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FORWARD PROGRESS: A NEW PATTERN CRIMINAL JURY INSTRUCTION FOR IMPEACHMENT WITH PRIOR INCONSISTENT STATEMENTS WILL EASE THE COURT'S BURDEN BY EMPHASIZING THE PROSECUTOR'S

*Hugh M. Mundy**

INTRODUCTION

Under Federal Rule of Evidence 801(d)(1)(A), a testifying witness's prior inconsistent statement is admissible as proof in a criminal or civil trial only if it "was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition."[1] On the other hand, Federal Rule of Evidence 613 provides that virtually *any* oral or written prior inconsistent statement is admissible to attack a declarant-witness's credibility.[2] Though the distinction is vital from an evidentiary perspective, it is often lost on jurors.[3] As a result, courts must give juries a limiting instruction to explain the permissible use of a witness's prior inconsistent statement.[4] To say the least, the value of such an instruction is dubious.[5] Edmund Morgan, the author of the Model Code of Evidence, famously derided judicial attempts to differentiate a prior inconsistent statement to impeach from one admissible as proof (or "for its truth") as "a pious fraud."[6]

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1. FED. R. EVID. 801(d)(1)(A). Notably, Rule 801(d)(1)(A) requires only that the declarant-witness is subject to cross-examination about the prior inconsistent statement at the *current* proceeding. As a result, a declarant-witness's grand jury testimony falls within the scope of the rule. United States v. Distler, 671 F.2d 954, 958–59 (6th Cir. 1981), *cert. denied*, 454 U.S. 827 (1981).

2. FED. R. EVID. 613(b).

3. Steven V. DeBraccio, *That's (Not) What She Said: The Case for Expanding Admission of Prior Inconsistent Statements in New York Criminal Trials*, 78 ALB. L. REV. 269, 295 (2014) ("[T]here are times when lay jurors may not be able to take evidence merely as impeachment, and not substantive evidence.").

4. *See, e.g.*, COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS, THIRD CIRCUIT, MODEL CRIMINAL JURY INSTRUCTIONS § 2.16 (2015) [hereinafter THIRD CIRCUIT CRIMINAL JURY INSTRUCTIONS].

5. *See* Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 193–94 (1948).

6. *Id.* at 193.

Due in part to the "difficult-to-follow" instruction, the Advisory Committee on the Federal Rules of Evidence ("the Advisory Committee" or "the Committee") is now contemplating the expansion of Rule 801(d)(1)(A) to allow for the substantive admissibility of *all* prior inconsistent statements.[7] While a revised rule would obviate the need for a limiting instruction, the change would enable federal prosecutors to offer out-of-court statements of tenuous reliability as proof against criminal defendants. A more just approach lies in a recrafted jury instruction—one which frames the admissibility of prior inconsistent statements in terms of the prosecutor's burden of proof.

In this Article, I discuss the history of Rule 801(d)(1)(A), focusing on the origins and importance of the Rule's restrictive language. In addition, I review the current federal landscape of pattern criminal jury instructions for witness impeachment with a prior inconsistent statement.[8] Finally, I propose a revised jury instruction designed to clarify juror confusion while maintaining the critical safeguards for substantive admissibility of prior inconsistent statements.

I. THE IMPORTANCE OF RULE 801(D)(1)(A) SAFEGUARDS

The treatment of a declarant-witness's prior inconsistent statements by the inaugural Advisory Committee was a topic of "considerable controversy."[9] At common law, prior inconsistent statements were hearsay and admissible only to impeach a witness's trial testimony.[10] Ostensibly, the basis for the common law prohibition was that "the conditions of oath, cross-examination, and demeanor observation" did not accompany the prior statement.[11] The Advisory Committee found the common law rule "troublesome" as it failed to "explain[] why cross-examination cannot be conducted subsequently with success."[12] The Committee likewise questioned concerns over "demeanor observation" as "[t]he trier of fact has the declarant before it" to "see and hear" him or her.[13] Finally, the "mere presence" of an oath, the Committee noted, "receives much less emphasis than cross-examination as a truth-compelling device."[14] Consequently, the Committee took the opposite tack, declaring that all prior inconsistent statements "are substantive evidence."[15]

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7. Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules 120, 121 (Mar. 15, 2015) [hereinafter Capra Memo] (on file with the *Fordham Law Review*).

