and criminal convictions to prove character.

## II. SECTION 801—HEARSAY, NONHEARSAY, NOT HEARSAY AND EXCEPTIONS BY DEFINITION

### A. *How to Read Section 801*

Section 801<sup>3</sup> is an elaborate rule and many parts of it can easily be

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2. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 156 (1973).

3. Section 801 Definitions.

For purposes of this Code;

1. A "statement" is:

a. an oral or written assertion, or  
b. nonverbal conduct of a person, if it is intended by him as an assertion;

2. A "declarant" is a person who makes a statement;

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

4. A statement is not hearsay if:

a. the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(1) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a deposition, trial, hearing or other proceeding, or  
(2) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive; or

b. the statement is offered against a party and is

(1) his own statement, in either his individual or a representative capacity, or  
(2) a statement of which he has manifested his adoption or belief in its truth, or  
(3) a statement by a person authorized by him to make a statement concerning the subject, or  
(4) a statement by his agent or servant concerning a matter within the scope of his agency or employment, or  
(5) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

misread. Indeed, the more a reader knows about hearsay, the more likely he is to misread Section 801. The easiest way to read Section 801 is to treat it as performing two different functions. First, Section 801 draws the traditional distinction between the hearsay use of out of court statements and the nonhearsay use of such statements. Second, Section 801 creates four or five "exceptions by definition" to the rule against hearsay by excluding from its definition of hearsay certain uses of out of court statements which would otherwise be within the definition. Four "exceptions by definition" are clearly provided by the language of Section 801. These are exceptions for (1) admissions of a party-opponent,<sup>4</sup> (2) some prior inconsistent statements by a witness,<sup>5</sup> (3) some prior consistent statements by a witness,<sup>6</sup> and (4) nonassertive conduct which is offered to prove a belief of the nonassertive actor.<sup>7</sup> A comment by the Federal Advisory Committee that drafted the Supreme Court version of the proposed Federal Rules of Evidence suggests the existence of a fifth exception by definition. That comment suggested that language which has been carried forward unchanged into both the Federal Rules of Evidence and the Oklahoma Evidence Code<sup>8</sup> creates an exception by definition for "implied assertions." This article will argue that the Oklahoma Evidence Code does not create any such exception.

It will frequently be necessary in discussing Oklahoma Evidence Code Section 801 to look back to the creation and development of its ancestor, Federal Evidence Rule 801. The reader will therefore have to overcome a problem of terminology. Although Section 801 is virtually a word by word copy of Federal Evidence Rule 801 (except for two deletions),<sup>9</sup> Section 801 is, nevertheless, the only section of the Oklahoma Evidence Code whose subdivisions are not instantly recognizable as the equivalents of the corresponding subdivisions of the corresponding Federal Evidence Rules. All sections of the Oklahoma Code except Section 801 changed the lower case letters used in the Federal Rules to capitals, but there is no difficulty in seeing that Section

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4. Section 801(4)(b).

5. Section 801(4)(a)(1).

6. Section 801(4)(a)(2).

7. Section 801(1).

8. Section 801(3).

9. There is no subdivision in Section 801 corresponding to Federal Evidence Rule 801(d)(1)(c) (statements of identification). Section 801(4)(b)(3) corresponds to Federal Evidence Rule 801(d)(2)(D) but does not require that a statement must have been "made during the existence of the relationship."

804(B)(5) corresponds to Rule 804(b)(5). A comparison of Section 801 and Rule 801, however, must deal with a system in which the order of the federal subdivision designations has been rejected in favor of one that is somehow one step out of step. Numbers replace letters; letters, numbers; and numbers, letters again. Thus Rule 801(d)(2)(A) corresponds to Section 801(4)(b)(1). Persons using both the Code and the Rules will eventually master this transliteration. This article will supply the transliteration in the footnotes.

In fairness to the draftsmen of both Federal Evidence Rule 801 and Oklahoma Evidence Code Section 801, it must be pointed out that they did not take the simple view of their redefinition of hearsay that has been suggested to the reader as useful. The elaborate provisions of Section 801 were created by the Advisory Committee which drafted the proposed Federal Rules of Evidence. That Committee attempted to justify each of the provisions which are here called "exceptions by definition" with arguments that some unusual feature of the statements involved in each provision justified treatment of that provision as "not hearsay" rather than as an exception to the rule against hearsay.<sup>10</sup> However, none of the arguments which the Advisory Committee made in support of these provisions were directed to the basis upon which hearsay is usually distinguished from nonhearsay—the purpose for which an out of court statement is to be used.

A hearsay problem arises whenever an out of court statement is offered for a testimonial purpose—that is, for a purpose which involves treating the out of court declarant who made the statement as if he were a witness to facts described by the statement.<sup>11</sup> Whenever that happens, the person who ought to be cross-examined about the out of court statement is the out of court declarant himself. On the other hand, when an out of court statement is offered for a nontestimonial purpose in which the mere fact that the statement was made is enough

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10. (Proposed) Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 293-97 (1972) [hereinafter cited as Proposed Federal Rules]. Similar arguments by the Subcommittee on Evidence of the Code Procedure - Civil Committee of the Oklahoma Bar Association accompany their draft of a *Proposed Oklahoma Code of Evidence*, 47 OKLA. B.J. 2606, 2644-45 (1976) [hereinafter cited as *Proposed Code*]. These arguments also appear in the revised version of the Evidence Subcommittee's Notes which appear throughout OKLA. STAT. ANN. tit. 12, §§ 2101 to 3103 (West Supp. 1979) in the form of comments upon the enacted Code sections. See the text accompanying notes 28 to 33, 85 to 102, 170 to 181, 191 to 201 and 215 to 261 below for discussions of the individual arguments.

11. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 245, 246 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

to prove something, there is no hearsay problem.<sup>12</sup> The only question in the nontestimonial situation is whether the statement was made or not. Any witness who claims to have heard the statement can be fully cross-examined as to whether or not the statement was made.

All of the situations for which Section 801 creates "exceptions by definition" involve the testimonial use of out of court statements. This is probably most clearly illustrated by the exception for admissions of a party-opponent created by Section 801(4)(b).<sup>13</sup> This is one of three situations for which Section 801(4) creates an "exception by definition" by the simple device of declaring that a statement included in that situation "is not hearsay." Because we already know what an admission of a party-opponent is and what it does, we are unlikely to be confused by that definition. We know that an admission of a party-opponent is received in evidence for a testimonial purpose.<sup>14</sup> An admission by a party-opponent can be used to prove the truth of whatever it admits. Therefore the statement in Section 801(4) that admissions of a party-opponent are "not hearsay" cannot mean that admissions of a party-opponent are being admitted for nontestimonial purposes. Instead Section 801(4) means only that the rule against hearsay is not to be applied to exclude admissions of a party-opponent from introduction as evidence. By declaring that admissions of a party-opponent are "not hearsay," Section 801 exempts them from the ban on hearsay set forth in Section 802 and therefore permits them to be introduced in evidence for all purposes, testimonial or nontestimonial.<sup>15</sup>

The reader must distinguish carefully between the true nonhearsay which is admitted in evidence for a nontestimonial purpose and the four or five provisions in Section 801 which exclude statements (or other evidence) from the definition of hearsay set forth in that Section in order to permit them to be admitted in evidence for either nontestimonial or testimonial purposes. The reader may find it helpful in dealing with Section 801 to draw a distinction between the words "nonhearsay" and "not hearsay." If the reader will reserve the term nonhearsay for out of court statements that are admitted for a nontestimonial purpose and apply "not hearsay" to all of the evidence which

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12. MCCORMICK, *supra* note 11, § 249.

13. The corresponding Federal Evidence Rule is 801(d)(2).

14. MCCORMICK, *supra* note 11, § 262, at 629-30; 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2) [01] (1978 & Supp. 1978) [hereinafter cited as 4 WEINSTEIN & BERGER].

15. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2) [01].

may be admitted for both testimonial and nontestimonial purposes, he may find it easier to understand Section 801. This article has used and will continue to use the term "exception by definition" to describe those provisions that I suggest might be called "not hearsay."

Sections 801(4)(a)(1)<sup>16</sup> and 801(4)(a)(2)<sup>17</sup> are two sections that might easily be misread if the reader is not alert to what Section 801 means by the phrase "not hearsay." The kinds of out of court statements involved in those provisions, prior inconsistent statements by a witness and prior consistent statements by a witness, are ones which were admissible under the common law only for nontestimonial purposes.<sup>18</sup> The effect of the provisions in Section 801(4)(a)(1) and 801(4)(a)(2) that some of these prior statements by witnesses are "not hearsay" is to permit such statements to be admitted for both testimonial and nontestimonial purposes.<sup>19</sup>

The fourth exception by definition applies to conduct rather than statements. Section 801(1) excludes from the definition of statement and therefore from the definition of hearsay in Section 801(3) all conduct that was not intended as an assertion by the person who performed the conduct. The effect of this is to permit the nonassertive conduct to be introduced as evidence of the beliefs of the person who performed the conduct.<sup>20</sup> The beliefs could then be used for a testimonial purpose. The possible fifth exception by definition involves a similar idea in which assertive conduct and statements would be used to prove beliefs of the speaker different from his intended assertions. Once again the beliefs would be used for testimonial purposes.<sup>21</sup> The term implied assertions is used to describe this kind of evidence. Whether Section 801 creates an exception by definition for implied assertions depends upon a question of interpretation which will be discussed later in this article.<sup>22</sup>

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16. The corresponding Federal Evidence Rule is 801(d)(1)(A).

17. The corresponding Federal Evidence Rule is 801(d)(1)(B).

18. *Proposed Code*, *supra* note 10, at 2645; 3A & 4 J. WIGMORE, EVIDENCE §§ 1018, 1126, 1129, 1130, 1132 (J. Chadbourn 1970 & 1972); MCCORMICK, *supra* note 11, § 34; 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1) [01] & ¶ 801(d)(1)(B) [01].

19. *Proposed Code*, *supra* note 10, at 2645; and 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1) [01] & ¶ 801(d)(1)(B) [01].

20. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(a) [01] and [02].

21. See Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L.REV. 682, 684 n.8, and Proposed Federal Rules, *supra* note 10, at 294.

22. See text accompanying notes 216-261 *infra*.

## B. *True Nonhearsay*

It continues to be true under the Oklahoma Evidence Code that out of court statements that are offered in evidence for a nontestimonial purpose are nonhearsay and are not barred by the rule against hearsay.<sup>23</sup> Thus the words that form a contract are admissible to prove what was agreed.<sup>24</sup> It also continues to be true under the Code that hearsay is a particular use of an out of court statement; therefore, whether or not a particular statement is hearsay depends upon the purpose for which it is offered in evidence. Some out of court statements may have only one possible use in a particular case and are therefore clearly either hearsay or nonhearsay. Other statements, however, are capable of being used for either a testimonial or a nontestimonial purpose.<sup>25</sup> One frequently used example involves an out of court statement that an automobile has faulty brakes made before the car was involved in an accident which is alleged to have been caused by faulty brakes. If the out of court statement is offered for the purpose of proving that the automobile did have faulty brakes, it is being used as hearsay and must either satisfy one of the exceptions to the rule against hearsay or be excluded. However, if the statement is offered for the purpose of proving that the driver was given notice that the brakes were bad, the purpose is nontestimonial and the rule against hearsay does not apply.<sup>26</sup> The evidence might nevertheless be excluded under Section 403 if the trial court found that its probative value as proof of notice was substantially outweighed by the danger of unfair prejudice due to possible misuse of the statement for a hearsay purpose, but the hearsay rule no longer applies to the statement if it is offered for a nontestimonial purpose.

Section 801(3)<sup>27</sup> is the portion of the Code which confirms that out of court statements offered in evidence for nontestimonial purposes are not hearsay. It provides: "‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

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23. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(c) [01].

24. *Id.*; MCCORMICK, *supra* note 11, § 249.

25. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 166 (1978).

26. *Id.*

27. The corresponding Federal Evidence Rule is 801(c).

### C. *Admissions of a Party-Opponent*

#### 1. Introduction—The Nature of Admissions of a Party-Opponent

It continues to be true under the Code just as it was true at common law that the exception for admissions of a party-opponent is substantially different from all other exceptions. Many restrictions which are applied to other hearsay exceptions do not apply to admissions of a party-opponent. A party making an out of court admission need not have personal knowledge of the matter about which he speaks.<sup>28</sup> The statement need not be against his interest at the time he makes it.<sup>29</sup> And it is unlikely that the rule against opinion will be applied to exclude anything he admits.<sup>30</sup> An admission of a party-opponent is admissible whenever it will aid the opposing party's case simply because it is an admission of a party-opponent.

It was upon these aspects of the law of admissions of a party-opponent that the draftsmen of the Federal Rules of Evidence and the Oklahoma Evidence Code based their arguments that admissions of a party opponent should be described as "not hearsay." The outcome of this argument will not affect anything. Admissions of a party will be admissible as evidence regardless of whether we call them exceptions to the rules against hearsay or "not hearsay." Furthermore, the usual rules that apply to admissions of a party-opponent will remain the same regardless of which phrase is used to explain why they are admissible. Nevertheless, a brief review of the debate may help to clarify the nature of admissions of a party-opponent.

Both the Federal Advisory Committee and the Oklahoma Evidence Subcommittee justified the classification of admissions of a party-opponent as "not hearsay" with the following words:

[A]dmissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed

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28. 4 J. WIGMORE, EVIDENCE § 1053(1) (J. Chadbourn 1972); McCORMICK, *supra* note 11, § 263; 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(A) [01].

29. 4 J. WIGMORE, EVIDENCE § 1048(3) (J. Chadbourn 1972); McCORMICK, *supra* note 11, § 262; 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(A) [01].

30. 4 J. WIGMORE, EVIDENCE § 1053(3) (J. Chadbourn 1972); McCORMICK, *supra* note 11, § 264; 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(A) [01].

from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.<sup>31</sup>

That statement describes accurately the formal requirements for the admission in evidence of admissions of a party-opponent, but it ignores what is done with such admissions and why it is done.

Admissions of a party-opponent are used for the hearsay testimonial purpose of proving the truth of what they say.<sup>32</sup> They are used more often than any other kind of hearsay. Among the reasons that admissions of a party-opponent are used so often is the fact that they are persuasive. The judge and the jury are very likely to decide that they are trustworthy.

It is true that admissions of a party-opponent do not have to pass any of the tests that are designed to assure trustworthiness in other hearsay exceptions. A party need not have had personal knowledge of the matter admitted, and the statement need not have been against his interest at the time it was made. But the nature of admissions of a party-opponent provides other assurances of trustworthiness. A party is very likely to know the truth about the matter involved and is unlikely to have said something that can be used to make a case against him if it was not true. In any event, if an admission by a party was incorrect, he is in an excellent position to explain why he was incorrect.

The formal requirements for the introduction of admissions of a party-opponent have not been restated to require any of "these facts that do give assurances of trustworthiness, but their presence probably explains the frequency and success with which admissions of a party-opponent are used as evidence in courts. Mere embarrassing circumstances would not be so convincing."<sup>33</sup>

## 2. Personal and Adoptive Admissions of a Party-Opponent

Any out of court statement made by a party himself which would

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31. *Proposed Code*, *supra* note 10, at 2645 (quoting from Proposed Federal Rules, *supra* note 10, at 297).

