

THAT'S (NOT) WHAT SHE SAID: THE CASE FOR EXPANDING
ADMISSION OF PRIOR INCONSISTENT STATEMENTS IN NEW
YORK CRIMINAL TRIALS

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I. INTRODUCTION

The admission of prior inconsistent statements is a delicate topic in New York. The rules concerning prior inconsistent statements, like other hearsay evidence determinations, impinge on the essentials of balancing the interest in admitting all relevant evidence to aid the fact finders in criminal trials with the defendant's rights to effectively refute and test the evidence admitted. Further, admitting evidence for a purpose other than to prove the truth that the evidence purports to suggest makes this balancing even tougher; limiting instructions and concerns over unfair prejudice are at their maximum. Still, we allow evidence for limited purposes because the criminal justice system operates on the assumption that jurors will follow instructions to consider evidence for only permissible purposes.¹

The critical question in this article is the comparison of the New York and federal approaches to admitting prior inconsistent statements in criminal cases and ultimately, which is the approach

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¹ See, e.g., *Bruton v. United States*, 391 U.S. 123, 135 (1968) ("Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." (quoting *Delli Paoli v. United States*, 352 U.S. 232, 242 (1957), *overruled in part by Bruton*, 391 U.S. 123) (internal quotation marks omitted)). "There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored" but "in many . . . cases the jury can and will follow the trial judge's instructions to disregard such information." *Bruton*, 391 U.S. at 135; see also Ralph C. Thomas, *The Rule Against Impeaching One's Own Witness: A Reconsideration*, 31 MO. L. REV. 364, 377-78 (1966) (discussing the effectiveness of limiting instructions and how some jurisdictions have addressed the issue).

that more appropriately balances defendants' rights with those of the State. This article contains four parts. In Part II, I will introduce the rules on prior inconsistent statements in New York and in federal law for both those statements made formally and those made informally. Further, I will introduce two cases that would be affected by the New York approach, along with a scientific experiment that sheds new light on eyewitness testimony. In Part III, I will evaluate the differences between the New York and federal rules and discuss the benefits and drawbacks of both standards. In Part IV, I will conclude that the federal rules on prior inconsistent statements are the more appropriate standard and would further the interest in fact-finding while still adequately protecting defendants' rights.

II. THE TWO APPROACHES TO PRIOR INCONSISTENT STATEMENTS

A. *Introduction to Prior Inconsistent Statements*

Before teasing out the differences between the New York and federal approaches on prior inconsistent statements, some background on two key topics is necessary: (1) hearsay, and (2) the definitions of a prior inconsistent statement. First, hearsay is defined both in New York² and the Federal Rules of Evidence³ as an out-of-court statement that is admitted for its truth. A party may seek to admit a prior inconsistent statement either for the truth of the matter asserted (as hearsay) or to critique a testifying witness⁴ or hearsay declarant's⁵ credibility. Second, a prior inconsistent statement is defined as one that "taken as a whole, either by what it says or by what it omits to say affords some indication that the fact

² See, e.g., *People v. Buie*, 86 N.Y.2d 501, 505, 658 N.E.2d 192, 194, 634 N.Y.S.2d 415, 417 (1995); *People v. Caviness*, 38 N.Y.2d 227, 230, 342 N.E.2d 496, 498–99, 379 N.Y.S.2d 695, 698 (1975); RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 8-101 (11th ed. 1995).

³ FED. R. EVID. 801(c).

⁴ *Id.* at R. 801(d)(1); N.Y. CRIM. PROC. LAW § 60.35.1 (McKinney 2014). Under both New York and federal rules, a witness must have an opportunity to confront his/her impeached statement. FED. R. EVID. 613(b); *Larkin v. Nassau Elec. R.R. Co.*, 205 N.Y. 267, 269, 98 N.E. 465, 466 (1912) (holding that a witness cannot be impeached by his/her prior inconsistent statement without having an opportunity to correct, deny, or explain the statement); see also *Morris v. Palmier Oil Co.*, 94 A.D.2d 911, 912, 463 N.Y.S.2d 631, 633 (App. Div. 3d Dep't 1983) (holding that the plaintiffs failed to lay a proper foundation in giving the witness an opportunity to confront his inconsistent statement).

⁵ Under both the New York, see, e.g., *People v. Delvalle*, 248 A.D.2d 126, 127, 670 N.Y.S.2d 827, 828 (App. Div. 1st Dep't 1998), and federal rules, see FED. R. EVID. 806, a hearsay declarant, even one who does not testify, may be impeached through a prior inconsistent statement.

was different from the testimony of the witness whom it sought to contradict.”⁶ On the edges, there are cases in which it is difficult to determine whether a statement truly is inconsistent;⁷ however, this paper will not parse out the definition at length. It will be assumed that a party can make a showing that the statement is inconsistent.