8. For the sake of brevity, I refer to jury instructions concerning witness impeachment by a prior inconsistent statement as Rule 613 instructions.

9. FED. R. EVID. 801(d)(1)(A) advisory committee's note.

10. *See id.* ("Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence.").

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

The Advisory Committee's pendulum swing did not survive congressional review. Instead, the House Committee on the Judiciary severely limited Rule 801(d)(1)(A) to admit as substantive evidence only prior inconsistent statements "made while the declarant was subject to cross-examination at a trail [sic] or hearing or in a deposition."[16] Unlike the Advisory Committee, the House Committee viewed the oath and "context of a formal proceeding" as "firm . . . assurances" of a prior statement's reliability.[17] A subsequent joint House/Senate Committee amendment eliminated the cross-examination prerequisite as "[Rule 801(d)(1)(A)] only comes into play when the witness testifies in the present trial."[18] Thus, the rule's current limitations—"given under penalty of perjury at trial, hearing, or other proceeding, or in a deposition"—reflect a balance between the expansive Advisory Committee proposal and the House's more conservative approach.[19]

Viewed one way, Rule 801(d)(1)(A) has limited utility as only a small fraction of prior inconsistent statements falls within its exacting ambit.[20] Still, the rule plays an essential gatekeeping function in limiting the substantive admissibility of unreliable out-of-court statements. First, despite the Advisory Committee's diminished view of oath taking, the formalities concomitant with 801(d)(1)(A) statements provide assurances of reliability.[21] The oath and attendant procedural structure establish bookends that buttress testimonial credibility. On one side, in taking the oath, a witness "*must commit himself to truth-telling in advance of his testimony*."[22] On the other, the oath ensures that a witness may be tried for perjury if it is later "demonstrated that he failed to tell the truth after promising to do so."[23]

More important, Rule 801(d)(1)(A) prior inconsistent statements are transcribed or otherwise recorded. As a result, when offered as evidence at trial, the substance of the witness's statement is unambiguous.[24] To the contrary, prior inconsistent statements offered to impeach often arise from

16. *Id.* 801(d)(1)(A); H.R. REP. NO. 93-650, at 13 (1973). The House Committee's position as to the cross-examination requirement tracks the logic of *State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939) ("The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process.").

17. H.R. REP. NO. 93-650, at 13.

18. FED. R. EVID. 801(d)(1)(A) advisory committee's note; S. REP. NO. 93-1277, at 7062 (1973).

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

20. *See* Capra Memo, *supra* note 7, at 121 ("It goes without saying that the vast majority of prior inconsistent statements are not made under oath at a formal proceeding.").

21. H.R. REP. NO. 93-650, at 16.

22. Robert C. Sorensen, *The Effectiveness of the Oath to Obtain a Witness' True Personal Opinion*, 47 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 284, 286 (1956) (describing the oath's two-fold "deterrent to falsehood").

23. *Id.*

24. H.R. REP. NO. 93-650, at 13 ("[U]nlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made.").

conversations, written notes, or other informal communications.[25] These sources leave the declarant-witness's past words susceptible to the faulty memory, misinterpretation, or manipulation of another. Indeed, a declarant-witness's own lack of—or selective—memory at trial may be impeached with evidence of a prior inconsistent statement if the trial court determines that the memory lapse is disingenuous.[26] In such cases, another witness may testify about the declarant-witness's alleged prior statements, presenting a battle of dueling recollections. While cross-examination ideally functions as a "truth-compelling device," an adversarial back-and-forth may just as easily obfuscate the facts.[27] Ultimately, absent Rule 801(d)(1)(A)'s recording requirement, jurors would be instructed to treat as "true" prior statements of uncertain veracity.