32. E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 241 (5th ed. J. Weinstein 1976).

33. Blakey, *You Can Say That If You Want—the Redefinition of Hearsay in Rule 801 of the Proposed Federal Rules of Evidence*, 35 OHIO ST. L.J. 601, 617 (1974) [hereinafter cited as Blakey, *Redefinition*].

help his opponent's case is admissible against that party as an admission of a party-opponent under Section 801(4)(b)(1).<sup>34</sup>

Under common law practice this exception also permitted the introduction, as an admission of a party-opponent, of any conduct by a party that strengthened the case against him, such as an attempt to destroy evidence or an attempt to bribe a witness.<sup>35</sup> Though it is now possible to argue that such evidence comes in as nonassertive conduct rather than under any of the provisions of Section 801(4),<sup>36</sup> it is clear that it is still admissible. Counsel would be wise to continue to argue to the jury that they should consider such conduct to be an admission.<sup>37</sup>

A party may also make an admission by adopting a statement by someone else, and this will be admissible against that party as an admission of a party-opponent under Section 801(4)(b)(2).<sup>38</sup> A party can adopt a statement by some other person because he wishes to do so,<sup>39</sup>

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34. Section 801(4) provides in part, "A statement is not hearsay if . . . the statement is offered against a party and is (1) his own statement, in either his individual or a representative capacity. . . ." This section corresponds to Federal Evidence Rule 801(d)(2)(A).

35. 2 J. WIGMORE, EVIDENCE §§ 277, 278, 291 (3d ed. 1940); MCCORMICK, *supra* note 11, § 273.

36. Section 801(1) and corresponding Federal Evidence Rule 801(a) define "statement" so as to exclude conduct that was not intended as an assertion. The purpose of this definition is to exempt nonassertive conduct from the ban of the rule against hearsay, but an incidental effect of the definition is to remove also such conduct from the coverage of the exceptions by definition for admissions of a party-opponent. Section 801(4) also applies only to "statements," and therefore does not apply to such nonassertive conduct.

37. The reader must be careful not to be confused by the special ways in which Section 801 uses particular words. The power of evidence that one of the parties attempted to bribe a witness to persuade a jury that his case is questionable does not depend upon what such evidence is called when deciding whether or not the rule against hearsay will prevent its admission. If there is a logical argument that it is an admission of the weakness of that party's case, that argument is available without regard to whether Section 801 describes such conduct as an admission by a party-opponent.

It is especially important not to allow Section 801 to confuse analysis of admissions by conduct, for their status as admissions is already somewhat uncertain. McCormick summarized both the uncertainty and the usual resolution:

A question may well be raised whether the relatively modest probative value of this species of evidence is not often outweighed by its prejudicial aspects. The litigant who would not like to have a stronger case must indeed be a rarity. It may well be that the real underpinning of the rule of admissibility is a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof. In any event, the evidence is generally admitted.

MCCORMICK, *supra* note 11, § 273 (citations omitted).

38. Section 801(4) provides, in part, "[a] statement is not hearsay if . . . the statement is offered against a party and is . . . a statement of which he has manifested his adoption or belief in its truth. . . ." This section corresponds to Federal Evidence Rule 801(d)(2)(B).

39. See *United States v. Morgan*, 581 F.2d 933 (1978), for a rare example. "Proofs of loss" submitted to obtain payment on insurance policies are frequently offered and sometimes received as adoptive admissions. However, the facts of those cases frequently disclose that there was no adoption at all. MCCORMICK, *supra* note 11, § 269; 4 J. WIGMORE, EVIDENCE § 1073(4) (J. Chadbourne 1972).

but almost all of the cases involve claims that a party "adopted" a statement by failing to deny it. This theory of "admission by silence" has been used in civil cases,<sup>40</sup> but it has been most widely used in criminal prosecutions.<sup>41</sup> The *Miranda* rules<sup>42</sup> limit the extent to which silence during custodial interrogation can be offered as an admission by silence.<sup>43</sup> It is nevertheless clear that the theory has been used far too often in criminal cases to admit statements made to criminal defendants followed by the defendant's silence in circumstances in which silence could not be reasonably considered to be assent.<sup>44</sup>

The United States Court of Appeals for the Second Circuit explained why the admission by silence theory has been so widely abused in an opinion in which it held that a distinguished judge<sup>45</sup> had erred in admitting evidence that a criminal defendant had responded with silence when a stoic codefendant had stated (in Spanish) as they were being arrested, "Why so much excitement. If we are caught, we are caught."<sup>46</sup> The court held that it was error to have admitted that evi-

40. *Great Am. Life Ins. Co. v. Stephenson*, 176 Okla. 295, 55 P.2d 56 (1936); McCORMICK, *supra* note 11, § 270.

41. 4. J. WIGMORE, EVIDENCE § 1071 (J. Chadbourn 1972); WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(B) [01]. The Federal Advisory Committee discussed this problem:

When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

Proposed Federal Rules, *supra* note 10, at 298.

42. *Miranda v. Arizona*, 384 U.S. 436 (1966).

43. In *Miranda* the Supreme Court provided with respect to proof of silence during custodial interrogation: "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n.37. Weinstein and Berger state that:

[C]onstitutional developments in the interrelated areas of confessions, comment on the exercise of the privilege against self-incrimination and right to counsel have considerably lessened the possibility of police abuse, since the courts have recognized that, if defendant's constitutional right to remain silent is to have any meaning, then no adverse inference may be drawn from his failure to deny accusations while in custody, or from his insistence on remaining silent in the absence of counsel.

4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(B) [01] (citations omitted).

44. 4 J. WIGMORE, EVIDENCE, § 1071; 4 WEINSTEIN & BERGER, *supra* note 14, at 31-34 (Supp. 1979).

45. Judge Weinstein.

46. *United States v. Flecha*, 539 F.2d 874 (2d Cir. 1976).

dence.<sup>47</sup>

[T]he judge fell into the error, against which Dean Wigmore so clearly warned, 4 Wigmore, Evidence § 1071, at 102 (Chadbourn rev. 1972), of jumping from the correct proposition that hearing the statement of a third person is a necessary condition for adoption by silence, . . . to the incorrect conclusion that it is a sufficient one. After quoting the maxim "silence gives consent," Wigmore explains "that the inference of assent may safely be made only when no other explanation is equally consistent with silence; and there is always another possible explanation—namely, ignorance or dissent—*unless the circumstances are such that a dissent would in ordinary experience have been expressed if the communication had not been correct.*" (Emphasis supplied.) However, "the force of the brief maxim has always been such that in practice . . . a sort of working rule grew up that *whatever was said in a party's presence* was receivable against him as an admission, because presumably assented to. This working rule became so firmly entrenched in practice that frequent judicial deliverances became necessary in order to dislodge it; for in this simple and comprehensive form it ignored the inherent qualifications of the principle." (Emphasis in original.) Among the judicial deliverances quoted, it suffices to cite Chief Justice Shaw's statements in *Commonwealth v. Kenney*, 53 Mass. 235, 237 (1847), that before receiving an admission by silence the court must determine, *inter alia* "whether he [the party] is in such a situation that he is at liberty to make any reply" and "whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it"; and Lord Justice Bowen's more succinct statement in *Wiedemann v. Walpole*, 2 Q.B. 534, 539 (1891):

Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.<sup>48</sup>

The Oklahoma case of *Ryan v. State*,<sup>49</sup> cited by the Oklahoma Evidence Subcommittee as an illustration of an adoptive admission,<sup>50</sup>

47. *Id.* at 877-78. The error was also held harmless, however, and the conviction was affirmed.

48. *Id.* But see *United States v. Williams*, 577 F.2d 188 (2d Cir. 1978), in which an admission by silence was found.

49. 451 P.2d 383 (Okla. Crim. 1969).

50. *Proposed Code*, *supra* note 10, at 2645.

demonstrates the kind of circumstances that should be proven in order to show "that a dissent would in ordinary experience have been expressed if the communication had not been correct." In that case the arresting officer testified:

that he had been told by a Mr. Nakeamura upon entering his apartment [and finding the defendant there] that he, Nakeamura, was not acquainted with the defendant and that the defendant merely ran into their apartment saying that his television was out of order and that he wanted to watch television with him. The defendant had told him [Nakeamura] that "the cops were outside looking for a robber."<sup>51</sup>

One of the factors which the court stressed in that case was that the defendant was not yet under arrest when he failed to deny Mr. Nakeamura's statements.<sup>52</sup> But the overall circumstances are also such that a denial was to be expected. The exception for adoptive admissions should be used only in such cases.

### 3. Admissions by Agents and Employees of a Party-Opponent

Admissions of a party-opponent can be made by his agents or employees. The most widely followed common law rule was an agency theory which permitted out of court statements by employees to be introduced against their employer only if the employer had authorized the employees to make statements on the subject.<sup>53</sup> Employers naturally insisted that they had not hired their employees for the purpose of making damaging statements.<sup>54</sup>

If admissions are considered to be mere statements by a party that are inconsistent with that party's present position, then unauthorized statements by employees do not qualify as admissions of party-opponents. However, statements by employees that turn out to be inconsistent with their employer's interests are likely to be useful, reliable and persuasive evidence<sup>55</sup> for the same reasons that the employer's own admissions are useful, reliable and persuasive evidence. Many courts have attempted to find ways to admit statements by employees either by weakening the requirement of authorization or by applying other

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51. *Ryan v. State*, 451 P.2d 383, 385 (Okla. Crim. 1969).

52. *Id.*

53. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(D) [01]; Proposed Federal Rules, *supra* note 10, at 298.

54. Proposed Federal Rules, *supra* note 10, at 298.

55. See MCCORMICK, *supra* note 11, § 267; 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(D) [01].

exceptions such as the exception for excited utterances.<sup>56</sup>

The draftsmen of the Federal Rules of Evidence developed a solution to avoid the loss of what they called "valuable and helpful evidence."<sup>57</sup> The Oklahoma Evidence Code also adopted that solution which involves dividing the common law exception into two separate exceptions. Section 801(4)(b)(3)<sup>58</sup> provides an exception by definition for out of court statements by agents who were actually authorized to speak on that subject by the party against whom the statement is offered. Section 801(4)(b)(4)<sup>59</sup> provides a separate exception by definition for statements by an agent or employee "concerning a matter within the scope of his agency or employment." There simply is no requirement in Section 801(4)(b)(4) that the statement have been authorized at all if an agent made it concerning a matter within the scope of his agency or an employee made it concerning a matter within the scope of his employment.<sup>60</sup> The Federal Rule which corresponds to Section 801(4)(b)(4), Rule 801(d)(2)(D), does require that the statement have been "made during the existence of the relationship," but the Oklahoma Evidence Code deleted those words from its version of the provision.<sup>61</sup>

One frequent question under the common law authorized agency theory of vicarious admissions was whether statements that an employee had been authorized to make *to* the employer or for the internal use of the employer's organization should be admissible in evidence as authorized admissions.<sup>62</sup> Under Section 801(4)(b)(4) there is no question of whether such statements were authorized at all if they concern a

56. WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(D) [01].

57. Proposed Federal Rules, *supra* note 10, at 298.

58. The corresponding Federal Evidence Rule is 801(d)(1)(c).

59. The corresponding Federal Evidence Rule is 801(d)(1)(D).

60. Weinstein and Berger state:

Rule 801(d)(2)(D) adopts the approach pioneered by Model Code Rule 508(a) and endorsed by Uniform Rule 63(9)(a) which, as a general proposition, makes statements made by agents within the scope of their employment admissible. No longer need judges, in cases like those discussed above, analyze the particular factors to determine whether the statement in question should be admitted as an exception to, or extension of, the traditional rule. Once agency, and the making of the statement while the relationship continues, are established, the statement is exempt from the hearsay rule so long as it relates to a matter within the scope of the agency.

4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(D) [01] (citations omitted).

61. The Oklahoma Evidence Subcommittee recommended this deletion in order to bring the new rule into accord with title 12, section 447 of the Oklahoma Statutes, OKLA. STAT. tit. 12, § 447 (1971), which permits admissions in the deposition of an agent, servant, or employee of a party to be used against that party and does not state that the deposition must have been taken during the continuation of the relationship. *Proposed Code*, *supra* note 10, at 2646.

62. MCCORMICK, *supra* note 11, § 267, at 642-43.

matter within the scope of the employee's employment or agency. If a statement by an employee does not concern matters within the scope of his own employment, it is not admissible under Section 801(4)(b)(4); but it may be admissible under Section 801(4)(b)(3) if it was actually authorized. Both the Federal and the Oklahoma Comments indicate that a statement by an employee is admissible under Section 801(4)(b)(3) even if the employee was only authorized to make the statement to his employer. The Federal Advisory Committee states:

No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both.<sup>63</sup>

The Oklahoma Evidence Subcommittee's Note adds: "[Section 801(4)(b)(3)] would admit statements authorized by a party to be made by the party. The rule is broad enough to include both statements to a third person and statements by an agent to a principal."<sup>64</sup>

#### 4. Admissions by a Co-conspirator of a Party-Opponent

Section 801(4)(b)(5)<sup>65</sup> permits the introduction into evidence of statements made "by a co-conspirator of a party during the course and in furtherance of the conspiracy." This is a conventional statement of the rule already in effect in both Oklahoma<sup>66</sup> and most of the United States.<sup>67</sup> However, in many cases courts have ignored the requirement that the statement by the co-conspirator must be "in furtherance of the conspiracy" in order to be admissible.<sup>68</sup> McCormick explains:

Literally applied, the "in furtherance" requirement calls for general exclusion of statements possessing evidential value solely as admissions, yet in fact more emphasis seems to be placed upon the "during continuation" aspect and any statement so qualifying in point of time may be admitted in evidence without much regard to whether it in fact furthered the conspiracy. These latter decisions may represent a parallel to

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63. Proposed Federal Rules, *supra* note 10, at 298.

64. *Proposed Code*, *supra* note 10, at 2645.

65. The corresponding Federal Evidence Rule is 801(d)(2)(E).

66. *Proposed Code*, *supra* note 10, at 2646.

67. MCCORMICK, *supra* note 11, § 267.

68. *Id.*

the cases allowing in evidence against the principal declarations of an agent which relate to the subject of the agency, even though the agent was not authorized to make a statement.<sup>69</sup>

These practices led the draftsmen of the Model Code of Evidence and the 1954 Uniform Rules of Evidence to drop the requirement that a statement be made in furtherance of the conspiracy.<sup>70</sup> Therefore, the decision by the draftsmen of the Federal Rules of Evidence and the Oklahoma Evidence Code to retain this conventional requirement is one that deserves attention and explanation. Weinstein and Berger explain:

The obvious question is why the draftsmen of the federal rules chose to retain the traditional, limited agency approach towards conspirators' statements when they had abandoned this concept for statements by agents? The answer is that the draftsmen endorsed the agency approach not because they found it a convincing rationale but because they adjudged it a useful device for protecting defendants from the very real dangers of unfairness posed by conspiracy prosecutions.<sup>71</sup>

Judge Weinstein and Professor Berger therefore urge the importance of ensuring the enforcement of the conventional requirement that statements by a co-conspirator are admissible only if they were made in furtherance of the conspiracy. Although their argument is directed largely toward decisions that ultimately must be made by judges, they point out that some courts do not enforce their "in furtherance" requirements because of failures by defense counsel to analyze the evidence to see if offered statements actually were in furtherance of a conspiracy.<sup>72</sup>

##### 5. Foundation Requirements for Vicarious Admissions of a Party-Opponent

It was well established at common law that out of court statements by a purported agent, employee or co-conspirator could not establish by themselves the existence of the agency, employment or conspiracy relationship necessary to make them admissible.<sup>73</sup> Instead, independent evidence of the existence of the proper relationship was required in

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69. *Id.* at 645-46.