B. *The New York Approach*

Like the federal rules, the New York “rules of evidence” have three main rules for admitting inconsistent statements,⁸ which are contained in the New York Criminal Procedure Law (CPL).⁹ First, inconsistent statements made by a defendant are freely admissible as impeachment evidence or substantive evidence under the party admission rule, so long as the statement was voluntarily made.¹⁰ There is no requirement that it be given in any formal setting.¹¹ Second, prior inconsistent statements are admissible against a witness or hearsay declarant (on cross-examination) for impeachment purposes, whether or not the statement was formally made, so long as a proper foundation has been made.¹² Third, the

⁶ United States v. Barile, 286 F.3d 749, 755 (4th Cir. 2002) (quoting United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988)) (internal quotation marks omitted).

⁷ See, e.g., Jenkins v. Anderson, 447 U.S. 231, 239 (1980); United States v. Larry Reed & Sons P’Ship, 280 F.3d 1212, 1215 (8th Cir. 2002).

⁸ I use the term “rules of evidence” in quotation marks because New York, unlike a majority of states, does not have a codified set of evidence rules. Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York’s Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641, 641–42 (1992).

⁹ N.Y. CRIM. PROC. LAW §§ 60.35, 60.45 (McKinney 2014).

¹⁰ See *id.*; see also People v. Chico, 90 N.Y.2d 585, 589, 687 N.E.2d 1288, 1291, 665 N.Y.S.2d 5, 8 (1997) (“[A]dmissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made.” (alteration in original) (quoting FARRELL, *supra* note 2, § 8-201) (internal quotation marks omitted)).

¹¹ See CRIM. PROC. § 60.45.1 (“Evidence of a written or oral confession, *admission*, or *other statement* made by a defendant with respect to his participation or lack of participation in the offense charged may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made.” (emphasis added)). As a result, voluntary statements are admissible. See, e.g., People v. Anderson, 42 N.Y.2d 35, 37–39, 41, 364 N.E.2d 1318, 1319–20, 1322, 396 N.Y.S.2d 625, 626–27, 629 (1977) (holding that the statements were inadmissible because the prosecution was unable to prove that the defendant’s statements were voluntary); People v. Nimmons, 95 A.D.3d 1360, 1360–61, 945 N.Y.S.2d 358, 359 (App. Div. 2d Dep’t 2012) (finding that the defendant’s statements were voluntary and thus, admissible).

¹² See CRIM. PROC. § 60.35 (lacking any distinction between formal and informal statements); People v. Duncan, 46 N.Y.2d 74, 80–81, 385 N.E.2d 572, 576, 412 N.Y.S.2d 833, 837–38 (1978); People v. Weldon, 111 N.Y. 569, 575–77, 19 N.E. 279, 279 (1888); see also People v. Fisher, 18 N.Y.3d 964, 968, 967 N.E.2d 676, 679–80, 944 N.Y.S.2d 453, 456–57 (2012) (Smith, J., dissenting) (noting that it was improper for the prosecutor to state that the witnesses had said the same thing every time they had been interrogated because the prior consistent statements were inadmissible hearsay; however, it would have been proper if the attorney had merely stated that the witnesses had not been impeached by any significant

most restrictive rule applies where a party seeks to impeach his/her own witness on direct examination.¹³ Where a party seeks to impeach his/her own witness, the party may seek to admit a prior inconsistent statement for impeachment purposes only where: (1) the party gives inconsistent testimony on a material issue in the case that tends to disprove the position of the party who called the witness, and (2) the statement is either (a) orally made under oath or (b) written and signed by the witness.¹⁴ There is considerable case law regarding whether a witness's statement has affirmatively damaged a party's position.¹⁵

A brief history of CPL section 60.35 is in order. CPL section 60.10 provides that "[u]nless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings."¹⁶ The New York Civil Practice Law and Rules (CPLR) provision on point is CPLR 4514, which provides that "[i]n addition to impeachment in the manner

inconsistencies because prior inconsistent statements are admissible for impeachment purposes).

¹³ See CRIM. PROC. § 60.35.

¹⁴ *Id.* § 60.35.1. Note also that the statement must affirmatively damage a party's assertion; the mere fact that testimony is disappointing to the party who elicited the testimony on direct examination is not a basis for admitting a prior inconsistent statement. See *People v. Winant*, 179 Misc. 2d 357, 359, 684 N.Y.S.2d 836, 837–38 (Rensselaer Cnty. Ct. 1998) ("The inability of the witness to recall the events in question is insufficient to justify impeachment, for such testimony merely fails to corroborate or bolster the [party's] case; it does not contradict or disprove any testimony or other factual evidence presented by the [party]." (citing *People v. Fitzpatrick*, 40 N.Y.2d 44, 50, 351 N.E.2d 675, 678, 386 N.Y.S.2d 28, 30–32 (1976); *People v. Burke*, 96 A.D.2d 971, 972, 466 N.Y.S.2d 867, 869 (App. Div. 3d Dep't 1983), *aff'd*, 62 N.Y.2d 860, 466 N.E.2d 158, 477 N.Y.S.2d 618 (1984)). The ever-prevalent example of a witness not recalling his/her previous testimony does not constitute an affirmatively damaging statement. See, e.g., *People v. Johnson*, 108 A.D.2d 1059, 1060–61, 485 N.Y.S.2d 627, 629 (App. Div. 3d Dep't 1985) (noting that a witness's inability to recall whether the defendant had a gun did not constitute an affirmatively damaging statement); *People v. Dann*, 100 A.D.2d 909, 912, 474 N.Y.S.2d 566, 570 (App. Div. 2d Dep't 1984) (holding that the testimony of a witness that he did not know who was in a car during a drag race even though he previously stated that he saw the defendant was in the car was not an affirmatively damaging statement). The Appellate Division has also held that a witness's invocation of his/her right to remain silent under the Self-Incrimination Clause of the Fifth Amendment does not constitute affirmatively damaging a party's position either. *People v. Jackson*, 101 A.D.2d 955, 956, 477 N.Y.S.2d 441, 443–44 (App. Div. 3d Dep't 1984).