Further, law enforcement custodial interrogations and investigative interviews present especially problematic sources of witness prior inconsistent statements. Rule 801(d)(1)(A) wisely excludes interrogations and interviews by police even if a declarant-witness's statement is written and sworn.[28] Arrestees are usually unrepresented by counsel during custodial interrogations and waive their *Miranda* rights,[29] tilting the balance of power heavily toward law enforcement.[30] In the rare instance that an arrestee invokes his or her *Miranda* rights, a prosecutor may still impeach the arrestee-witness at a later trial with his or her pre-*Miranda* silence.[31] Even custodial statements taken in violation of *Miranda* may be used to impeach a witness's later testimony.[32] Not surprisingly, the inherently coercive interrogation environment risks false confessions and

25. *See, e.g.*, Jankins v. TDC Mgmt. Corp., 21 F.3d 436, 442 (D.C. Cir. 1994) (holding that Federal Rule of Evidence 613(a) "clearly contemplates that a witness's prior oral statement" may be used to impeach his trial testimony).

26. *See* United States v. Mayberry, 540 F.3d 506, 516 (6th Cir. 2008).

27. When extrinsic evidence is offered as evidence of a prior inconsistent statement, the witness must be given an opportunity to explain or deny the statement. In reality, the explanation or denial may have the opposite effect of *highlighting* the prior inconsistent statement, especially if counsel is required to recall a declarant-witness to the stand to challenge his or her alleged inconsistency. *See* FED. R. EVID. 613(b) advisory committee's note (stating that the opportunity to explain is subject to "no specification [to] any particular time or sequence").

28. *See* United States v. Day, 789 F.2d 1217, 1222–23 (6th Cir. 1986).

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

30. *See* Bryan L. Sykes, Eliza Solowiej & Evelyn J. Patterson, *The Fiscal Savings of Accessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013*, 5 U.C. IRVINE L. REV. 813, 816, 819 (2015) (documenting that only 0.2 percent of individuals arrested in Cook County, Illinois, had a defense lawyer at the police station; about 80 percent of arrestees waived their *Miranda* rights).

31. *See, e.g.*, United States v. Musquiz, 45 F.3d 927, 930–31 (5th Cir. 1995) (holding that, after the defendant offered an innocent explanation for his alleged criminal conduct on direct examination at trial, the prosecution was permitted to impeach him with his failure to offer the same explanation between his arrest and *Miranda* warnings).

32. *See, e.g.*, James v. Illinois, 493 U.S. 307, 312 (1990) (holding that "illegally obtained" prior inconsistent statements may be offered to impeach a defendant's trial testimony). A defendant's prior inconsistent statement may otherwise be admissible as proof under Federal Rule of Evidence 801(d)(2)(A).

accusations—especially as to arrestees who are threatened with more severe treatment unless the "true culprit" is named.[33]

In fact, *noncustodial* investigative interviews may also produce false accusations by suspects or witnesses. In a 2008 study of the influence of police interviewing techniques on false witness statements, researchers asked college students a series of questions about the instigator of a computer crash.[34] After a "relatively low-pressure" interview, 45 percent of the participants falsely implicated a peer.[35] Notwithstanding data undercutting the reliability of statements made during interrogations and interviews, such statements remain fair game for witness impeachment.[36] Extending their availability as proof of the defendant's guilt, however, would increase the danger of wrongful convictions.[37] Interestingly, as protection against the admission of false confessions and accusations, prosecutors and defense counsel alike recommend a basic assurance that Rule 801(d)(1)(A) requires: recording of the prior statement.[38]

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33. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 36 L. & HUM. BEHAV. 3, 6 (2010) (noting that the "single-minded purpose" of interrogation is "not to discern the truth" but "to elicit incriminating statements . . . in an effort to secure the conviction of offenders"); *see also* Peter Whoriskey, *Execution of a Ga. Man Near Despite Recantations*, WASH. POST (July 16, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/15/AR2007071501250.html (reporting on recantations by key witnesses in the capital trial of Troy Davis who said "they lied under pressure from police") [perma.cc/XE5V-MUCK].

34. *See* Kirk A. B. Newring & William O'Donohue, *False Confessions and Influenced Witnesses*, 4 APPLIED PSYCHOL. CRIM. JUST. 81, 87–90 (2008). The study employed the so-called "Reid technique," a popular police method of questioning subjects.

35. *Id.* at 98.

36. *See, e.g.*, United States v. Day, 789 F.2d 1217, 1223 (6th Cir. 1986).