70. MODEL CODE OF EVIDENCE Rule 508(b) and 1954 UNIFORM RULES OF EVIDENCE 63(9).

71. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(E) [01].

72. *Id.*

73. 4 J. WIGMORE, EVIDENCE § 1078, at 176 (3d ed. 1940); MCCORMICK, *supra* note 11, § 267, at 642.

order to make the out of court statements admissible.<sup>74</sup> Neither the Federal Rules of Evidence nor the comments on them by the Federal Advisory Committee and by Congress make any reference to the independent evidence requirements. The federal courts have, however, continued to apply the requirement of independent evidence exactly as they did prior to the adoption of the Rules.<sup>75</sup> In conspiracy cases the federal courts have had difficulty in deciding how the required independent evidence should be related to the evidence of statements by co-conspirators, but they faced these same problems prior to the adoption of the Rules.<sup>76</sup>

This strong federal precedent finds further support in the comments of the Oklahoma Evidence Subcommittee. In their Note to what subsequently became Section 801(4)(b)(4) the Subcommittee stated:

Of course, the proponent of the vicarious "admission must first prove the fact and scope of the agency . . . by the testimony of the asserted agent himself, or by anyone who knows, or by circumstantial evidence. Evidence of the purported agent's past declarations asserting the agency, are inadmissible hearsay when offered to show the relation."<sup>77</sup>

#### 6. The Code Does Not Provide Any Exception For Statements by Persons in Privity with a Party

The Federal Rules of Evidence and the Oklahoma Evidence Code both reject one widely accepted form of admission by a party-opponent which is privity. This ground of admissibility has been accepted in a bewildering variety of situations and rejected in an almost equally bewildering variety of similar situations.<sup>78</sup> Many of the cases have involved interests in real estate. McCormick states:

The notion that "privity," or identity of interest, as be-

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74. MCCORMICK, *supra* note 11, § 267, at 642.

75. Saltzburg and Redden state:

There is agreement among virtually all Circuits that before an agent's statement can be introduced against a principal the fact of agency must be shown by independent evidence, *i.e.*, something other than the statements themselves unless the statements are otherwise admissible under a hearsay exception. But the Circuits divide on whether the statements of an agent can be used to establish the scope of agency once the fact of agency is established by independent evidence.

S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 468 (2d ed. 1977) [hereinafter cited as SALTZBURG & REDDEN].

76. SALTZBURG & REDDEN, *supra* note 75, at 461.

77. *Proposed Code*, *supra* note 10, at 2646.

78. MCCORMICK, *supra* note 11, § 268; 4 J. WIGMORE, *EVIDENCE* §§ 1080-1087 (J. Chadbourne 1972).

tween the declarant and the party against whom the declaration is offered, justifies its introduction against the party as an admission has been generally accepted by the courts. Thus the declaration of one joint tenant or joint owner against another is received, but not that of a tenant in common, a co-legatee or co-devisee, or a co-trustee, so strictly is the distinction derived from the law of property applied in this context. The more frequent and important application of this property analogy is the use of declarations of a predecessor in title to land or personalty or choses in action, against his successor. The successor has been thought of as acquiring his interest burdened with the same liability of having the declarations used against him that his predecessor was subject to.<sup>79</sup>

The principle has also been applied in cases involving actions on notes, some wrongful death actions, and actions on life insurance policies.<sup>80</sup>

Neither the Federal Advisory Committee nor the Oklahoma Evidence Subcommittee pointed out that their drafts ignored these grounds of admissibility or explained why they were being abolished. It is clear, however, that they were adopting the position of the late Professor Edmund Morgan<sup>81</sup> which was also adopted in the proposed Model Code of Evidence and the 1954 proposed Uniform Rules of Evidence.<sup>82</sup>

This is one of the few situations in which the failure of the Code to deal with a subject is enough to change the prior law on that subject. Section 802 clearly excludes all hearsay that does not qualify for admission under some provision of law, and Section 801(4)(b) clearly is limited to the kinds of admissions of a party-opponent which it describes. However, many of the statements which would have qualified as admissions by privities in interest will be admissible through some hearsay exception. These statements are likely to satisfy the requirements for declarations against interest.<sup>83</sup> If for some reason they cannot qualify as declarations against interest, they may nevertheless be admissible under one of the "open-ended exceptions," Sections 803(24) and 804(B)(5).<sup>84</sup>

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79. MCCORMICK, *supra* note 11, § 268 (citations omitted).

80. *Id.*; 4 J. WIGMORE, EVIDENCE, §§ 1081, 1084 (J. Chadbourn 1972).

81. Falknor, *Hearsay*, 1969 L. & SOC. ORD. 591, 603-04. *See* 4 J. WIGMORE, EVIDENCE § 1080a (J. Chadbourn 1972).

82. Falknor, *Hearsay*, 1969 L. & SOC. ORD. 591, 603.

83. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(2)(D) [01] at 801-139, 801-140.

84. Saltzburg and Redden appear to argue that statements which would have been admissible as admissions by privities cannot qualify under the "open-ended exceptions." SALTZBURG &

#### D. *Prior Inconsistent Statements by a Witness*

##### 1. Introduction—the Three Theories Involved in Section 801(4)(a)(1)

This Section creates an exception by definition for certain prior inconsistent statements by a witness who testifies at a trial or hearing and “is subject to cross-examination concerning the statement.” The exception applies only to prior inconsistent statements which were “given under oath subject to the penalty of perjury at a deposition, trial, hearing or other proceeding.” This Section and the corresponding Federal Rule of Evidence, Rule 801(d)(1)(A), are based upon a combination of three conflicting theories concerning the use of prior inconsistent statements. Two of these theories are apparent in the language of the Section. These two theories are, first, the accepted common law theory that prior inconsistent statements by a witness are admissible only for the nontestimonial purpose of impeaching the witness, and, second, an academic theory that *all* prior statements by a witness should be admissible for all purposes since the person who made the statements is available to be questioned about them.

The first theory is the orthodox common law theory.<sup>85</sup> It allows a prior inconsistent statement to be admitted for the limited purpose of showing that the witness has been inconsistent. The fact of inconsistency is damaging to the credibility of the witness even if the fact finder is not permitted to use the out of court statement for any testimonial purpose. The orthodox common law theory has frequently been attacked<sup>86</sup> and even ridiculed<sup>87</sup> because it appears so unlikely that a jury can obey an instruction to consider a prior inconsistent statement only as evidence of inconsistency and not as testimonial evidence of the truth of whatever was said out of court. The common law limitation on the use of prior inconsistent statements is, in fact, enforceable in those cases in which it is most important. In cases in which there is no evi-

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REDDEN, *supra* note 75, at 469. If they do mean to say that, they are incorrect and have been misled by the difficulties of talking about hearsay as “not hearsay.”

85. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)[01]; MCCORMICK, *supra* note 11, § 39; 3A J. WIGMORE, EVIDENCE § 1018, at 998 n.3 (J. Chadbourn 1970).

86. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)(A)[01].

87. Wigmore states:

But this theoretical and artificial nicety is overworked by some courts . . . [T]he opinions are full of directions to trial courts to tell the jurors to use their mental force to ignore in such self-contradicting assertions that testimonial value which the jurors' natural reasoning persists in seeing there.

3A J. WIGMORE, EVIDENCE § 1018, at 1007 (J. Chadbourn 1970).

dence to prove a vital point except a prior inconsistent statement, the trial court can, and must, enforce the orthodox theory on the limited value of such evidence by directing a verdict against the party with the burden of proof.

The second theory has received wide academic acceptance,<sup>88</sup> but was almost universally rejected by the courts prior to the movement to adopt evidence codes.<sup>89</sup> The academic theory is that the hearsay problem presented by an out of court statement has been solved by the fact that the out of court declarant is available to be questioned about the statement. To Wigmore the effect of the opportunity to examine a witness concerning a prior statement was to eliminate any hearsay problem with respect to that statement.<sup>90</sup>

[T]he theory of the hearsay rule is that an extrajudicial statement is rejected because it was made out of court by an absent person not subject to cross-examination . . . Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve.<sup>91</sup>

Arguments such as these persuaded the draftsmen of both the Model Code of Evidence and the 1954 Uniform Rules of Evidence to create a hearsay exception for all prior statements by a witness who is subject to examination concerning those statements.<sup>92</sup> However, Kansas was the only state to adopt so broad a version of this exception.<sup>93</sup>

California adopted a version of this exception permitting the substantive use of a prior statement made by a witness who was available to be examined concerning that statement only if the statement was one which was (1) a prior inconsistent statement,<sup>94</sup> or (2) a prior consistent statement which satisfied the requirement for nontestimonial use as re-

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88. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1) [01].

89. *Id.*

90. MCCORMICK, *supra* note 11, § 251; 3A J. WIGMORE, EVIDENCE § 1018 (J. Chadbourn 1970).

91. 3A J. WIGMORE, EVIDENCE § 1018, at 996 (J. Chadbourn 1970).

92. MODEL CODE OF EVIDENCE Rule 503(b); 1954 UNIFORM RULES OF EVIDENCE Rule 63(1).

93. KAN. STAT. ANN. § 60-460(a) (1976).

94. CAL. EVID. CODE § 1235 (West 1966). *See also* N.J. STAT. ANN. tit., 2A § 84A Rule 63(1)(a) and (b) (1976).

habilitative evidence,<sup>95</sup> or (3) a statement of identification.<sup>96</sup> These restrictions had two effects which helped to make substantive use of prior statements by witnesses less objectional. First, the possibility of the use of prior consistent statements created especially for use at trial<sup>97</sup> was virtually eliminated since the situations in which consistent statements could be used were very narrow. Second, under the California rules, substantive use was largely restricted to statements that were already admissible for a nonhearsay purpose either as impeachment or rehabilitation. However, the California rules were broad enough to include all prior inconsistent statements by a witness regardless of whether the statement would have been admissible as impeachment. To understand the importance of this, the third theory involved in Section 801(4)(a)(1) must be examined.

The third theory which lies behind Section 801(4)(a)(1) is one which has seldom been frankly stated by either courts or scholars, but which has nevertheless been widely applied in cases involving so-called "turncoat" witnesses. In many, although not all, cases in which a witness appears to have changed his story after making an out of court statement, the courts have permitted that statement to be brought to the attention of the jury through one device or another. The most common of these devices has been "impeachment,"<sup>98</sup> but similar use has also been made of purported attempts to "refresh the memory" of a witness by reading his statement to the jury.<sup>99</sup> In some cases the impeachment

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95. CAL. EVID. CODE § 1236 (West 1966).

96. CAL. EVID. CODE § 1238 (West 1966).

97. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)[01], at 801-68 & 801-69; McCORMICK, *supra* note 11, § 251, at 603.

98. See Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competency, Privileges, Witnesses, Opinion and Expert Witnesses*, 14 TULSA L.J. 227, 310-12 (1978) [hereinafter cited as Blakey, *Introduction I*]. See also Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L.J. 3, 24-26 (1975) [hereinafter cited as Blakey, *Substantive Use*]; Ordoover, *Surprise! That Damaging Turncoat Witness Is Still with Us: An Analysis of Federal Rules of Evidence 607, 801(d)(a)(A) and 403*, 5 HOFSTRA L. REV. 65, 66-68, 73 (1976); 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, 1612 (1977).

99. Louisell and Mueller write:

When, as is often the case, the matter which the questioner mentions to refresh recollection is a statement relating to the issues, but inadmissible (because of the hearsay doctrine) to prove the truth of the matter asserted, great caution is required. Merely questioning the witness may put a statement before a jury so graphically as to give rise to a serious risk that the statement will be considered for its truth. Of course, this fact becomes insignificant if, in the end, the memory of the witness is indeed refreshed, and he adopts the statement as his own on the witness stand, or substantially reiterates in his testimony the matters asserted in the statement.

But if the memory of the witness is not refreshed, and the questioner fails in his

device is defensible; but in many others it is not. The claim that memory is being refreshed is frequently a sham. The theory that unites and explains all of these cases—although it is almost never stated in courtrooms—is that the fact finder should “know” about the former statements. This hearsay theory, in which the purpose of allowing the fact finder to know about a prior statement is to permit the fact finder to use the statement for a testimonial purpose, is not a full hearsay exception. In almost all cases the statement comes in through a distortion of a nonhearsay use and is supposedly not substantive evidence. It would therefore probably be most accurate to describe the devices under which prior statements by alleged “turncoat” witnesses are so frequently admitted as quasi-exceptions to the rule against hearsay.

The California rules eliminated all need for such quasi-exceptions as purported impeachment and purported memory refreshment by creating a full hearsay exception that would apply to the same statements. The California Law Revision Commission stated:

Because [the California provision] permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely as evidence casting discredit on the witness, it follows that a party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony and whether or not the party was surprised by the testimony, for such evidence is no longer irrelevant (and, hence, inadmissible).<sup>100</sup>

Federal Evidence Rule 801(d)(1)(A) and Oklahoma Evidence Rule 801(4)(a)(1) are based upon the California Evidence Code provision dealing with prior inconsistent statements.<sup>101</sup> They are narrower than the California provision because they apply only to sworn prior inconsistent statements, but for such sworn prior inconsistent statements they eliminate the need for a quasi-exception to the rule against hearsay. Although they are a combination of all three theories, the

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ostensible purpose, the jury may still consider what it has learned as substantive evidence. This amounts to “prejudice” within the meaning of Rule 403—a kind of misuse of “evidence”—and the trial judge should disallow the effort to refresh recollection when the risk of this kind of prejudice appears serious. Indeed, it may sometimes happen that the questioner's true purpose is to get the statement before the jury, rather than to refresh the recollection of the witness, which he may know in advance to be a futile enterprise. . . .

3 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 339, at 467-68 (1979 & Supp. 1979) (citation omitted) [hereinafter cited as LOUISELL & MUELLER].

100. CALIFORNIA LAW REVISION COMMISSION, *RECOMMENDATION PROPOSING AN EVIDENCE CODE* 233 (1965).

101. Proposed Federal Rules, *supra* note 10, at 295-96.

function they serve comes closest to the quasi-exception for statements by "turncoat" witnesses. The federal cases applying Federal Rule 801(d)(1)(A) are "turncoat" witness cases.<sup>102</sup>

The combination of the three theories does create some problems. Questions concerning the requirement of "cross-examination," the requirement of inconsistency, and the value of prior inconsistent statements as substantive evidence are discussed below.