¹⁵ See *infra* notes 20–25 and accompanying text; see also *People v. Lawrence*, 227 A.D.2d 893, 894, 643 N.Y.S.2d 273, 274 (App. Div. 4th Dep't 1996) ("The People may impeach their own witness with prior inconsistent statements only when the testimony of that witness on a material issue affirmatively damages the People's case." (citing *Fitzpatrick*, 40 N.Y.2d at 50–51, 351 N.E.2d at 678–79, 386 N.Y.S.2d at 31–32; *People v. Huggins*, 222 A.D.2d 1036, 1036, 636 N.Y.S.2d 530, 530 (App. Div. 4th Dep't 1995)).

¹⁶ CRIM. PROC. § 60.10. CPL section 60.10 was enacted in 1970. Act of May 20, 1970, ch. 996, 1970 N.Y. LAWS 3137.

permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath.”¹⁷ Thus far, there is a requirement that the statement be made in writing or under oath, but there is nothing in CPLR 4514 about a requirement that a witness affirmatively damage a party’s position if the party seeking to impeach called the witness.¹⁸ It is the language of CPL section 60.35(1) that displaces the language of CPLR 4514.¹⁹

The Court of Appeals had to scrutinize CPL section 60.35 for the first time in *People v. Fitzpatrick*.²⁰ That case involved a perjury prosecution in which a witness failed to recall at trial whether the defendant submitted a check to the witness to cash even though he testified at the grand jury that the defendant did tender the check.²¹ The Court of Appeals correctly interpreted the literal text of CPL section 60.35 as requiring “testimony [by the witness to be impeached] upon a material issue of the case *which tends to disprove the position of such party . . .*”²² It noted that “were it not for the purpose of including the full-blown damage requirement, there would have been no need to pass [a] new CPL 60.35 at all” and CPLR 4514 “retained intact for civil trials.”²³ The court further commented that under the requirement that a witness affirmatively damage a party’s case,

a balance is struck between the need “to correct the inequities occasioned by the fact that in many cases both sides were unfairly hampered by . . . [an] inability to impeach unreliable witnesses upon whom they were compelled to rely” and the need to ensure that material which has “no substantial or independent testimonial value” is excluded.²⁴

¹⁷ N.Y. C.P.L.R. 4514 (McKinney 2014). CPLR 4514 modifies the common law rule that the party who called the witness “vouched” for the credibility of the witness and thus could not impeach the witness under any circumstances. Vincent C. Alexander, *Practice Commentaries*, in N.Y. C.P.L.R. 4514 (McKinney 2014). CPLR 4514 was enacted in 1962. Act of Apr. 4, 1962, ch. 308, 1962 N.Y. LAWS 1417.

¹⁸ See C.P.L.R. 4514.

¹⁹ See CRIM. PROC. § 60.35.1.

²⁰ *Fitzpatrick*, 40 N.Y.2d at 46–49, 351 N.E.2d at 676–677, 386 N.Y.S.2d at 29–30.

²¹ *Id.*

²² *Id.* at 48, 351 N.E.2d at 677, 386 N.Y.S.2d at 30 (quoting CRIM. PROC. § 60.35.1).

²³ *Fitzpatrick*, 40 N.Y.2d at 52, 351 N.E.2d at 679, 386 N.Y.S.2d at 32.

²⁴ *Id.* at 51, 351 N.E.2d at 679, 386 N.Y.S.2d at 31–32 (quoting *People v. Freeman*, 9 N.Y.2d 600, 603, 605 176 N.E.2d 39, 40–41, 217 N.Y.S.2d 5, 7–8 (1961)) (internal quotation marks omitted).