37. A typical scenario in which a prior inconsistent statement is offered to impeach involves a police officer's testimony about a recanting witness's prior statement or the production of the witness's written statement as evidence. But studies have "consistently shown" that only 54 percent of lay persons accurately discern an individual's truthfulness and that "training does not produce reliable improvement [so] police investigators . . . perform only slightly better, if at all—albeit with high levels of confidence." Kassin, *supra* note 33, at 6. If offered as true through the testimony of an officer, prior inconsistent statements stemming from police encounters would provide powerful evidence of guilt despite a coin-flip chance of falsity.

38. Press Release, U.S. Dep't of Justice, Attorney General Holder Announces Significant Policy Shift Concerning Electronic Recording of Statements (May 22, 2014), http://www.justice.gov/opa/pr/attorney-general-holder-announces-significant-policy-shift-concerning-electronic-recording (outlining policy requiring electronic recording of custodial interviews to ensure "an objective account" of "interactions with people who are held in federal custody") [perma.cc/332A-68A5]; News Release, Nat'l Ass'n of Criminal Def. Lawyers, Department of Justice Announces New Policy Concerning the Recording of Custodial Interrogations (May 21, 2014), http://www.nacdl.org/NewsReleases.aspx?id=33171 ("NACDL has long advocated the recording of interrogations as a practice that ensures the transparency, integrity and propriety of the interrogation process.") [perma.cc/4WEC-B6G9].

II. THE CURRENT STATE OF RULE 613 PATTERN JURY INSTRUCTIONS

Pattern jury instructions across federal circuits reflect varied language as to the use of prior inconsistent statements that lack Rule 801(d)(1)(A) safeguards. The instructions range from general guidance to consider a declarant-witness's previous inconsistencies in an overall credibility assessment to specific warnings that certain prior inconsistent statements are inadmissible "for their truth." On one end of the spectrum, the Eighth and Ninth Circuits typify the use of broad directives regarding impeachment evidence. The Eighth Circuit Model Jury Instructions lack an express instruction covering a witness's prior inconsistent statements.[39] Instead, the model instruction covering witness credibility directs jurors to consider "whether [the] witness said something different at an earlier time" in "deciding what testimony to believe."[40] Commentary to the instruction places the onus on the party seeking to restrict the use of a previous statement to request a Rule 105 limiting instruction.[41] In like fashion, the commentary to the Ninth Circuit's catch-all impeachment instruction notes that Rule 105 permits a defendant to request an instruction limiting use of a prior inconsistent statement "to determine the credibility of the witness."[42]

On the opposite end, the Third, Fifth, and Seventh Circuits establish express parameters around the use of Rule 613 statements. The Third Circuit instruction first cautions jurors that a witness's prior inconsistent statement may be used "only to help you decide whether you believe [his or her] testimony here at trial."[43] The instruction then continues, "You cannot use [the earlier statement] as *proof of the truth* of what the witness said."[44] Similarly, Fifth Circuit juries are instructed that Rule 613 statements "were not admitted in evidence to *prove that the contents of those statements are true*."[45] Rather, the instruction limits the jurors' use of the earlier statement to determine the "credibility of [the] witness."[46] The Seventh Circuit follows suit, if somewhat more elliptically.[47] Jurors are instructed to consider prior inconsistent statements for the "truthfulness" of the witness's trial testimony but not for the "truth" of the statement itself.[48]

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39. *See* JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS, EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT (2014). The model instructions, however, include an instruction regarding impeachment of a defendant's testimony with an "otherwise inadmissible statement," such as one obtained in violation of the defendant's constitutional rights. *Id.* at 57.

40. *Id.* at 72.

41. *See id.* at 72 n.1.

42. NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 65 (2010).

43. THIRD CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 4, § 2.16.

44. *Id.* (emphasis added).

45. COMM. ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 22 (2015) (emphasis added).

46. *Id.*

47. COMM. ON FED. JURY CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT 24 (2014).

48. *Id.* at 29.