## 2. Substantive Use of Sworn Prior Inconsistent Statements

Section 801(4)(a)(1) controls the substantive use of prior inconsistent statements by a witness. A prior inconsistent statement which meets the requirements of this provision is admissible for both testimonial and nontestimonial purposes. Section 801(4)(a)(1) requires both that the prior inconsistent statement have been made by a witness who "testifies at the trial or hearing and is subject to cross-examination concerning the statement," and that the inconsistent statement have been made "under oath subject to the penalty of perjury at a deposition, trial, hearing or other proceeding." The requirement that the prior inconsistent statement have been made under oath follows a similar requirement which Congress added to the corresponding Federal Evidence Rule.<sup>103</sup> The effect of this requirement is to prohibit the substantive use of the vast majority of prior inconsistent statements.<sup>104</sup>

Critics of the "under oath" requirement argue that whether or not a prior statement was made under oath does not determine whether it is trustworthy.<sup>105</sup> It certainly is true that the fact that a statement was made under oath is not a reason to consider the statement to be trust-

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102. See, e.g., *United States v. Long Soldier*, 562 F.2d 601 (8th Cir. 1977); *United States v. Champion Int'l Corp.*, 557 F.2d 1270 (9th Cir. 1977); *United States v. Morgan*, 555 F.2d 238 (9th Cir. 1977). See also cases summarized in SALTZBURG & REDDEN, *supra* note 75, at 496-98 & 1979 Supp., at 180-81.

103. The corresponding Federal Evidence Rule is 801(d)(1)(A).

104. In *United States v. Castro-Ayon*, 537 F.2d 1055 (1976), the United States Court of Appeals for the Ninth Circuit held that the other proceedings at which the sworn prior inconsistent statement must be given need not be a judicial proceeding. The court upheld the introduction of testimony by a Border Patrol Agent concerning sworn statements made before him by illegal aliens which were inconsistent with their testimony at the subsequent trial. The court relied upon the similarities between the immigration proceeding before the Agent and the proceedings before a grand jury, which Congress clearly intended to include within the coverage of the Federal Rule corresponding to Section 801(4)(a)(1). On the other hand, the sworn prior inconsistent statements must have been made subject to the penalty of perjury and at a proceeding. A signed affidavit would not qualify. See 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)[01], at 801-81.

105. Stalmack, *Prior Inconsistent Statements: Congress Takes a Compromising Step Backward in Enacting Rule 801 (d)(1)(A)*, 8 LOY. CHI. L.J. 251, 275-76 (1977); Ordovery, *supra* note 98, at 69.

worthy; but the requirement that the prior inconsistent statement must have been made under oath largely eliminates two problems which make unsworn prior inconsistent statements less trustworthy than sworn ones. First, the "under oath" requirement largely eliminates the danger that the prior statement may not have been made at all or may be misreported.<sup>106</sup> Although the "under oath" requirement does not require that a transcript of the statement have been taken or be used to prove that the statement was made,<sup>107</sup> a transcript will usually be available to ensure that the statement is reported accurately. Second, the fact that the prior inconsistent statement was taken at some sort of "proceeding" will serve to reduce uncertainty about whether or not the witness intended to say what he appeared to say in the prior statement.<sup>108</sup> It should be kept in mind that if a prior inconsistent statement was not made during some proceeding it was probably obtained by a partisan investigator.<sup>109</sup> If the statement was made in writing the investigator probably wrote the statement, regardless of whether the witness signed the statement. Weinstein and Berger point out:

[M]ost prior inconsistent statements used at trials are given under circumstances where there are subtle and sometimes severe pressures operating to skew the story one way or the other. The inconsistent statement may be given to an insurance investigator or an FBI agent at the time of arrest, or before a Grand Jury where the witness can be led, advertently or otherwise, to give a somewhat colored version of the events. In a swearing contest between the witness and FBI agents the witness will usually come off second best. Very few such statements used at trial are given in a completely neutral and unpressured setting. Skepticism about such cases explain why the rule was narrowed from its original breadth.<sup>110</sup>

There is no requirement, however, that the prior inconsistent statement have been subject to cross-examination at the time it was made. Grand jury testimony clearly qualifies for admission under Section

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106. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 13 (1974).

107. Stalmack, *supra* note 105, at 275-76.

108. In *United States v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976), a Border Patrol Agent was permitted to testify "to the substance of the prior statements," but a tape-recording had been made of the prior statements and may have been available as a check on the accuracy of the Agent's testimony.

109. See *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess., Ser. 2, Supp. at 92-94 (1973) (letter of Frederick B. McDonald) [hereinafter cited as *1973 Hearings*] for a detailed description of ways in which partisan investigators can shape prior statements.

110. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)(A) [01], at 801-86.

801(4)(a)(1).<sup>111</sup> There is a question, however, (which is discussed in a later section)<sup>112</sup> as to whether prior inconsistent statements admitted under Section 801(4)(a)(1), such as grand jury testimony, should be sufficient to sustain a conviction by themselves.

### 3. Impeachment Use of Prior Inconsistent Statements

Section 801(4)(a)(1) does *not* control the use of prior inconsistent statements for the purpose of impeachment. Statements which qualify for admission under that Section are admitted for all purposes including both substantive use and impeachment. Prior inconsistent statements that do not qualify for admission under Section 801(4)(a)(1) for some reason (*e.g.*, they were not made under oath) will still be admissible for impeachment purposes if they satisfy the appropriate requirements. The Code does not spell out what these requirements are, but it is clear that impeachment of witnesses by prior inconsistent statements continues to be proper under the Code just as it was at common law. The Congressional Conference Committee that drafted the corresponding Federal Rule expressly recognized this.<sup>113</sup> What is uncertain, however, under both the Federal Rules of Evidence and the Oklahoma Evidence Code is the extent to which unsworn prior statements by a witness can be introduced when impeachment is not the true purpose or effect of the introduction of such statements.<sup>114</sup>

### 4. Difficulties Caused by the Requirement that the Prior Statement Be Inconsistent

Section 801(4)(a)(1) applies only to prior sworn statements by a witness that are "inconsistent" with his testimony. This means that the courts will be forced to decide whether the witness's testimony is inconsistent with his prior testimony. This has frequently been a difficult

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111. The Conference Report on the version of Federal Evidence Rule 801(d)(1)(A) finally adopted states "The rule as adopted covers statements before a grand jury." H.R. REP. NO. 1597, 93rd Cong., 2d Sess. 10 (1974).

112. See text accompanying notes 130 to 165 *infra*.

113. "Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness." H.R. REP. NO. 1597, 93 Cong., 2d Sess. 10 (1974). McCormick states "The use of inconsistent statements for impeachment purposes when such statements are not admissible as substantive evidence under Rule 801(d)(1) or as an exception to the hearsay rule will continue under the Rules." MCCORMICK, *supra* note 11, § 34 (Supp. 1978). See also 3 LOUISELL & MUELLER, *supra* note 99, § 299, at 194.

114. See Blakey, *Introduction I*, *supra* note 98, at 310-12.

problem in simple impeachment situations.<sup>115</sup> It becomes more difficult, however, when substantive use of the prior sworn statement depends upon a finding of inconsistency.<sup>116</sup> One problem that will become especially important is the possibility that the witness will not deny anything in his prior sworn statement but will instead claim an absence of present memory about some of the matters described in the statement.<sup>117</sup> This is not, strictly speaking, inconsistent.

Should Section 801(4)(a)(1) be read so strictly as to keep out prior statements when the witness claims a lapse of memory? Utah solved this problem by making loss of memory an additional ground for the admission of prior statements made by witnesses.<sup>118</sup> Both California and the federal courts have attempted to stretch the inconsistent requirement to cover a claimed loss of memory—at least in situations in which the courts disbelieved the claim.

In *United States v. Insana*,<sup>119</sup> the Second Circuit applied such an analysis in a pre-Federal Rules case:

Where, as here, a recalcitrant witness who has testified to one or more relevant facts indicates by his conduct that the reason for his failure to continue to so testify is not a lack of memory but a desire "not to hurt anyone," then the court has discretionary latitude in the search for truth, to admit a prior sworn statement which the witness does not in fact deny he made . . . . However, this does not mean that the trial judge's hands should be tied where a witness does not deny making the statements nor the truth thereof but merely falsifies a lack of memory. Here Schurman had testified in detail before the grand jury, had already pleaded guilty, and on the stand identified Insana and testified to two relevant events. Based upon these facts, the only rational conclusion is that Schurman was fully aware of the content of his grand jury testimony but

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115. 3A WIGMORE, EVIDENCE §§ 1040-1043 (J. Chadbourn 1970); MCCORMICK, *supra* note 11, § 34.

116. Weinstein and Berger state "The rule is silent as to what test of inconsistency should be used. . . ." 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)(A)[01], at 801-87.

117. *Id.* at [04]; MCCORMICK, *supra* note 11, § 251 (Supp. 1978).

118. Rule 63(1) of the Utah Rules of Evidence declares the following to be hearsay exception: Prior Statements of Witnesses. A prior statement of a witness, if the judge finds that the witness had an adequate opportunity to perceive the event or condition which his statement narrates, describes or explains, provided that (a) it is inconsistent with his present testimony, or (b) it contains otherwise admissible facts which the witness denies having stated or has forgotten since making the statement . . . .

9B UTAH CODE ANN., RULES OF EVIDENCE 63 (1) (1977).

119. 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970).

wished to escape testifying against Insana and thus make a mockery of the trial. By conceding that his lack of memory was due to his desire not to hurt anyone, he impliedly admitted the truth of the extra-judicial statements harmful to the defendant. Thus we believe that these statements are admissible not only to impeach his claim of lack of memory but also as an implied affirmation of the truth.<sup>120</sup>

Similarly the Supreme Court of California stated in *California v. Green*:<sup>121</sup>

In normal circumstances, the testimony of a witness that he does not remember an event is not "inconsistent" with a prior statement by him describing that event. But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement and the same principle governs the case of the forgetful witness . . . . [H]ere Porter admittedly remembered the events both leading up to and following the crucial moment when the marijuana came into his possession, and as to that moment his testimony was equivocal. For the reasons stated above, we conclude that Porter's deliberate evasion of the latter point in his trial testimony must be deemed to constitute an implied denial that defendant did in fact furnish him with the marijuana as charged. His testimony was thus materially inconsistent with his preliminary hearing testimony and his extra-judicial declaration to Officer Wade, in both of which he specifically named defendant as his supplier. Accordingly, the two prior statements of this witness were properly admitted . . . .<sup>122</sup>

However, the California courts have also held that an honest fail-

120. *Id.* at 1170.

121. 3 Cal. 3d 981, 987-88, 92 Cal. Rptr. 494, 498, 479 P.2d 998, 1002-03 (1971).

122. *Id.* If this approach is followed . . . the trial judge will be forced to make a determination as to the honesty of every claim of lack of memory by a witness who has made prior affirmative statements. Because of the potential effect of such a determination, it would appear that parties opposing introduction of the prior statements would be entitled to ask for at least a voir dire hearing at which they might offer evidence as to the truth of the claim of loss of memory. In both *Insana* and *Green*, however, the trial judges and the appellate courts made the determination that the witness was lying on the basis of what happened during the examination of the witness . . . . *Insana* was an extremely unusual case, however, in which the demeanor evidence visible to the trial judge found its way into the "cold record." Footnote 1 states:

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

"I have excused the jury because I want to talk very frankly here. It must be clear to

ure of memory is *not* inconsistent with the prior statement.<sup>123</sup> Weinstein and Berger argue that the federal courts should also treat at least some honest lapses of memory as not inconsistent.

Although the Supreme Court left the matter open in *Green*, it would seem that the prior statement should be included under [the Federal Rule] if the judge finds that the witness genuinely cannot remember, and the period of amnesia or forgetfulness is crucial as regards the facts in issue. This result would be compatible with case law which suggests that a statement of no recollection is not inconsistent with a former statement about the now forgotten matter.<sup>124</sup>

As Weinstein and Berger suggest, there may be constitutional problems with a decision to treat an honest lapse of memory as a basis for the admission of a prior statement under Section 801(4)(a)(1) because the opportunity to cross-examine such a witness would be completely worthless. However, the Utah rule treats both honest and dishonest lapses of memory alike,<sup>125</sup> and Judge Friendly restated the Federal Rule in dicta in *United States v. Marchand*<sup>126</sup> as if it were the Utah rule. He wrote "if a witness has testified to such facts before a grand jury and forgets or denies them at trial, his grand jury testimony or any fair representation of it falls squarely within Rule 801(d)(1)(A)."<sup>127</sup> That probably goes too far.<sup>128</sup> Neither the Federal

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everybody who looks at this witness that he is faking and he is attempting to avoid giving answers.

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

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

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

423 F.2d at 1167 n.1; Blakey, *Substantive Use*, *supra* note 98, at 16-17.

123. *People v. Sam*, 71 Cal. 2d 194, 77 Cal. Rptr. 804, 454 P.2d 700 (1969); *People v. Carter*, 46 Cal. App. 3d 260, 120 Cal. Rptr. 181 (1975).

124. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)(A)[4], at 801-98, -99.

125. See note 118 *supra*.

126. 564 F.2d 983 (2d Cir. 1977).

127. *Id.* at 999.

128. Note, however, that a statement by a witness who claims lack of memory may qualify for admission under one of the exceptions in Section 804(B) for statements by declarants who are "unavailable as a witness." Under Section 804(A)(3) a person who "[t]estifies to a lack of memory of the subject matter of his statement" is declared to be unavailable as a witness. Similarly, under Section 804(A)(2) a witness who "[p]ersists in refusing to testify concerning the subject matter of his statement" is also declared to be unavailable as a witness.

Rules nor the Oklahoma Evidence Code adopts the Utah rule. It is likely, however, that both the federal courts and the Oklahoma courts will refuse to permit a witness to evade inconsistency through a false claim of loss of memory. As McCormick suggests, "circumstances clearly may be such as to warrant the judge in concluding that the assertion of lack of memory is untrue and in effect a repudiation of the prior statement, thus justifying its admission in evidence."<sup>129</sup>

5. Are Prior Inconsistent Statements Inferior Evidence Even if Admitted As Substantive Evidence?

Hearsay evidence which has been admitted through some exception to the rule against hearsay has traditionally been considered just as adequate to prove the facts it states as testimony to those same facts by an in court witness. There is nothing in the language of Section 801(4)(a)(1) to suggest that the value of prior inconsistent statements admitted through this exception by definition will be any less than the value of hearsay statements admitted through the traditional hearsay exceptions. The history of Federal Evidence Rule 801(d)(1)(A) raises serious questions, however, of whether a prior inconsistent statement admitted under Section 801(4)(a)(1) should be considered equal in value to in court testimony.

Critics of substantive use of prior inconsistent statements complained that Federal Rule 801(d)(1)(A) would permit criminal convictions and civil judgments to be obtained which would be based only upon prior inconsistent statements,<sup>130</sup> but advocates of that rule replied that the critics were confusing *sufficiency* and *admissibility*. Judge Weinstein stated during a discussion of the proposed rules at a Judicial Conference of the Second Circuit in 1969:

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

One question, and that is the only one we are facing, is what comes in. The general rules with respect to the responsibility of the bench and of the jury is to insure that people are not convicted in criminal cases on evidence which leaves a

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129. MCCORMICK, *supra* note 11, § 251, at 604.