The New York approach centers around two axes: (1) whether the statement was formally made and (2) whether the impeaching party called the witness.²⁵ The first axis, whether the statement was formally made, hinges largely on the reason the hearsay rule exists.²⁶ Oddly enough, the prevalence of the hearsay rule is shrinking, with England making an exception in criminal cases where the witness is unavailable and Canada, Australia, and New Zealand making exceptions to hearsay whenever the statement is likely to be reliable.²⁷ United States federal courts have not been so liberal;²⁸ however, there have been an ever-burgeoning increase in the exceptions to hearsay (with the last count at thirty-six—eight in Rule 801, twenty-three in Rule 803, four in Rule 804, and the residual exception in Rule 807).²⁹ Moreover, while the hearsay rule and the Confrontation Clause were thought to stem from the same rationale,³⁰ that rationale being a reaction to trial court abuses in sixteenth- and seventeenth-century England,³¹ the Supreme Court has moved away from such an interpretation in their most recent Confrontation Clause line of cases.³²

The second axis concerns which party called the witness. It is often said in New York courts that a party must generally live with his/her witness's testimony, unhelpful as it may be.³³ The court in *Fitzpatrick* explained the rule in a historical context:

It is helpful to an understanding of the significance of the statutory change to note briefly how the principles of the law of impeachment have developed. The idea of prohibition of impeachment of one's own witnesses descends to us from the ancient time when a party's witnesses were brought into

²⁵ CRIM. PROC. § 60.35.1.

²⁶ See *infra* note 72 and accompanying text.

²⁷ David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 29–30.

²⁸ *Id.* at 28.

²⁹ See FED. R. EVID. 801, 803, 804, 807.

³⁰ See Sklansky, *supra* note 27, at 3; see also *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (plurality opinion) (“It seems apparent that the Sixth Amendment’s Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now.” (footnotes omitted)).

³¹ See *Crawford v. Washington*, 541 U.S. 36, 43–45 (2004) (discussing Sir Walter Raleigh’s case and the need for the confrontation of witnesses following evidence presentations from paper testimony of witnesses to judicial officers who never testified at the trial).

³² See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713–14 (2011); *Michigan v. Bryant*, 131 S. Ct. 1143, 1166–67 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009); *Davis v. Washington*, 547 U.S. 813, 821 (2006); *Crawford*, 541 U.S. at 61.

³³ See *Pollock v. Pollock*, 71 N.Y. 137, 152 (1877) (“It is fair to judge a party by his own witness. If a party puts upon the stand a witness who is for any reason assailable, that party asserts or admits the credibility of that witness.” (citations omitted)).

court not to swear to facts in a case but rather to a party's own credibility. Not surprisingly, it then was considered ill befitting for a party to question the veracity of his/her own witnesses.³⁴

C. *The Federal Approach*

The Federal Rules of Evidence followed largely the same track as the New York rules, only allowing impeachment of a party's own witness "if that witness's testimony was both surprising and damaging,"³⁵ and even so, the prior inconsistent statements were traditionally only admissible for impeachment purposes, not as substantive evidence.³⁶ In fact, before 1975 when Congress passed the Federal Rules of Evidence allowing for impeachment of a party's own witness under Rule 607,³⁷ only the Second Circuit allowed for the admission of prior inconsistent statements as substantive evidence.³⁸

The federal rules have three main rules for admitting prior inconsistent statements. First, statements made by a defendant are freely admissible against him/her, whether or not they are inconsistent.³⁹ Second, formal statements can be used both as impeachment evidence and as substantive evidence.⁴⁰ Prior inconsistent statements may be admitted as substantive evidence if: (1) "[t]he declarant testifies and is subject to cross-examination about the prior statement, and the statement: [(2)] is inconsistent with the declarant's testimony and [(3)] was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition"⁴¹ Third, statements that do not meet the formality requirements of Rule 801(d)(1)(A) are admissible against any witness, whether the party introducing the statement called the witness or not.⁴²

³⁴ *People v. Fitzpatrick*, 40 N.Y.2d 44, 49, 351 N.E.2d 675, 677-78, 386 N.Y.S.2d 28, 30 (1976).

³⁵ Colleen Gale Treml, *State v. Hunt: Rekindling Requirements for Impeaching One's Own Witness*, 68 N.C. L. REV. 1236, 1236 (1990) (footnote omitted).

³⁶ FED. R. EVID. 801(d) advisory committee's note.

³⁷ Treml, *supra* note 35, at 1236.

³⁸ See FED. R. EVID. 801(d)(1) advisory committee's note; *United States v. Cunningham*, 446 F.2d 194, 195, 197 (2d Cir. 1971); *United States v. DeSisto*, 329 F.2d 929, 933-34 (2d Cir. 1964).

³⁹ See FED. R. EVID. 801(d)(2)(A). So long as the statements do not violate Rules 401 and 403 (relevance and excessive unfair prejudice), and are not double hearsay to which no exception applies, the statements are admissible. See *id.* at R. 401, 403, 805.

⁴⁰ *Id.* at R. 806, 801(d)(1)(A).

⁴¹ *Id.* at R. 801(d)(1)(A).

⁴² See *id.* at R. 607, 613(b).