Still other circuits strike a middle ground, providing a pattern instruction that covers the appropriate use of a prior inconsistent statement without express admonitions against the statement's "truthfulness."[49] For example, the First Circuit instructs jurors to "consider" a witness's earlier statement "to help you decide how much of [the witness's] testimony to believe."[50] Any inconsistency, the instruction advises, may "affect[] the believability" of the witness's trial testimony.[51] Likewise, the Sixth and Tenth Circuit instructions on impeachment by prior inconsistencies provide that the witness's prior statement "was brought to your attention only to help you decide how believable his testimony was."[52] Both instructions prohibit use of the statement "as proof of anything else."[53] Finally, the Eleventh Circuit instructions on use of inconsistent statements for impeachment echo the First and Tenth Circuits' core concern about a declarant-witness's honesty.[54]

III. A NEW RULE 613 PATTERN JURY INSTRUCTION

A recent study by the American Association of Trial Consultants reaffirmed that jurors "are confused by jury instructions and often disregard them."[55] The study attributed juror confusion to several factors, including "low average" literacy levels combined with the "linguistic complexity" of various jury instructions.[56] The resulting comprehension gap leads many jurors to replace legal concepts with "easier questions, stereotypes and cognitive shortcuts."[57] To discourage juror reliance on these "shortcuts," the study recommended the use of instructions with "understandable"

49. The Federal Judicial Center's Pattern Jury Instructions provide the template for these "middle ground" instructions. *See* JUDICIAL CONFERENCE OF THE U.S., PATTERN CRIMINAL JURY INSTRUCTIONS 32 (1987), http://federalevidence.com/pdf/JuryInst/FJC_Crim_1987.pdf ("These earlier statements were brought to your attention to help you decide if you believe ___'s testimony. You cannot use these earlier statements as evidence in this case.") [perma.cc/JVP8-5LMS].

50. U.S. DISTRICT COURT, DISTRICT OF ME., 2015 REVISIONS TO PATTERN JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT 26 (2015).

51. *Id.*

52. SIXTH CIRCUIT COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS § 7.04 (2015) [hereinafter SIXTH CIRCUIT CRIMINAL JURY INSTRUCTIONS]; *see also* TENTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS 21 (2011) [hereinafter TENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS].

53. SIXTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 52, § 7.04; *see also* TENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 52, at 21. The commentary to the Tenth Circuit instructions advises that a limiting instruction should also be given upon request.

54. JUDICIAL COUNCIL, ELEVENTH CIRCUIT, ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 24–28 (2010) ("[A]sk whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial. [If so], you must decide whether it was because of an innocent lapse in memory or an intentional deception.").

55. Steven E. Perkel & Benjamin Perkel, *Jury Instructions: Work in Progress*, JURY EXPERT, May 2015, at 1, http://www.thejuryexpert.com/wp-content/uploads/TJEMay2015_workinprogress.pdf [perma.cc/P8ZX-V3ND].

56. *Id.* at 1–3.

57. *Id.* at 3.

vocabulary (or "non-legalese"), active voice, concrete phrasing, and "examples relevant to everyday life."[58]

To further improve the understanding and retention of difficult legal concepts, "countless studies" support the value of visual aids and cues.[59] To this end, the incorporation of visuals may assist jurors not only when an instruction is initially given but also throughout deliberations. Visuals are presently utilized in select pattern jury instructions, particularly those involving burden of proof.[60] For instance, to describe preponderance of the evidence, the Third Circuit pattern civil jury instructions ask jurors to imagine the parties' evidence on "opposite sides" of a scale.[61] To prevail, the plaintiff must "make the scales tip somewhat on [his or her] side."[62] In criminal cases, a typical—if less concrete—visual aid casts "proof beyond a reasonable doubt" as "proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives."[63]

Juror confusion may be uniquely acute over matters of hearsay and "truth of the matter asserted," an area that frequently confounds lawyers and judges.[64] As a consequence, Rule 613 pattern jury instructions which focus on the "truth" as a legal abstraction are prone to juror misinterpretation.[65] Alternatively, the notion of substantive admissibility may be more effectively defined as "evidence that advances the prosecutor's burden of proof beyond a reasonable doubt." First, the prosecutor's burden of proof in criminal cases is well-known to almost every juror—and is the subject of a separate jury instruction. Thus, the use of the familiar burden to contextualize the evidentiary value of prior inconsistent statements for witness impeachment will facilitate juror comprehension. Additionally, describing the distinction in the language of burden "advancement" reflects best practices for jury instructions, including incorporation of active voice, concrete phrasing, and colloquial language. To better elucidate the relationship between prior inconsistent statements admitted to impeach and the prosecutor's burden, an improved instruction should also include an easily understood visual aid. For instance, the instruction might evoke

58. *Id.* at 3–4.