130. See, e.g., Blakey, *Redefinition*, *supra* note 33, at 625, and authorities cited in Stalmack, *supra* note 105, at 267 n.87.

reasonable doubt. In my opinion a conviction on the evidence you presented in your hypothetical could not stand.<sup>131</sup>

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

Apparently the premise that underlines the suggested re-draft is that a statement not made under penalty of perjury is an insufficient basis to support a conviction. The premise confuses two distinct concepts: sufficiency and admissibility. If every item of evidence admitted were required to be sufficient to support a verdict, almost all circumstantial evidence, for example, would be excluded. No one would argue that this is so. Admittedly, if a judge were confronted with a situation, under the rule as transmitted to Congress, in which the entire case for the prosecution was a prior inconsistent unsworn statement it would be difficult indeed to see how he could avoid directing a verdict.<sup>132</sup>

The idea also appears as part of the legislative history of the Federal Rule in the form of a footnote to the Senate Committee Report. The footnote states:

It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate.<sup>133</sup>

Weinstein and Berger cite the Senate Report footnote as part of the authority for their conclusion: "It is doubtful, however, that in any but the most unusual case, a prior inconsistent statement alone will suffice to support a conviction since it is unlikely that a reasonable juror could be convinced beyond a reasonable doubt by such evidence alone."<sup>134</sup>

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131. JUDICIAL CONFERENCE, SECOND JUDICIAL CIRCUIT, A DISCUSSION OF THE PROPOSED FEDERAL RULES OF EVIDENCE, 48 F.R.D. 39, 65 (1969).

132. 1973 *Hearings*, *supra* note 109, at 98-99.

133. S. REP. NO. 1277, 93rd Cong., 2d Sess., at 16 n.21.

134. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)(A)[01], at 801-86.

Thus, there is substantial authority to support the argument that a conviction or judgment supported only by prior inconsistent statements should not be allowed to stand. However, neither Rule 801(d)(1)(A) nor Section 801(4)(a)(1) states any such limitation; and not everyone agrees that the limitation exists. At the same 1969 conference at which Judge Weinstein drew the distinction between sufficiency and admissibility, Professor Fleming James, Jr., responded to the question of whether a conviction could be based upon a repudiated prior statement: "That is as I understand the rules."<sup>135</sup>

It is not possible to tell from the reported opinions whether the federal courts have permitted anyone to be convicted in a case in which the sole evidence on a necessary element was a prior inconsistent statement admitted under Federal Rule 801(d)(1)(A), but there are several cases in which the courts may well have done so.<sup>136</sup> Furthermore, no federal court has so far cited the foregoing portions of the legislative history of Federal Rule 801(d)(1)(A).

There are three reasons why it would be appropriate to treat prior inconsistent statements under Section 801(d)(a)(1) as a slightly inferior kind of evidence which is inadequate as the sole evidence on a point to support a criminal conviction or a civil judgment. The first of these reasons is the legislative history of Federal Rule 801(d)(1)(A) which has been set forth above. There is no reference to that federal legislative history in the Oklahoma Evidence Subcommittee's Note,<sup>137</sup> but that silence probably should be read as agreement with the federal interpretation. It is clear, both from the tone of the Oklahoma Evidence Subcommittee's Note to what became Section 801(4)(a)(1)<sup>138</sup> and from the fact that Section 801(4)(a)(1) is almost a word by word copy of the Federal Rule, that Oklahoma intended to adopt the Federal Rule.

There are two additional arguments that may justify treating evidence admitted under either Section 801(4)(a)(1) or Federal Rule 801(d)(1)(A) as inferior evidence. One is based upon the nature of the problem which led to the creation of those rules; the other is a Constitutional argument which may apply only to criminal cases.

It is likely that advocates of Federal Rule 801(d)(1)(A) such as Professor Cleary and Judge Weinstein were willing to argue that prior

135. 48 F.R.D. at 65.

136. *United States v. Mosley*, 555 F.2d 191 (8th Cir. 1977); *United States v. Long Solider*, 562 F.2d 601 (8th Cir. 1977). See also *State v. Creamer*, 379 A.2d 733 (Me. 1977).

137. *Proposed Code*, *supra* note 10, at 2644-45.

138. *Id.*

inconsistent statements admitted under that rule would be inferior evidence which might be unable to sustain a verdict by themselves because of the nature of one problem which they were attempting to solve. That problem was the mass of unsatisfactory quasi-exceptions to the hearsay rule that had grown up to permit lawyers to inform juries of the existence of prior inconsistent statements. In most of these situations, the prior inconsistent statement was introduced for some non-substantive purpose such as impeachment or refreshing memory. Frequently these statements did not really qualify for the purposes for which they were introduced but were admitted by courts that had lost faith in their own rule prohibiting the hearsay use of such statements.

The major effect of Rule 801(d)(1)(A) and Section 801(4)(a)(1) is to provide a straight forward basis for the admission of these prior inconsistent statements. It was not necessary to that purpose that a prior inconsistent statement admitted under these rules be given equal status with other evidence. Under the quasi-exceptions for impeachment and memory refreshing which these rules replaced, prior inconsistent statements were not substantive evidence at all. It therefore made sense for Cleary, Weinstein, and the Senate Judiciary Committee to argue that evidence admitted under Federal Evidence Rule 801(d)(1)(A) need not be considered to be adequate to support a verdict by itself.

None of the advocates of Federal Evidence Rule 801(d)(1)(A) found it necessary to explain to what degree prior inconsistent statements should be considered inferior evidence. Although they explained that either some or all prior inconsistent statements might be inadequate to support a conviction or civil judgment, they did not go on to discuss the question of how much more evidence would be necessary in order to support a conviction or a civil judgment. There are, however, only two logically possible general rules that could be applied to situations in which part of the evidence consists of a prior inconsistent statement admitted under Federal Evidence Rule 801(d)(1)(A) or Section 801(4)(a)(1). If a court holds that a prior inconsistent statement is not sufficient by itself to support a conviction or a civil judgment, the court must then apply one of two possible standards requiring that the remaining evidence be sufficient by itself without considering the prior inconsistent statement, or the court must impose a less demanding standard which requires only that the combination of the remaining evidence and the prior inconsistent statement be sufficient.

The first standard would permit prior inconsistent statements to be

used only to corroborate evidence which was already sufficient. It should be noted that this is exactly the way prior inconsistent statements were treated when they were admitted under the quasi-exceptions for impeachment and memory refreshing. The second standard would permit a prior inconsistent statement to be used to support a conviction of civil judgment if it were supported by other evidence. That other evidence might consist of corroboration. John M. Stalmack has argued that corroboration should be required, but that an adequately corroborated prior inconsistent statement should be sufficient to support a conviction or civil judgment.

Many have feared that a change in position allowing the prior inconsistent statement to be given substantive effect would probably also require that a prior inconsistent statement be sufficient to sustain a party's case. To say that a prior inconsistent statement alone would in all instances be enough to sustain a party's case is a gross overstatement. This is not an issue that is reductive to a hard and fast rule, but one that should depend upon the circumstances of each case.

. . . .

The enigma of the single, direct, prior inconsistent statement, however, can be solved by a requirement of corroboration. But rather than requiring corroboration as a prerequisite to admissibility, prior inconsistent statements should be admitted in every case. Corroboration, then should be a determining factor considered by the trial court when passing upon the sufficiency of that single, direct, prior inconsistent statement to withstand a motion for a directed verdict, a judgment notwithstanding the verdict, or a judgment of acquittal.<sup>139</sup>

Since 1964 Kansas law has permitted the introduction of statements "previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter. . . ."<sup>140</sup> A Kansas judge and writer reviewed the experience of the Kansas courts with that rule over a period of almost fifteen years and indicated that the Kansas courts have treated some prior statements as inferior evidence.<sup>141</sup> However, it does not appear that the Kansas courts have adopted any general standard for determining when they will treat prior statements as inferior evidence or of

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139. Stalmack, *supra* note 105, at 267-69.

140. KAN. STAT. ANN. 60-460(a) (1976).

141. Gard, *Survey of Kansas Law: Evidence*, 27 KAN. L. REV. 225, 226-27 (1979).

what weight they will give to such statements. Judge Spencer A. Gard wrote:

[The Kansas hearsay exception for] out-of-court statements by a person present at the hearing who is available for cross-examination, was expected by legislative skeptics to give the courts considerable trouble because of its scope and novelty. The effect of the exception is to give consistent and inconsistent prior statements by witnesses substantive evidence status. Contrary to expectations, no cases of consequence under this exception reached the Kansas Supreme Court for a number of years, and when such cases did reach the court they caused little trouble because trial judges had shown their capacity for discretionary control in preventing attorneys from abusing the exception with self-serving statements. In turn, the attorneys realized the futility of staking their cases on out-of-court declarations, either consistent or inconsistent, without better evidence in the record . . . . As to inconsistent statements, the tendency is to limit the evidence to typical turncoat situations.<sup>142</sup>

The Kansas experience reported by Judge Gard and the silence of the federal courts with respect to the question of the value of prior inconsistent statements admitted under Federal Evidence Rule 801(d)(1)(A) since 1975 suggest that clear general rules concerning the extent to which prior inconsistent statements are inferior evidence are unlikely to be developed in the near future.

Nevertheless, in any case in which there is so little evidence on a vital point that substantive use of prior inconsistent statements may affect whether or not the evidence is sufficient to go to a jury, the idea that prior inconsistent statements may be an inferior kind of evidence will have to be considered by the trial and appellate judges. In some cases in which counsel bring this point to the attention of the courts, the question may be expressly discussed and decided. Even in cases in which the question is not discussed, however, it will be a necessary part of the evaluation of the sufficiency of the evidence.

Still the absence of any express rule on the value of prior inconsistent statements leaves open the question of how Oklahoma would deal with the problems presented by a case similar to the Kansas case of *State v. Fisher*.<sup>143</sup> In that case a majority of the Supreme Court of

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142. *Id.* (citations omitted).

143. 222 Kan. 76, 563 P.2d 1012 (1977).

Kansas indicated that they were willing to uphold a conviction based solely upon the prior inconsistent statements of the alleged victim.<sup>144</sup> The alleged victim was an eleven year old girl and the defendant was her stepfather. The stepfather was charged with two sexual offenses involving the girl. The only evidence against the defendant consisted of testimony concerning prior statements by the girl, who was called as a witness by the state but denied that the defendant had done any of the acts she had previously described,<sup>145</sup> and by her mother, who was present but not called as a witness.<sup>146</sup> The majority opinion held that the conviction must be reversed because of the introduction of the prior statements by the mother, but indicated that it was willing to sustain a conviction based solely upon the prior statements of the girl. The majority stated:

The testimony of the deputy as to what was told him by the complaining child was sufficient to sustain a verdict of guilty if believed by the jury. In reviewing the sufficiency of evidence, the function of an appellate court is limited to whether there was a basis in the evidence for a reasonable inference of guilt.<sup>147</sup>

Three Justices dissented. Justice Miller pointed out for the dissenters that there was no corroborating testimony such as evidence that someone had committed a crime against the child.

[I]t is shocking that here we have no medical testimony and *no corroborating evidence whatsoever* to establish (1) that a crime was committed or (2) that Fisher committed it. The victim sustained no physical harm. Fisher was sentenced to be imprisoned for a minimum of 5 years and a maximum of life. His conviction and sentence were based solely on what a small child once said—and now denies.

Where *the only evidence* offered by the state to prove that an offense has been committed and that the defendant committed it is hearsay testimony, admissible only by virtue of K.S.A. 60-460(a), such evidence, standing alone, is insufficient in my judgment to establish guilt beyond a reasonable doubt. It does not form the basis for that reasonable inference of guilt necessary upon appellate review.<sup>148</sup>

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144. *Id.* at 86, 563 P.2d at 1020.

145. *Id.* at 77, 563 P.2d at 1015.

146. *Id.*

147. *Id.* at 86, 563 P.2d at 1020.

148. *Id.* at 87, 563 P.2d at 1021 (Miller, J., dissenting). See also Gard, *supra* note 141, at 228.

I suggest that the dissenting judges were correct. Although it is easy to understand why the majority was reluctant to order an acquittal when the wife and child changed their stories in circumstances such as these, there simply was not enough evidence to support a conviction. This problem could not arise under the Oklahoma Evidence Code on exactly these same facts because Oklahoma Evidence Code Section 801(4)(a)(1) requires that prior inconsistent statements must have been made under oath in order to be admissible as substantive evidence. However, that requirement would be satisfied if the wife and child had testified before a grand jury. Would a case consisting only of such grand jury testimony be adequate to uphold a conviction in Oklahoma? The existence of a grand jury record would make it overwhelmingly certain that the wife and child actually made these accusations, but it would not provide any corroboration to support the accuracy of the accusations. Therefore Oklahoma should refuse to permit a conviction based upon such evidence.

The final reason why prior inconsistent statements admitted under Section 801(4)(a)(1) may be inferior evidence is that the requirements of due process mandated by the Constitution of the United States may limit the use that can be made of such evidence. The Supreme Court of the United States suggested this possibility in a footnote in its opinion in *California v. Green*.<sup>149</sup>

While we may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking, . . . we do not read *Bridges* as declaring that the Constitution is necessarily violated by the admission of a witness' prior inconsistent statement for the truth of the matter asserted.<sup>150</sup>

In another footnote in *Green* the Supreme Court suggested that there was a "not insubstantial" issue of the sufficiency of the evidence to sustain a conviction in *Green* itself.<sup>151</sup> The Court seemed to be assuming that even if the Constitution did not prohibit the use of prior inconsistent statements as substantive evidence, nevertheless such statements by themselves might not provide "a reliable evidentiary basis" to support a conviction.

However, the Court did not spell out any standards which lower

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

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

151. *Id.* at 170 n.19.

courts might apply to judge the sufficiency of prior inconsistent statements. The difficulties involved in applying any sufficiency standard to prior inconsistent statements are illustrated by the decision of the Supreme Court of California in *Green* when it considered that case on remand from the Supreme Court of the United States.<sup>152</sup> In a footnote the Supreme Court of the United States had pointed out that there was a "not insubstantial" issue as to the sufficiency of the evidence to sustain the conviction because (in addition to other reasons) the conviction rested "almost entirely on the evidence in Porter's two prior statements which were themselves inconsistent in some respects."<sup>153</sup> Porter was a sixteen year old minor who had claimed, in both an out of court statement to a police officer and testimony at a preliminary hearing, that defendant Green had supplied him with marijuana. At Green's trial Porter claimed that he did not know whether Green had supplied him with marijuana because of the effects of a hallucinogenic drug which he had taken. The state thereupon introduced Porter's prior statements in order to prove Green guilty of supplying Porter with marijuana.<sup>154</sup> The Supreme Court of California emphasized Porter's apparent unreliability as a witness<sup>155</sup> and stated in a footnote with respect to the trial court's reaction to Porter:

[T]he court expressed deep concern over the probative value of the testimony of this youth "who comes in here and defies the Court and counsel with his nonresponsive, insolent answers." In explaining his decision to find defendant guilty, the court again emphasized "the small probability attached to the veracity of this young renegade. . ."<sup>156</sup>

Nevertheless, the California Supreme Court upheld the sufficiency of the evidence. Porter's deficiencies as a witness were applied to destroy only his in court denials and not his prior accusations. The Supreme Court of California stated:

The evidence is not insufficient as a matter of law to support the finding of guilt: despite certain inconsistencies between Porter's preliminary hearing testimony and his declaration to Officer Wade, both statements unequivocally identify defendant as his supplier of marijuana. Far from being themselves inherently incredible, the statements depict, as

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152. 3 Cal. 3d 981, 92 Cal. Rptr. 494, 479 P.2d 998 (1971).