There are no special rules for impeaching a party's own witness, like there are in New York.⁴³

To introduce a witness's own earlier statement for impeachment, (1) the statements must be inconsistent, (2) the inconsistency must be relevant, (3) the inconsistent statement must, on request, be disclosed to opposing counsel, the witness allowed to explain the inconsistency, and opposing counsel allowed to question the witness, and (4) the . . . court should instruct the jury about the limited purpose of the earlier statement.⁴⁴

III. ARGUING THE CASE: THE STRENGTHS AND WEAKNESSES OF BOTH APPROACHES

A. *The New York Approach*

The New York approach to evidence in its broadest sense is significantly more restrictive than the federal approach with respect to expert witness testimony,⁴⁵ spousal privilege,⁴⁶ character

⁴³ N.Y. CRIM. PROC. LAW § 60.35 (McKinney 2014); see FED. R. EVID. 607 (“Any party, including the party that called the witness, may attack the witness’s credibility.” (emphasis added)); see also *supra* note 25 and accompanying text (discussing the two axes of the New York approach to hearsay, whether the statement was formally made, and whether the impeaching party called the witness).

⁴⁴ *United States v. Larry Reed & Sons P’Ship*, 280 F.3d 1212, 1215 (8th Cir. 2002) (citing *United States v. Rogers*, 549 F.2d 490, 495–98 (8th Cir. 1976)). The requirements that, upon request, the inconsistent statement be disclosed to the opposing party, the declarant be allowed to explain it, and opposing counsel be allowed to examine the witness about it are not applicable when the statement is being admitted to impeach a hearsay declarant. FED. R. EVID. 806.

⁴⁵ Federal courts use the four-part factor test established in *Daubert v. Merrell Dow Pharmaceuticals*, which rejects the “rigid ‘general acceptance’ requirement [because such a] requirement would be at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to ‘opinion’ testimony” in favor of a more “permissive backdrop.” *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 588–89 (1993) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). Under the *Daubert* test, general acceptance is a factor but not a rigid requirement to admissibility. See *Daubert*, 509 U.S. at 594 (discussing the factors that should be considered in determining whether the scientific basis for an expert’s testimony is valid and can be properly applied to the facts of the case). New York still conforms to a more rigid standard that requires general acceptance in the scientific community. *People v. Wesley*, 83 N.Y.2d 417, 422–23, 633 N.E.2d 451, 454, 611 N.Y.S.2d 97, 100 (1994) (citing *Frye v. United States*, 293 F. 1013, 1013–14 (D.C. Cir. 1923)); see also *Wesley*, 83 N.Y.2d at 423 n.2, 633 N.E.2d at 454 n.2, 611 N.Y.S.2d at 100 n.2 (discussing how the *Daubert* test, which arose after *Frye* was superseded by Federal Rule of Evidence 702, was inapplicable in this case).

⁴⁶ New York courts interpret spousal privilege to apply only where the communication is confidential “and induced by . . . the marital relationship.” *People v. Melski*, 10 N.Y.2d 78, 79, 176 N.E.2d 81, 83, 217 N.Y.S.2d 65, 67 (1961). Federal courts recognize two theories of marital privilege—adverse spousal testimony privilege, where the power is in the hands of

evidence,⁴⁷ the statements for medical treatment exception,⁴⁸ defining unavailability for hearsay purposes,⁴⁹ admitting prior sex crimes in sexual abuse trials as substantive evidence of guilt,⁵⁰ the residual exception to hearsay,⁵¹ and of course, prior inconsistent

the testifying spouse who may or may not testify against his/her spouse, and marital confidential communication privilege. *United States v. Bad Wound*, 203 F.3d 1072, 1075 (8th Cir. 2000).

⁴⁷ Under the federal rules, a party may present character evidence both through the person's reputation in the community as well as the witness's opinion of the person's character. FED. R. EVID. 405(a). In New York, however, a party may only prove character evidence through testimony about the person's reputation in the community. *See People v. Barber*, 74 N.Y.2d 653, 655, 541 N.E.2d 394, 395, 543 N.Y.S.2d 365, 366 (1989) (Titone, J., dissenting) (citing *People v. Bouton*, 50 N.Y.2d 130, 138–39, 405 N.E.2d 699, 703, 428 N.Y.S.2d 218, 222 (1980); *People v. Van Gaasbeck*, 189 N.Y. 408, 417, 82 N.E. 718, 720–21 (1907)) (noting that a majority of states also allow opinion testimony about a person's character).

⁴⁸ The federal rules simply require that the statement is made for the purpose of “medical diagnosis or treatment” and describes the medical problem. FED. R. EVID. 803(4). On the other hand, New York courts will disregard certain details of how an injury may have occurred if that information is not relevant to medical treatment or diagnosis. *People v. Ortega*, 15 N.Y.3d 610, 617, 942 N.E.2d 201, 214, 917 N.Y.S.2d 1, 5 (2010).