59. *See* Haig Kouyoumdjian, *Learning Through Visuals: Visual Imagery in the Classroom*, PSYCHOL. TODAY (July 20, 2012), https://www.psychologytoday.com/blog/get-psyched/201207/learning-through-visuals ("[T]he effective use of visuals can decrease learning time, improve comprehension, enhance retrieval, and increase retention.") [perma.cc/YEU7-2VER].

60. *See, e.g.*, THIRD CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 4, § 1.10.

61. *Id.*

62. *Id.*

63. SIXTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 52, § 1.03.

64. Paul S. Milich, *Re-Examining Hearsay Under the Federal Rules: Some Method for the Madness*, 39 U. KAN. L. REV. 893, 893–95 (1991) (citing sources characterizing the hearsay rule as "bizarre," "a crazy quilt," and "an unintelligible thicket"); *see also* JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 265 (4th ed. 2005) (describing lawyers' impression of the hearsay rule as "baffling," "amazingly complex," and "impossible to apply").

65. *See, e.g.*, *supra* notes 43–44 and accompanying text.

"forward progress," a common term in football describing "the progress of the ballcarrier towards the opposition's goalline."[66] Integrating these concepts, a revised pattern jury instruction for witness impeachment with a prior inconsistent statement might read as follows:

> The witness's earlier statements were brought to your attention only to help you decide if you believe [his or her] trial testimony. The government cannot use the statements to advance its burden of proof beyond a reasonable doubt. To put it differently, imagine a football team attempting to move the ball towards its opponent's goal line. The witness's prior statements would not advance the team's forward progress. Instead, the ball would remain in the same position on the field.[67]

CONCLUSION

As the Advisory Committee Notes reflect, the restrictions to the substantive admissibility of prior inconsistent statements in Rule 801(d)(1)(A) evolved through thoughtful deliberation and compromise. Then as now, the limitations provide essential assurances of a prior statement's truth. Consequently, their wholesale eradication would invite the admission of unreliable evidence in criminal cases. Instead, a more prudent and pragmatic approach includes the adoption of a plain-language pattern jury instruction highlighting the difference between prior inconsistent statements admissible to impeach and those offered for their truth. The revised instruction will enable courts to more cogently explain the important distinction to juries while emphasizing the prosecutor's burden of proof. Moreover, rather than a tectonic shift away from the safeguards embodied in Rule 801(d)(1)(A), the proposed revisions represent an incremental step toward more effective application of the Rule's longstanding and meaningful restrictions.

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66. *Forward Progress*, SPORTSDEFINITIONS.COM, http://www.sportsdefinitions.com/american-football/Forward-progress.html (last visited Feb. 26, 2016) [perma.cc/PQ6S-8RZ2]. While sports analogies may fail to land with some jurors, professional football has remained the most popular sport among U.S. adults for more than three decades and continues to gain viewership. *See* Darren Rovell, *NFL Most Popular for 30th Year in a Row*, ESPN (Jan. 26, 2014), http://espn.go.com/nfl/story/_/id/10354114/harris-poll-nfl-most-popular-mlb-2nd (citing a Harris Poll that "35 percent of fans call the NFL their favorite sport, followed by Major League Baseball" at 14 percent) [perma.cc/6KW7-N9UG]; John Breech, *Super Bowl 49 Watched by 114.4M, Sets U.S. TV Viewership Record*, CBSSPORTS (Feb. 2, 2015), http://www.cbssports.com/nfl/eye-on-football/25019076/super-bowl-49-watched-by-1144m-sets-us-tv-viewership-record (reporting that the 2015 Super Bowl was the "most watched television show in U.S. history") [perma.cc/ND65-FWQW].

67. It should be noted that sports metaphors, especially those based upon the traditionally male-dominated sport of football, may promote or reinforce gender bias. *See* LIA LITOSSELITI, GENDER AND LANGUAGE: THEORY AND PRACTICE 145 (2014) ("[T]he effects [of sports metaphors] are complex and the viability of gender-neutral metaphors is debatable."). To address those concerns, an alternative visual aid might liken the government's case to "rungs on a ladder" or "steps on a staircase."