153. 399 U.S. at 170 n.19.

154. 3 Cal. 3d at 984-91, 92 Cal. Rptr. at 495-500, 479 P.2d at 999-1004.

155. *Id.* at 987-88, 92 Cal. Rptr. at 498, 479 P.2d at 1002.

156. *Id.* at 988 n.5, 92 Cal. Rptr. at 498 n.5, 479 P.2d at 1002 n.5.

characterized by the Attorney General, "a dismally common story" of the exploitation of youth for the purpose of peddling contraband drugs. Even discounting Porter's low level of credibility, the trial court could properly conclude from all the evidence that "I am satisfied myself that Porter dealt with (defendant), used it (i.e., marijuana), and sold it. . ."<sup>157</sup>

Therefore, the Constitutional argument for treating prior inconsistent statements as inferior evidence has so far offered no firmer guidance than the arguments based upon legislative history or common law usage. However, a new 1979 decision by the Supreme Court of the United States will greatly strengthen arguments in future cases that criminal convictions based only upon prior inconsistent statements are a violation of the constitutional guarantee of due process. *Jackson v. Virginia*<sup>158</sup> did not involve any prior inconsistent statements. It held, however, that the rule announced by the Court in *Winship*,<sup>159</sup> that the "Constitution prohibited the criminal conviction of any person except on proof of guilt beyond a reasonable doubt,"<sup>160</sup> meant that the proper standard for review "of the sufficiency of the evidence to support a criminal conviction must be to determine . . . whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt."<sup>161</sup> This standard was announced in a federal habeas corpus review of a state court conviction, but it will logically apply to all American criminal trials.

In any case in which a prior inconsistent statement is the only evidence on a vital point, the court should give careful consideration to all three arguments that prior inconsistent statements are inferior evidence.

The starting point for all three arguments is the fact that a prior inconsistent statement offered for a testimonial purpose is hearsay. The existence of an opportunity to question the person who made the statement (or who is alleged to have made the statement) is worth something, but it does not eliminate the hearsay problems. The academic argument that all the hearsay problems are solved by the existence of the right to cross-examine the witness about his alleged out of court

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157. *Id.* at 991, 92 Cal. Rptr. at 500, 479 P.2d at 1004.

158. 99 S.Ct. 2781 (1979).

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

160. *Jackson v. Virginia*, 99 S.Ct. 2781, 2784 (1979).

161. *Id.* at 2789.

statement<sup>162</sup> is based upon an oversimplified view of witness examination. It overlooks two ways in which cross-examination of the person who allegedly made the prior inconsistent statement is not the equivalent of ordinary cross-examination of a witness.<sup>163</sup>

The first of these differences is the absence of direct examination. "Although the right to require strict compliance with the rules concerning direct examination is one that parties frequently waive, it is also one that can be very valuable if there is any doubt as to whether a witness intends to say what examining counsel would have him say."<sup>164</sup> Of course, this problem arises every time hearsay is introduced, but it is a problem that cannot be eliminated by giving the party against whom hearsay is introduced a right of cross-examination.

Secondly, the right to cross-examine comes too late. There is no way in which the cross-examination at trial can destroy the out of court statement.

The witness is treated as if he were two witnesses—one outside and one inside the courtroom. Nothing that happens to the witness inside the courtroom can deprive the fact finder of the right to believe the witness outside the courtroom. Indeed, if the witness inside the courtroom were to be attacked with the usual devices of the cross-examiner and shown to be untrustworthy, that would merely make it all the more likely that the fact finder would decide to believe the witness outside the courtroom.<sup>165</sup>

The fact that the hearsay dangers of prior inconsistent statements cannot be eliminated does not mean that it was improper to create a hearsay exception for prior inconsistent statements. But it does mean that this exception, like other hearsay exceptions, is based upon a judgment as to the proper weighing of hearsay dangers against probative value. In cases in which a prior inconsistent statement provides the only evidence on a vital point the hearsay dangers may well outweigh the value of the evidence.

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162. See MCCORMICK, *supra* note 11, § 251 and 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)[01]. But see Bein, *Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)*, 26 UCLA L. REV. 976 (1979).

163. See Blakey, *Substantive Use*, *supra* note 98, at 42-47.

164. *Id.* at 42.

165. *Id.* at 44-45.

6. Difficulties That Might Be Caused By the Requirement that the Witness Be Subject to Cross-Examination Concerning the Statement

Section 801(4)(a)(1) requires that the witness be subject to "cross-examination concerning the statement." This requirement will not create any problem when a party calls a "turncoat" witness for the purpose of introducing his sworn prior inconsistent statement. The statement will be brought out on direct examination of that witness and that witness will then be subject to cross-examination by the opposing party. The examination conducted by the opposing party will probably use very few of the tools of cross-examination<sup>166</sup> but the title cross-examination will satisfy the requirement of Section 801(4)(a)(1) and permit substantive use of the prior inconsistent statement.

If, however, the opposing party calls the witness and the prior statement is brought out on cross-examination, the next examination is redirect examination. Is the prior statement admissible as substantive evidence in this situation?

There is no reason to think that the draftsmen of the Federal Rules and the Oklahoma Evidence Code intended to make any distinction between situations in which the prior statement is brought out by the party calling the witness and situations in which it is brought out by the opposing party. In provisions dealing with the admission of prior testimony,<sup>167</sup> the draftsmen treated opportunities to develop testimony by direct, cross or redirect examination as equivalent. It therefore seems reasonable to regard "subject to cross-examination" as a rhetorical flourish and not a purposeful requirement. Judge Sam C. Pointer suggests "'Cross exam' may be unintended; perhaps should be understood merely as subject to 'examination.'" <sup>168</sup>

The federal courts have not yet faced this problem because the cases in which sworn prior inconsistent statements have been offered under Federal Evidence Rule 801(d)(1)(a) have been "turncoat" witness cases in which the witness has been called by the party who offers the prior statements. The problem can be solved, however, whenever it arises by treating both the Federal Rule and Section 801(4)(a)(1) as authorizing the cross-examination they require. Whenever a sworn

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166. *See id.* at 45.

167. Oklahoma Evidence Code § 804(B)(1) and Federal Evidence Rule 804(b)(1).

168. Pointer, *Federal Rules of Evidence*, in *Proceedings of Seminar for Newly Appointed United States Judges*, 75 F.R.D. 89, 345, 353 (1979).

prior inconsistent statement is offered under either provision the opposing party should be given the right to cross-examine the witness concerning that statement.<sup>169</sup>

E. *Use of Prior Consistent Statements as Either Substantive or Rehabilitative Evidence.*

Section 801(4)(a)(2) provides that a statement is "not hearsay" if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." It is extremely likely that this rule will frequently be misread as a restatement of the traditional rule that prior consistent statements by a witness are admissible for the true nonhearsay purpose of rehabilitating a witness if they will rebut charges of recent fabrication or improper influence or motive.<sup>170</sup> However, such a misreading will not cause any harm, and a correct reading of the rule will not lead to any benefit.

Although there is no other provision in the Oklahoma Evidence Code which deals with the use of prior consistent statements, Section 801(4)(a)(2) was not necessary to authorize the rehabilitative use of prior consistent statements. Past practices and the logical application of Section 106 (Limited Admissibility) and 801(3) would have authorized such rehabilitative use even if Section 801(4)(a)(2) did not exist or if 801(4)(a)(2) had been amended (like Section 801(4)(a)(1)) to apply to only some rehabilitative prior consistent statements. Nevertheless, the language of Section 801(4)(a)(2) is broad enough to include rehabilitative use and the Section will probably be cited as the rule authorizing rehabilitative use.

The actual effect of Section 801(4)(a)(2) is to permit the substantive use of the prior consistent statements to which it applies. Section 801(4)(a)(2) does not actually change the traditional rule that a prior consistent statement must serve a nonhearsay purpose to be admissible, but it does permit such statements to come in for both that nonhearsay purpose and for any other substantive purpose that might be possible.<sup>171</sup>

However, it is extremely unlikely that it will ever actually matter

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169. See also Blakey, *Substantive Use*, *supra* note 98, at 12-13.

170. 4 J. WIGMORE, EVIDENCE §§ 1128, 1129, 1132 (J. Chadbourne 1972).

171. *Proposed Code*, *supra* note 10, at 2645.

whether a prior consistent statement is admitted for substantive as well as nonhearsay purposes. A prior consistent statement will never be the only substantive evidence on a vital point. Therefore the fact that a particular prior consistent statement is substantive evidence will never determine whether a case goes to the jury. And it is hard to see how a jury could treat a substantive prior consistent statement any differently from a limited use rehabilitative prior consistent statement.<sup>172</sup>

It is difficult to discover why either the draftsmen of the Federal Rules of Evidence or the draftsmen of the Oklahoma Evidence Code provided for substantive use of rehabilitative prior consistent statements. Both sets of draftsmen gave similar short and very lukewarm explanations. The Oklahoma Evidence Subcommittee stated:

As to Section 801(4)(a)(2) prior consistent statements have traditionally been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence as they would be under this section. See *Coppage v. State*, 76 Okla. Cr. 428, 137 P.2d 797 (1943). However, there is no sound reason for not admitting such statements if the opposite party opens the door for admission under the conditions authorized under the rule.<sup>173</sup>

The Federal Rule was based, however, upon section 1236 of the California Evidence Code<sup>174</sup> and the draftsmen of that Evidence Code did suggest a reason for substantive use of rehabilitative prior consistent statements which needs to be examined. The California Law Revision Commission argued

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

There is no reason to perpetuate the subtle distinction made in the cases. It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true.<sup>175</sup>

Both the Federal Rule of Evidence and the Oklahoma Evidence Code

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172. See *Blakey, Substantive Use*, *supra* note 98, at 26-28.

173. OKLA. STAT. ANN. tit. 12, § 2801, (West Supp. 1978) (Evidence Subcommittee's Note), restating Note in *Proposed Code*, *supra* note 10, at 2645. See also *Proposed Rules*, *supra* note 10, at 296.

174. *Proposed Rules*, *supra* note 10, at 296-97.

175. CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATIONS PROPOSING AN EVIDENCE CODE 234 (1965) (citation omitted).

reveal that their draftsmen wished to eliminate, in so far as they could, the necessity of explaining to a jury such "subtle distinction[s]" as the difference between limited use prior statements and substantive evidence. Although Section 106 and Federal Rule 106 authorize the admission of evidence for a limited use, many of the most common limited uses of evidence involving hearsay dangers are eliminated by changes which permit substantive use of such evidence. These changes affect not only prior inconsistent statements and prior consistent statements but also statements made for purposes of medical diagnosis<sup>176</sup> and statements in learned treatises.<sup>177</sup>

If Federal Evidence Rules 801(d)(1)(A) and 801(d)(1)(B) had been adopted in the form proposed by the Federal Advisory Committee,<sup>178</sup> it would have been possible to instruct a jury with respect to all prior statements without distinguishing between those that could be used to support a verdict and those that could not. But Federal Rule 801(d)(1)(A) was amended to make admissible as substantive evidence only prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition", and Oklahoma Evidence Code Section 801(4)(a)(1) adopted an almost identical restriction. Thus, even though all the prior consistent statements admissible under Section 801(4)(a)(2) will be substantive evidence, many of the prior inconsistent statements which will come into evidence in the traditional manner will not be. The problem of differentiating the two uses to the jury has not been eliminated. Seemingly, no harm will result if the jury either actually understands or completely ignores what it is told about this distinction. But substantial harm may result if the jury tries to apply an instruction that prior consistent statements are substantive evidence by interpreting the instruction to mean that prior consistent statements are to be given extra weight. Such a misunderstanding may well arise since there is almost no sensible use to which a jury could put an instruction from the judge that rehabilitative prior consistent statements are substantive evidence. Fortunately, the solution to this problem is easily found. Since no useful purpose is served by telling the jury that any prior consistent statements are substantive evidence, the jury need not, and should not, be given any such instructions.

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176. Section 803(4) and Federal Evidence Rule 803(4).

177. Section 803(18) and Federal Evidence Rule 803(18).

178. Proposed Rules, *supra* note 10, at 293.

Aside from the problems that may arise in instructing the jury, substantive use of prior consistent statements is unlikely to have any effect.<sup>179</sup> The California Supreme Court at one time held that their similar California Evidence Code Section 1236 was unconstitutional.<sup>180</sup> That court also held that the error involved in applying that section was harmless.<sup>181</sup>

F. *Oklahoma Did Not Adopt a Hearsay Exception for Statements of Identification.*

Federal Evidence Rule 801(d)(1), which corresponds to Oklahoma Evidence Code Section 801(4)(a), contains an additional "exception by definition" for a statement made by a witness who is subject to cross-examination concerning the statement. This exception applies to a statement "of identification of a person made after perceiving him." The Federal Advisory Committee proposed this exception,<sup>182</sup> but Congress rejected this exception when it adopted the Federal Rules.<sup>183</sup> The Federal Rules were amended to add this exception<sup>184</sup> in the fall of 1975.<sup>185</sup>

The absence of such an exception in the Oklahoma Evidence Code is not likely to be significant; and Oklahoma was probably wise to refuse to create a hearsay exception for those few prior statements of identification that will not be admissible under some other exception. Although the exception for statements of identification appears to operate "independently of the impeachment process,"<sup>186</sup> in cases in which the identification of a person is in dispute many prior statements of identification will be admissible either as rehabilitative consistent statements or as sworn prior inconsistent statements.<sup>187</sup> The only state-

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179. Substantive use of prior consistent statements under § 1236 CAL. EVID. CODE does not appear to have had any practical effect in any of the cases in which that section has been cited. See, e.g., *People v. Canady*, 8 Cal. 3d 379, 105 Cal. Rptr. 129, 503 P.2d 585 (1972) and *People v. Manson*, 61 Cal. App. 2d 102, 132 Cal. Rptr. 265 (2d Div. 1976) cert. denied sub nom. *Manson v. Calif.*, 430 U.S. 986 (1977). See also Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine*, 26 HAST. L.J. 361, 366 n.19 (1974).

180. *People v. Washington*, 71 Cal. 2d 1061, 80 Cal. Rptr. 567, 575, 458 P.2d 479, 487 (1969).

181. *Id.* at 1077-78, 80 Cal. Rptr. at 576, 458 P.2d at 488.

182. Proposed Rules, *supra* note 10, at 293, 296-97.

183. Pub. L. No. 93-595, 88 Stat. 1926, 1938 (Jan. 2, 1975).

184. Pub. L. No. 94-113, 89 Stat. 576 (Oct. 16, 1975).

185. See 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)(C)[01] for a discussion of these changes.

186. *Id.* at 801-103.

187. P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 388 (1973 & Supps. 1974, 1975) [hereinafter cited as ROTHSTEIN, UNDERSTANDING].

ments of identification which would not be admissible under those two exceptions alone would be consistent identifications that were not even admissible to rehabilitate the witness or unsworn prior identifications that were inconsistent with the witness's testimony.