⁴⁹ Under the federal rules, a declarant may be unavailable if a privilege applies, the witness refuses to testify even though he/she is ordered to, the witness testifies that he/she cannot remember the subject matter of his/her testimony, he/she cannot be present due to death or illness, or is absent and his/her testimony or presence cannot be procured through reasonable means. FED. R. EVID. 804(a). New York, however, only declares a witness unavailable if the witness died, was ill, was incapacitated, was outside the state or in federal custody and could not have been brought to court with due diligence, or could not be found with due diligence. N.Y. CRIM. PROC. LAW § 670.10.1 (McKinney 2014). Even the “forfeiture exception,” whereby a party who causes or acquiesces in the unavailability of a witness forfeits a hearsay and Confrontation Clause objection to the admission of the unavailable declarant's statement, is more admission-friendly at the federal level. *Compare Giles v. California*, 554 U.S. 353, 379 (Souter, J., concurring) (criticizing the majority for allowing the evidence on a showing by a preponderance of the evidence that the defendant procured the unavailability of the witness), *and* FED. R. EVID. 804(b)(6) advisory committee's note (noting that many federal courts of appeals adopted the preponderance of the evidence standard which was adopted by rule 104(a)), *with* *People v. Geraci*, 85 N.Y.2d 359, 367, 649 N.E.2d 817, 821, 625 N.Y.S.2d 469, 473 (1995) (adopting the more stringent clear and convincing evidence standard for admitting testimony through the forfeiture exception), *and* *People v. Cotto*, 92 N.Y.2d 68, 75–77, 699 N.E.2d 394, 397–98, 677 N.Y.S.2d 35, 38–39 (1998) (applying the clear and convincing evidence standard).

⁵⁰ The federal rules permit evidence that the defendant committed sexual assault or child molestation under any circumstance in which the defendant is accused of either crime, as long as the prior charge is relevant. FED. R. EVID. 413, 414; *see also* *United States v. LaJeunesse*, No. 09-324, 2010 U.S. Dist. LEXIS 102072, *2–3 (D. Minn. Sept. 28, 2010) (noting that evidence of prior sex crimes should generally be admitted unless the prejudice to the defendant substantially outweighs the probative value of the evidence). On the other hand, New York treats the admissibility of sex crimes the same as other crimes. CRIM. PROC. § 60.40; *see* *People v. Hayes*, 97 N.Y.2d 203, 206–07, 764 N.E.2d 963, 964–66, 738 N.Y.S.2d 663, 664–66 (2002) (holding that a criminal defendant can be impeached by the introduction of prior crimes even if they are similar in nature to the crime with which the criminal is currently charged, given the criminal defendant had an opportunity for an advanced ruling on the evidence in question).

⁵¹ The Federal Rules of Evidence allow residual hearsay where:

statements.⁵² While the “orthodox position” of prohibiting the use of prior inconsistent statements as substantive evidence was at one time the majority view,⁵³ today, only four other states join New York in not admitting prior inconsistent statements as substantive evidence.⁵⁴

In fairness, a witness whose testimony falls short of affirmatively damaging a party’s case, but still fails to present all the evidence the party sought to elicit, can have his/her recollection refreshed.⁵⁵ Moreover, the party may use any statement, formal, informal, or even one which contains the details which the witness attempts to remember,⁵⁶ and that statement may even be written by one other than the witness, because the document is not evidence.⁵⁷ However, the recollection refreshment course has two fatal flaws. First, the proponent really seeks the jury to hear the contents of the prior inconsistent statement and refreshing a witness’s recollection generally bars the party from reading the statement (or suggesting what the statement contains through leading questions) to the jury.⁵⁸ The best argument in favor of this approach is what was

a hearsay statement . . . is not specifically covered by a hearsay exception [if] . . . (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will serve the purposes of the[] rules and the interests of justice.

FED. R. EVID. 807(a). New York, however, does not admit residual hearsay merely because it is trustworthy unless it falls under another exception. *People v. Brown*, 166 Misc. 2d 539, 543–44, 632 N.Y.S.2d 938, 942 (Sup. Ct. Kings Cnty. 1995); see *Geraci*, 85 N.Y.2d at 368 n.3, 649 N.E.2d at 822 n.3, 625 N.Y.S.2d at 474 n.3.

⁵² See *supra* Part II.

⁵³ See *California v. Green*, 399 U.S. 149, 154 n.4 (1970); see also Michael H. Graham, *Prior Inconsistent Statements—Impeachment and Substantive Admissibility: An Analysis of the Effect of Adopting the Proposed Illinois Rules of Evidence*, 1978 U. ILL. L.F. 329, 331–32 (describing the “Orthodox Rule” as the old generally accepted position).

⁵⁴ *Commonwealth v. Brown*, 52 A.3d 1139, 1168 n.50 (Pa. 2012). Six states even allow prior out-of-court statements to be sufficient evidence for a conviction, even without corroboration. *Id.* at 1166–67 (noting that Maryland, Indiana, California, Hawaii, North Dakota, and Georgia allow convictions on prior inconsistent statements without corroboration).