An argument can be made for the admission of even these identifications on the theory that all out of court identifications are far more trustworthy than in court identifications,<sup>188</sup> but this theoretical trustworthiness of prior identifications must be weighed against the difficulties which the opposing party will face in responding to such evidence—especially if that evidence is introduced through the testimony of persons other than the identifying witness.<sup>189</sup> Therefore, Oklahoma probably acted wisely in rejecting this federal exception.<sup>190</sup>

### G. *Nonassertive Conduct.*

#### 1. Introduction

Nonassertive conduct and implied assertions are closely related ideas. They are both applications of a general argument that a belief which a person reveals without intending to do so is likely to be more trustworthy than a statement in which that person intentionally asserts a belief in something.<sup>191</sup> The term "implied assertion" describes a belief which someone has revealed without intending to do so. Sometimes a person will reveal such a belief by conduct that was not intended as an assertion at all, that is, by nonassertive conduct.<sup>192</sup> Whenever that happens the situation may be described by either term—as nonassertive conduct, referring to the evidence to be offered, or as an implied assertion, referring to the belief to be proven.<sup>193</sup> However, it is also logically possible for an implied assertion to be revealed by speech or conduct that was intended as an assertion if the speech or conduct was intended to assert something different from the belief it

188. *Hill v. State*, 500 P.2d 1075, 1078 (Okla. Crim. 1972) (Simms, J., concurring). 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)(C)[01] 801-126 to -129.

189. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(d)(1)(C)[01] 801-129 to -132. See *Hill v. State*, 568 P.2d 635, 637-38 (Okla. Crim. 1977); *Towning v. State*, 521 P.2d 415, 417 (Okla. Crim. 1974).

190. Proposed Code, *supra* note 10, at 2645. But see Note, *Admissibility of Extrajudicial Identifications*, 32 OKLA. L. REV. 462 (1979).

191. MCCORMICK, *supra* note 11, § 250; Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MT. L. REV. 133 (1961), [hereinafter cited as Falknor, "See-Do"]; Falknor, *Hearsay*, *supra* note 81, at 594-95. See 5 J. WIGMORE, EVIDENCE § 1362 n.1 (J. Chadbourne 1974).

192. MCCORMICK, *supra* note 11, pp. 596-97.

193. *Id.*

revealed.<sup>194</sup>

A series of illustrations may help to explain these extremely abstract ideas. Let us suppose a lawsuit in which there is an issue of whether or not it was raining outside a particular building at a particular time.<sup>195</sup> One witness is available who was in the lobby of the building at the time in question. Our witness did not go outside the building or even go close enough to the glass doors of the lobby to see whether it was raining outside. He did, however, see a woman<sup>196</sup> going out the doors of the building, open an umbrella and hold it over her head. If the witness is asked to testify about what he saw the woman do in order to prove that it was raining outside the building, a hearsay problem is presented.<sup>197</sup> The woman's conduct tends to prove that it was raining because she behaved as if she believed it was raining. This presents at least some of the hearsay dangers that would be present if the witness were able to testify that the woman called back to him as she went out the door, "It is raining." In both the situation in which the woman actually said, "It is raining," and the situation in which her conduct in raising her umbrella is offered as evidence that she believed it was raining, the trier of fact is called upon to treat the woman herself as a witness. Her conduct is being offered for a testimonial purpose.

However, it is extremely unlikely that the woman intended to make an assertion by opening her umbrella. Therefore, her act of raising the umbrella was "nonassertive conduct" and testimony that she raised the umbrella is admissible to prove that it was raining under the hearsay exception for nonassertive conduct created by Oklahoma Evidence Code Section 801 and Federal Evidence Rule 801.

Implied assertions may also be based on assertive conduct which was intended to assert something other than the implied assertion. For an illustration of this, suppose the same facts as in the foregoing illustration, except that a man who went to the lobby doors and looked out at the street came back to our witness and told the witness: "I'll have to skip lunch today. Water would ruin this suit." These statements are

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194. Falknor, "See-Do", *supra* note 191, at 134; R. LEMPert AND S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 351 (1977).

195. This illustration is adapted from one given by Professor Falknor. Falknor, "See-Do", *supra* note 191, at 133.

196. In Professor Falknor's illustration "a number of passers-by" had their umbrellas up, *id.*, which is far more convincing than the single umbrella raised in this illustration. However, there is nothing in the theory of nonassertive conduct which will limit its application to conduct which is as convincing as Professor Falknor's example.

197. *Id.* at 133-34.

intended as assertions of some facts, but they do not appear to have been intended as assertions that it was raining outside the building.<sup>198</sup> Testimony by the witness that the man said these things might be offered to prove that it was raining. This would be an implied assertion based upon assertive conduct.<sup>199</sup> Whether the Oklahoma Evidence Code creates a hearsay exception for implied assertions based upon assertive conduct is subject to dispute.<sup>200</sup> Such an exception would be potentially far more important than a hearsay exception for nonassertive conduct alone.

Section 801(1) clearly creates an exception by definition for nonassertive conduct. Only verbal and nonverbal conduct which is intended as an assertion by the person performing the conduct is included within the definition of "statement" in Section 801(1). This has the effect of imposing the same limitation upon the term "hearsay" because Section 801(3) requires "hearsay" to be "a statement."<sup>201</sup>

## 2. Determining Whether Conduct Was Intended as an Assertion.

It should be apparent that the creation of a hearsay exception for nonassertive conduct involves the drawing of some very fine lines. Although the basis for the exception is that the person whose conduct is involved did not intend to make an assertion, the fact finder must use the conduct as if it were an assertion by that person. Therefore all or most of the usual hearsay dangers are present in just about the usual proportions. The advocates of this kind of evidence insist that the hearsay dangers are not as great because they have largely or entirely eliminated the danger of lack of sincerity or veracity.<sup>202</sup> The strongest statement of this view was made by Professor Falknor:

On this assumption, it is clear that evidence of conduct

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198. It will frequently be difficult to determine exactly what a statement was intended to assert. See notes 231-33 *infra* and accompanying text.

199. In these illustrations nonverbal conduct is used to illustrate nonassertive conduct and verbal conduct is used to illustrate assertive conduct, but there is no necessary relationship between the fact that conduct is verbal or nonverbal and the question of whether it is assertive or nonassertive. Thus if our witness had asked the man to whom he spoke if it was raining and the man had nodded his head up and down that would have been assertive but nonverbal conduct. Conversely words can be used without their being intended to be assertions. Thus the words of offer and acceptance by which a contract is made are frequently stated without the use of assertions.

200. See notes 215-61 *infra* and accompanying text.

201. Proposed Federal Rules, *supra* note 10, at 293; *Proposed Code*, *supra* note 10, at 2644.

202. Falknor, "See-Do", *supra* note 191, at 136; Proposed Rules, *supra* note 10, at 293-94.

must be taken as freed from at least one of the hearsay dangers, i.e., mendacity. A man does not lie to himself. Put otherwise, if in doing what he does a man has no intention of asserting the existence or non-existence of a fact, it would appear that the trustworthiness of evidence of this conduct is the same whether he is an egregious liar or a paragon of veracity. Accordingly, the lack of opportunity for cross-examination in relation to his veracity or lack of it, would seem to be of no substantial importance.<sup>203</sup>

Even if Professor Falknor were correct about questions of veracity, nonassertive conduct offered to prove the beliefs of the actor would present more unanswered questions as to the knowledge, memory and especially narration of the actor than the ordinary hearsay statement would present;<sup>204</sup> but it is only by hypothesis or assumption that even the sincerity questions are eliminated.

The hypothesis upon which the entire nonassertive conduct theory is based is that the trial judge can determine whether the conduct in question was or was not intended as an assertion of anything by the actor.<sup>205</sup> The Comment to one of the earlier versions of a nonassertive conduct rule in the American Law Institute's Model Code of Evidence provides, without conscious humor,<sup>206</sup> that whether a flight by a person would be hearsay would depend upon the secret intentions of the fleeing person:

Thus flight of a person intended by him to draw suspicion upon himself would amount to a statement that he had committed the wrong in question, and evidence of such flight would be hearsay evidence. On the other hand, his flight for the purpose of escape would not constitute such a statement and evidence of it would not be hearsay evidence within the definition. . . .<sup>207</sup>

The Federal Advisory Committee did recognize that there would be a problem in determining whether conduct was intended as an assertion and made a procedural suggestion that really does not solve the problem:

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary de-

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203. Falknor, "*See-Do*" *supra* note 191, at 136.

204. Finman, *supra* note 21, at 684-86, 688-89; Blakey, *Redefinition*, *supra* note 33, at 611-16.

205. Finman, *supra* note 21 at 686-88, 695-97.

206. *See* United States v. Myers, 550 F.2d 1036, 1048-51 (5th Cir. 1977).

207. ALI MODEL CODE OF EVIDENCE 228 (1942).

termination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact.<sup>208</sup>

The Federal Advisory Committee's suggestion that the wording of Federal Rule 801 (and Section 801) places the burden of showing that the actor did or did not intend to make an assertion upon either party is questionable. However, such a rule<sup>209</sup> would merely be a means of avoiding rather than answering the question of whether the conduct was intended to be assertive.<sup>210</sup> Trial courts will frequently be confronted with a very difficult decision as to whether a particular act was intended to be an assertion.

### 3. Weighing the Probative Value of Nonassertive Conduct.

Whenever a trial court does find that the offered conduct should be considered nonassertive, it will then face a second question: Is the conduct sufficiently strong evidence of a relevant belief to justify its admission? The California case of *People v. Clark*<sup>211</sup> illustrates a situation in which the conduct in question was almost certainly nonassertive but should, nevertheless, have been excluded from evidence.

The defendant in *People v. Clark* was convicted of second degree murder. The evidence of his guilt was so overwhelming that no reversal would have been necessary even if the appellate court had found error in the introduction of the nonassertive conduct evidence.<sup>212</sup> The nonassertive conduct issue involved a jacket with a fur-lined collar which was part of the description of the defendant on the night in question given by various witnesses. The California Court of Appeals for the Fifth District summarized the nonassertive conduct issue as follows:

Defendant's remaining contentions are of no consequence and need not detain us long. He complains because

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208. Proposed Rules, *supra* note 10, at 294 (citation omitted).

209. McCormick and Maguire would also place the burden of proving "assertive intent" on the party opposing the evidence, MCCORMICK, *supra* note 11, at 599; Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 766 (1961). Falknor would assume some conduct to be non-assertive, Falknor, "See-Do", *supra* note 191, at 136 n.13. But as Maguire points out "it is far from clear that actual court practice embodies this procedural rule." Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 766 (1966).

210. Finman, *supra* note 21, at 695-97.

211. 6 Cal. App. 3d 658, 86 Cal. Rptr. 106 (5th Dist. Ct. App. 1970).

212. *Id.* at 661-63, 665-66, 86 Cal. Rptr. at 107-12.

the court allowed Sergeant Tabler to testify that when he asked defendant if he had a jacket with a fur-lined collar, defendant turned to his wife and stated, "I don't have one like that, do I dear," and his wife fainted. The reaction of defendant's wife to this question was relevant to prove that defendant owned a coat with a fur-lined collar and that he had worn it on the night of the murder; and because it was non-assertive conduct it was not objectionable hearsay (Evid. Code §§ 225, 1200).<sup>213</sup>

A trial court must apply Section 403 to control the use of nonassertive conduct evidence.<sup>214</sup> Evidence which is offered for the purpose of proving what it does not assert is necessarily vague and that vagueness ought to be treated as a weakness. If the courts are not careful, however, the vagueness may be misused as if it were a strength, for that vagueness invites treating evidence as proving whatever needs to be proven when it actually proves nothing at all.

H. *The Oklahoma Evidence Code Does Not Create a Hearsay Exception for "Implied Assertions" Based Upon Assertive Conduct.*

Two different theories are frequently mixed together in discussions of implied assertions. Both theories are based upon the argument that verbal or nonverbal conduct which indirectly indicates a belief on the part of the actor is more reliable than an ordinary hearsay statement by that same person asserting that same belief.<sup>215</sup> The first theory is that an exception to the rule against hearsay should be created for conduct offered to prove the actor's belief if the conduct was not intended as an assertion at all.<sup>216</sup> The second (and similar) theory is that a hearsay exception should be created for conduct regardless of whether it was intended as an assertion so long as it was not intended as an assertion of the belief which it is now offered to prove.<sup>217</sup> The second theory is

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213. *Id.* at 668, 86 Cal. Rptr. at 112.

214. See CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATIONS PROPOSING AN EVIDENCE CODE 223 (1965); Falknor, "See-Do", *supra* note 191, at 138. But see, Finman, *supra* note 21, at 703-06.

215. Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 148 (1912); Falknor, "See-Do", *supra* note 191 at 136; Falknor, *Hearsay*, *supra* note 81, at 594-95; McCORMICK, *supra* note 11, § 250; 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(a)[01]; LILLY, *supra* note 25, § 51.

216. *Id.*

217. McCORMICK, *supra* note 11, § 250. See Falknor, "See-Do," *supra* note 191, at 134; Finman, *supra* note 21, at 684 n.8.

far broader than the first and adoption of the second theory would eliminate any need to consider the first theory. Discussions have, however, tended either to concentrate on the first theory<sup>218</sup> or to combine the two.<sup>219</sup> The language of the Model Code adopts both theories.<sup>220</sup> Federal Evidence Rule 801 and Oklahoma Evidence Code Section 801 clearly adopt the first theory.<sup>221</sup> Whether they also adopt the second theory is open to dispute. It is the opinion of this writer that they do not.

It might be argued that Federal Evidence Rule 801(c) and Oklahoma Evidence Code Section 801(3) create an exception for statements used to prove a belief they did not originally assert. They both provide that "Hearsay" is an out of court statement offered "to prove the truth of the matter asserted." The words "the matter asserted" might be read in either of two ways.<sup>222</sup> They might be read as referring to whatever the statement itself appears to assert. However, they also might be read as referring only to whatever the out of court declarant who made the statement originally intended to assert.

The second, narrower possible reading would turn the Federal and Oklahoma rule into the Model Code Rule that a hearsay statement was a statement offered "to prove the truth of the matter intended to be asserted or assumed to be so intended. . . ."<sup>223</sup>

The language used in the Federal and Oklahoma rule is much less forceful than the language used in the Model Code. The requirement that the statement be offered to prove "the truth of the matter asserted" could logically be satisfied if the statement was offered to prove the truth of an implied assertion. On the other hand, it could be argued that only an express assertion was "the matter asserted."

218. ALI MODEL CODE OF EVIDENCE at 225-228; CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATIONS PROPOSING AN EVIDENCE CODE at 222-23 (1965).

219. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(a)[01]; 11 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE § 801.10 (1976); Lilly, *supra* note 25, § 51.

220. MODEL CODE OF EVIDENCE Rule 501 (1942).

221. Proposed Federal Rules, *supra* note 10, at 293; *Proposed Code, supra* note 10, at 2644.

222. ROTHSTEIN, UNDERSTANDING, *supra* note 187, 1975 Supp. 373 n.1. Rothstein stated:

The "matter asserted" language in Rule 801(c) could refer to either the express or implied assertion. A discernible drafting intent throughout the whole of Article VIII, to narrow the hearsay rule, was originally manifest. . . . This would help resolve the question posed in favor of concluding the evidence is not hearsay. But that intention to some extent got reversed. See what Congress did to the Rules just enumerated. See also Senate, House, and Conference Report to Article VIII.

*Id.* But see also: P. ROTHSTEIN, RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 327 (2d ed. 1978) [hereinafter cited as ROTHSTEIN, FEDERAL RULES]; Note, *State of Mind: The Elusive Exception*, 9 U. CAL. DAVIS L. REV. 199, 203-07 (1976).

223. ALI MODEL CODE OF EVIDENCE Rule 501 (1942).

The question of what such an ambiguous rule means is likely to become confused with the question of what is the most desirable rule.<sup>224</sup> Nonassertive conduct and implied assertions are *not* more trustworthy than ordinary hearsay.<sup>225</sup> Indeed, because the trier of fact must speculate as to what beliefs are proven by such evidence they are frequently likely to be *less* trustworthy than ordinary hearsay.<sup>226</sup> The theory that nonassertion can be used to select which items of hearsay should be admissible presents essentially the same dangers as the similar use of the "state of mind" exception. Just as counsel, if permitted to do so, might turn every out of court statement into evidence of a state of mind, counsel may also be able to turn every out of court statement into an implied assertion of some statement very similar to itself.

The realization that a state of mind analysis of out of court statements might be used to totally destroy the rule against hearsay has led to the adoption of a prohibition on the use of that exception to prove past acts.<sup>227</sup> It ought also to have led, however, to questions about how it could be possible for a hearsay exception to destroy the rule against hearsay. One answer to such questions is that the idea of state of mind has no relationship whatsoever to the trustworthiness problems against which the hearsay rule is directed. There are items of evidence that can be described as state of mind that do appear to be trustworthy, but there is nothing in the idea of "state of mind" that provides that trustworthiness. Similarly, some nonassertive acts or implied assertions appear to be valuable evidence, but there is nothing in the nature of implied assertions that makes it likely that such evidence will be more trustworthy than ordinary hearsay.<sup>228</sup> The fact that state of mind and nonassertion are not based upon a test of trustworthiness makes them powerful tools for the admission of hearsay evidence which could not be admitted under the exceptions that do seek to identify trustworthiness.

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224. In dealing with such ambiguous language it well may be proper to ask what would be the wisest and fairest rule. As Professor Callahan asked while attempting to analyze adverse possession, "How can we possibly answer any of those questions without inquiring as to our purpose?" C. CALLAHAN, *ADVERSE POSSESSION* 81 (1961).

225. Finman, *supra* note 21, at 689-90, 692-93, 707-10; McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 491-504 (1930); Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1141-43 (1935). *But see* Morgan, *Hearsay*, 25 MISS. L.J. 1, 8 (1953); Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, 216-17 (1940); Blakey, *Redefinition*, *supra* note 33, at 611-16.

226. Finman, *supra* note 21, at 688-89.

227. Federal Evidence Rule and Oklahoma Evidence Code Section 803(3). See Proposed Rules, *supra* note 10, at 305-06; 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 803(3)[05].

228. Blakey, *Redefinition*, *supra* note 33, at 611-16; Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 972 (1974).

Several writers have recognized that much of the evidence which might be admitted as implied assertions is not trustworthy and have attempted to suggest ways in which a hearsay exception for implied assertions might be restricted to trustworthy evidence.<sup>229</sup> However, Federal Rule 801(c) and Section 801(3) do not adopt any of those suggested restrictions and if they do create a hearsay exception for implied assertions based upon assertive conduct, that exception will apply to all implied assertions based upon assertive conduct. Of course, Section 403 can be used to exclude such evidence when its lack of probative value is very clear. That is unlikely to be a satisfactory solution, however, for the same reasons that Section 403 would not be a satisfactory substitute for the entire rule against hearsay. Professor Finman argues that such a balancing test would be particularly hard to apply to implied assertions.<sup>230</sup>

Finally, it should be pointed out that courts will have enormous difficulty in applying a hearsay exception based upon a distinction between direct assertions and implied assertions because that distinction does not actually exist. In our ordinary use of language neither the speaker nor the listener draws any distinction between direct assertions and implied assertions. Instead, both the speaker and the listener treat a statement as meaning both what it actually states and the many closely related ideas that it implies. Seligman pointed out in his pioneering article<sup>231</sup> on nonassertive conduct and state of mind that many implied assertions are part of what the speaker intends to assert.<sup>232</sup> The distinction which the courts would be required to draw if Federal Rule 801(c) and Section 801(3) do create a hearsay exception for implied assertions based upon assertive conduct will be a theoretical distinction between the ideas the speaker did intend to imply and the ideas which he also implied without intending to do so. This is a distinction which the speaker himself would frequently be unable to draw. It is likely to present difficulty for the courts.<sup>233</sup>

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229. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 504 (1930); Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1158-60 (1935); Falknor, *Silence as Hearsay*, 88 U. PA. L. REV. 192, 216-17; Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 768-73 (1961); and Finman, *supra* note 21, at 707-09.

230. Finman, *supra* note 21, at 701-06.

231. Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146 (1912).

232. *Id.* at 150-51 & n.13.

233. The difficulties which the courts will face are illustrated by two federal cases in which the courts reached what were probably correct decisions that particular items of evidence were properly admitted but in which the courts made arguments that a nametag on a briefcase is not an assertion of ownership, *United States v. Snow*, 517 F.2d 441, 443-44 (9th Cir. 1975), and that FAA

The strongest evidence that Federal Evidence Rule 801(c) did create an exception to the hearsay rule for implied assertions based upon assertive conduct is an indirect reference in the Federal Advisory Committee's Note to Federal Rule 801(a). After discussing nonassertive conduct,<sup>234</sup> the Committee stated: "Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c)."<sup>235</sup> That comment suggests that the Committee did think that Federal Rule 801(c) created a hearsay exception for verbal and nonverbal conduct offered to prove a belief whenever the actor did not originally intend to assert that belief.

In an earlier article I suggested that the federal courts were likely to follow the interpretation apparently assumed by the Federal Advisory Committee.<sup>236</sup> I am now suggesting that Oklahoma should reject that apparent interpretation. There are three reasons why Oklahoma Evidence Code Section 801(3) ought not to be read as creating a hearsay exception for implied assertions based upon assertive conduct. The first two reasons apply to the federal rule as well; the third reason applies only to Oklahoma.

The first reason is the language of the rules. There is nothing in Federal Rule 801(c) or Section 801(3) which announces that the common law is being changed. It should be kept in mind that each of these rules is a restatement of the basic common law rule which distinguished between testimonial use and nontestimonial use of an out of court statement.<sup>237</sup> It therefore has two vital functions to serve without considering the present question. First, it permits the introduction of out of court statements which could not be used for a testimonial purpose such as the words of a contract.<sup>238</sup> Secondly, it permits the introduction of out of court statements which could be used for a testimonial purpose but which are being offered only for a nontestimonial purpose. (Thus an out of court statement that the brakes on an automobile are

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circulars containing recommended landing procedures might be merely implied assertions that those were the proper procedures, *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1181 n.6. (5th Cir. 1975).

234. Proposed Rules, *supra* note 10, at 293-94.

235. *Id.* at 294.

236. Blakey, *Redefinition*, *supra* note 33, at 611.

237. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(c)[01]; MCCORMICK, *supra* note 11, § 249; Proposed Rules, *supra* note 10, at 294-95.

238. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(c)[01] at 801-65 to -66.

bad can be offered for the nontestimonial purpose of showing notice rather than the testimonial purpose of showing that the brakes were in fact bad.)<sup>239</sup> Every word of these rules is necessary to serve those two functions. There is nothing in Federal Rule 801(c) and Section 801(3) to which an opponent of an exception such as we are discussing should be expected to object. This is in sharp contrast to the language in Federal Rule 801(a) and Section 801(1) which clearly spells out the creation of an exception for nonassertive conduct.

Secondly, the legislative history of the Federal Rule will not support an argument that Federal Rule 801(c) creates the disputed exception. The Federal Rules of Evidence were actually adopted by Congress as legislation.<sup>240</sup> There is no reference in any of the Congressional reports to the creation of this exception.<sup>241</sup> There is also, admittedly, no reference to the exception created by Rule 801(a) for nonassertive conduct,<sup>242</sup> but there is no question about the adoption of that exception.

The legislative history supporting an argument that Federal Rule 801(c) creates a hearsay exception for implied assertions, therefore, consists only of the comment by the Federal Advisory Committee quoted above. There will be situations in which a single sentence in the Advisory Committee's Notes will determine the meaning of a Federal Rule, but this is not such a situation. This sentence is too subtle, too ambiguous, and placed in the wrong part of the Note to Federal Rule 801. There is nothing in the comment on Subdivision (c) that indicates that the common law is being changed at all.<sup>243</sup> Indeed that comment

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239. *Id.* at 801-70 to -72; LILLY, *supra* note 25, at 166.

240. An Act, Pub. L. No. 93-595, 88 Stat. 1296 (Jan. 2, 1975).

241. H.R. REP. NO. 650, 93d Cong., 1st Sess. (1973); S. REP. NO. 1277, 93d Cong., 2d Sess. (1974); and H.R. REP. NO. 1597, 93rd Cong., 2d Sess. (1974).

242. *Id.*, but see *Hearings on Federal Rules of Evidence Before the House Comm. on the Judiciary, United States Senate*, 93rd Cong., 2d Sess. 156-58 (written statement of Richard H. Keating and John T. Blanchard).

243. The entire comment on Subdivision (c) by the Federal Advisory Committee stated:

Subdivision (c). The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick § 225; 5 Wigmore § 1361, 6 *id.* § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534, letters of complaint from customers offered as a reason for cancellation of dealer's franchise, to rebut contention that franchise was revoked for refusal to finance sales through affiliated finance company. The effect is to exclude from hearsay the entire category of "verbal acts" and

cites a section of the first edition of McCormick<sup>244</sup> which offers a definition of hearsay which includes a requirement of a "statement being offered as an assertion to show the truth of matters asserted therein"<sup>245</sup> and which is described as ambiguous with respect to "the problem of whether acts evincing belief are to be treated as hearsay when offered to prove the facts believed."<sup>246</sup> The Advisory Committee's Note to Federal Rule 801 simply cannot be regarded as having given Congress notice that Federal Rule 801(c) would change the common law and create a new hearsay exception.

Writers on the Federal Rules of Evidence have generally ignored the question of whether or not Federal Rule 801(c) creates a hearsay exception for implied assertions based upon assertive conduct. Professor Rothstein, who pointed out in 1975 that 801(c) was ambiguous on this point,<sup>247</sup> now states that the Federal Rules "make no provision for words being" an implied statement.<sup>248</sup> Conversely, the Second Edition of McCormick (published in 1972 and supplemented in 1978) declares that Federal Rule 801 does create a hearsay exception for implied assertions based upon assertive conduct.<sup>249</sup> No explanation or argument is given to support these statements, but the language used in McCormick suggests that the writer of these portions of the revised McCormick would deny that Federal Rule 801(c) is ambiguous. These portions of the Second Edition of McCormick use the words "assertive statements not offered to prove what is asserted" to refer to implied assertions based upon assertive conduct.<sup>250</sup> They do so as if it were indisputable that that was what those words meant. That assumption is, of course, in conflict with the position taken in the section of the First Edition of McCormick cited by the Federal Advisory Commit-

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"verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

Proposed Rules, *supra* note 10, at 294-95.

244. C. MCCORMICK, EVIDENCE § 225 (1954) [hereinafter cited as FIRST EDITION OF MCCORMICK].

245. *Id.* at 460.

246. *Id.* n.2.

247. ROTHSTEIN, UNDERSTANDING, *supra* note 187, 1975 Supp. 373, quoted in note 222 *supra*.

248. ROTHSTEIN, FEDERAL RULES, *supra* note 222, at 327.

249. MCCORMICK, *supra* note 11, § 250, at 599-600 and 1978 Supp. at 73-74.

250. *Id.*

tee.<sup>251</sup> That section stated that a definition of hearsay which applied only to a statement being offered as an assertion to show the truth of matters asserted therein was ambiguous with respect to "the problem of whether acts evincing belief are to be treated as hearsay when offered to prove the facts believed."<sup>252</sup> That section of the First Edition has in fact been carried forward into the Second Edition virtually without change.<sup>253</sup>

Some support for the argument that Federal Evidence Rule 801(c) should be read as creating a hearsay exception for implied assertions based upon assertive conduct can be found in Professor Finman's article on implied assertions under the Uniform Rules<sup>254</sup> and in a student note,<sup>255</sup> but what is probably the most important evidence on the meaning of Federal Evidence Rule 801(c) is, fittingly enough, silence. Judge Weinstein and Professor Berger,<sup>256</sup> Professor Falknor,<sup>257</sup> Professor Moore and Ms. Bendix,<sup>258</sup> Professors Lempert and Saltzburg,<sup>259</sup> and Professor Lilly,<sup>260</sup> all ignore the possibility that Federal Evidence Rule 801(c) might be read as creating a hearsay exception for implied assertions based upon assertive conduct. Their silence is impressive evidence, which is admissible (since the rule against hearsay certainly does not apply to legal argument) to prove that Federal Evidence Rule 801(c) does not create a hearsay exception for implied assertions based upon assertive conduct.

Finally, Oklahoma has a third reason to reject a reading of Section 801(3) that would create a new hearsay exception—the legislative history contained in the Oklahoma Evidence Subcommittee's Note to proposed Oklahoma Rule 801. There is not even an indirect reference to implied assertions in the Oklahoma Note. Instead, the Subcommittee stated: "The definition of 'hearsay' in [Section 801(3)] follows familiar

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251. See note 243 *supra*.

252. FIRST EDITION OF MCCORMICK, *supra* note 244, § 225, at 460 & n.2.

253. MCCORMICK, *supra* note 11, § 246.

254. See Finman, *supra* note 21, at 684 n.8. for an argument that a statement offered to support an implied assertion "is not offered to prove the matter stated in it and therefore is not hearsay" under UNIFORM RULES OF EVIDENCE, Rule 63. But see FIRST EDITION OF MCCORMICK, *supra* note 244, § 229 n.32 and Falknor, "See-Do," *supra* note 191, at 137-38, both of which ignore that possible interpretation of UNIFORM RULES OF EVIDENCE, Rule 63.

255. Note, *State of Mind: The Elusive Exception*, 9 U. CAL. DAVIS L. REV. 199, 203-07 (1976). But see SALTZBURG & REDDEN, *supra* note 75, at 511.

256. 4 WEINSTEIN & BERGER, *supra* note 14, ¶ 801(a)[01], ¶ 801(a)[02], ¶ 801(c)[01].

257. Falknor, *Hearsay*, *supra* note 81, at 594-95.

258. 11 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE § 801.10 (1976).

259. LEMPERT & SALTZBURG, A MODERN APPROACH TO EVIDENCE 351 (1977).

260. LILLY, *supra* note 25, § 51.

doctrine. It is generally consistent with Oklahoma law though authorities adopting the formulation of Rule 801(c) are sparse and diverse in their substance."<sup>261</sup>

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261. *Proposed Code*, *supra* note 10, at 2644 (citations omitted).