⁵⁵ See 35A CARMODY-WAIT § 195:72 (2d ed. 2009) (citing *People v. Ferraro*, 293 N.Y. 51, 56, 55 N.E.2d 861, 863 (1944); *People v. Abair*, 134 A.D.2d 743, 744, 521 N.Y.S.2d 560, 562 (App. Div. 3d Dep’t 1987); *People v. Tyrrell*, 101 A.D.2d 946, 946, 475 N.Y.S.2d 937, 939 (App. Div. 3d Dep’t 1984)).

⁵⁶ See CARMODY-WAIT, *supra* note 55, § 195:72 (citing *People v. Rosario*, 275 A.D.2d 224, 225, 712 N.Y.S.2d 499, 500 (App. Div. 1st Dep’t 2000)).

⁵⁷ See CARMODY-WAIT, *supra* note 55, § 195:72 (citing *People v. Boyd*, 58 N.Y.2d 1016, 1018, 448 N.E.2d 1346, 1347, 462 N.Y.S.2d 435, 436 (1983)).

⁵⁸ See, e.g., *People v. Carrion*, 277 A.D.2d 480, 481, 715 N.Y.S.2d 257, 259 (App. Div. 3d Dep’t 2000) (“Where a party’s witness falls short of disproving the party’s position, a prior statement of the witness may be used to refresh his or her recollection, *but only if the contents of the statement are not disclosed to the jury.*” (emphasis added)); see *People v. Layman*, 284

argued by the Court of Appeals in *People v. Fitzpatrick*:

Under this damage test, a balance is struck between the need “to correct the inequities occasioned by the fact that in many cases both sides were unfairly hampered by . . . inability to impeach unreliable witnesses upon whom they were compelled to rely” and the need to ensure that material which has “no substantial or independent testimonial value” is excluded.⁵⁹

Further, a stable rule such as this would avoid a trial judge’s decision of having to weigh the probative value versus the prejudice of such a statement and ensure that trials are conducted consistently across the state.⁶⁰

B. *The Federal Approach*

The federal approach centers around one thing: formality. I have not included the rules from both the federal rules and the New York rules concerning a statement’s admissibility against a party. The rules on party admissions in both jurisdictions are essentially the same and are largely outside the scope of this article.⁶¹ With those limitations in mind, the advisory comments to the Federal Rules of Evidence refer to a comparable evidence rule under California law to explain the federal approach:

Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less

A.D.2d 558, 560, 725 N.Y.S.2d 744, 747 (App. Div. 3d Dep’t 2001). In *Layman*, the court admitted a prior inconsistent statement of a prosecution witness on direct where “a sincere attempt was made to ‘refresh [her] recollection in a discreet [and] non-publicizing manner’ without any attempt to disclose the contents of her statement to the jury.” *Layman*, 284 A.D.2d at 560, 725 N.Y.S.2d at 787 (alterations in original) (emphasis added) (quoting Peter Preiser, *Practice Commentaries*, in N.Y. CRIM. PROC. LAW § 60.35 (McKinney 2014)).

⁵⁹ *People v. Fitzpatrick*, 40 N.Y.2d at 51, 351 N.E.2d at 679, 386 N.Y.S.2d at 31–32 (1976) (quoting *Freeman*, 9 N.Y.2d at 603, 605, 176 N.E.2d at 40–41, 217 N.Y.S.2d at 7–8).

⁶⁰ See *People v. Cass*, 18 N.Y.3d 553, 560 n.3, 563, 965 N.E.2d 918, 924 n.3, 926, 942 N.Y.S.2d 416, 422 n.3, 424 (2012) (noting that balancing probative value versus prejudice is discretionary and that the New York Court of Appeals may only review such a determination for an abuse of discretion).

⁶¹ See *supra* notes 10, 39 and accompanying text.

likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the “turncoat” witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.⁶²

The purpose of obtaining truthful statements under penalty of perjury is secured even though the statement is not obtained at trial.⁶³ There is significantly more danger in admitting “extra-judicial” statements obtained without an oath because there can be no assurance that the statement is true.⁶⁴

C. Justifications for the New York Approach

While this article may assert that the federal approach is superior to the New York approach, there are justifications for New York’s limited approach.

1. Historical Tradition and the Professional Rules of Conduct

As was discussed earlier, American courts have a history of attorneys “vouching” for the credibility of witnesses rather than the testimony they provided.⁶⁵ While such “vouching” is not permitted today under either New York case law⁶⁶ or the New York Rules of Professional Conduct,⁶⁷ the New York rules provide that attorneys

⁶² FED. R. EVID. 801(d)(1)(A) advisory committee’s note (quoting CAL. EVID. CODE § 1235 law revision commission cmt. (West 2014)); *California v. Green*, 399 U.S. 149, 154 (1970) (upholding the constitutionality of the advisory committee’s view).

⁶³ Under the federal approach, for a prior inconsistent statement to be admitted as substantive evidence it must have been made under penalty of perjury. FED. R. EVID. 801(d)(1)(A).

⁶⁴ *United States v. Alvarez*, 132 S. Ct. 2537, 2547–48 (2012) (plurality opinion) (holding that a lie about one’s military status cannot be criminalized under the First Amendment).

⁶⁵ See *supra* note 34 and accompanying text.

⁶⁶ See *People v. Moye*, 12 N.Y.3d 743, 743, 907 N.E.2d 267, 267, 879 N.Y.S.2d 354, 354 (2009) (“An attorney may not ‘mak[e] himself an unsworn witness’ by ‘supporting his case by his own’ or anyone else’s ‘veracity and position.’” (alterations in original) (quoting *People v. Lovello*, 1 N.Y.2d 436, 439, 136 N.E.2d 483, 484, 154 N.Y.S.2d 8, 9 (1956))).

⁶⁷ See N.Y. RULES OF PROF’L CONDUCT r. 3.4(d)(3) (2014) (codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 (2014)) (“A lawyer shall not . . . in appearing before a tribunal on

may not proffer false evidence⁶⁸ or make frivolous claims.⁶⁹ Arguably, this approach furthers the goal that by placing the witness on the stand, whether the witness makes the claims the party hoped the witness would, the party must stand by its evidence.

2. Reliability and Credibility Questions

The rule of hearsay was designed to ensure reliability and confrontation wherever possible.⁷⁰ First, admitting prior statements taken outside the courtroom carries a large risk because the fact finder cannot observe the demeanor of the declarant at the time the declarant made the statement.⁷¹ One of the most important functions of the jury is to parse out the trustworthy from the untrustworthy.⁷² It is for this reason that jury credibility determinations are entitled to deference when reviewed on appeal.⁷³ Second, there is reduced reliability from out-of-court statements and significantly more danger in admitting “extra-judicial” statements obtained without an oath because there can be no assurance that the statement is true.⁷⁴ This is evident from the testimony taken

behalf of a client . . . assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein . . .”).

⁶⁸ See *id.* at r. 3.3(a)(3).

⁶⁹ See *id.* at r. 3.1(a).

⁷⁰ Charles J. Walsh & Gwen L. Posner, *Presenting and Challenging Witnesses Under New Jersey Rules of Evidence 607, 611(c), and 803(a)(1): Should We Vouch for the Credibility of These Rules?*, 27 SETON HALL L. REV. 399, 420 (1997).

⁷¹ Commonwealth v. Brown, 52 A.3d 1139, 1168 (Pa. 2012) (citing California v. Green, 399 U.S. 149, 154 (1970)).

⁷² See *Brown*, 52 A.3d at 1160 (emphasizing the importance of the jury in determining the credibility of the evidence and statements made by witnesses); see also *People v. Barbara*, 255 N.W.2d 171, 194 n.36 (Mich. 1977) (“The most important function served by a jury is in bringing its accumulated experience to bear upon witnesses testifying before it, in order to distinguish truth from falsity.”).

⁷³ *People v. Romero*, 7 N.Y.3d 633, 644, 859 N.E.2d 902, 909, 826 N.Y.S.2d 163, 170 (2006); *People v. Mateo*, 2 N.Y.3d 383, 410, 811 N.E.2d 1053, 1069, 779 N.Y.S.2d 399, 415 (2004) (“[G]reat deference is accorded to the fact-finder’s opportunity to view the witnesses, hear the testimony and observe demeanor.” (alteration in original) (quoting *People v. Bleakley*, 69 N.Y.2d 490, 495–96, 508 N.E.2d 672, 675, 515 N.Y.S.2d 761, 763 (1987)) (internal quotation marks omitted)); see also *Romero*, 7 N.Y.3d at 644, 859 N.E.2d at 909, 826 N.Y.S.2d at 170 (“From a historical standpoint, we have always recognized that juries have a superior ability to ‘separate the true from the false with a degree of accuracy which, according to the theory of our law founded on the experience of many generations, cannot be attained by reviewing judges.’” (quoting *People v. Gaimari*, 176 N.Y. 84, 94, 68 N.E. 112, 116 (1903))).

⁷⁴ See Mark A. Summers, *Taking Confrontation Seriously: Does Crawford Mean that Confessions must be Cross-Examined?*, 76 ALB. L. REV. 1805, 1813, 1819 n.104 (2012/2013) (noting that out-of-court statements must be reliable in order to fall under a hearsay

before the United States Senate Committee on the Judiciary when the federal rule allowing inconsistent testimony as substantive evidence was considered.⁷⁵ Third, while the declarant must be subjected to cross-examination at trial,⁷⁶ the Supreme Court has stated that, albeit in a different context, no matter how reliable a statement is, the Constitution requires that a declarant be cross-examined.⁷⁷ What makes the New York approach better is that, as many evidence experts would argue, effective cross-examination can only occur when the declarant is cross-examined at the time the statement is made, not months or even years later where the declarant might have an opportunity to craft an answer for the inconsistent statements.⁷⁸

exception which is designed to protect against unreliable statements (citing *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011)). The United States Supreme Court held last term that a lie about one's military status cannot be criminalized under the First Amendment. *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (plurality opinion).

⁷⁵ Walsh & Posner, *supra* note 70, at 441 n. 174, 442 n. 175, 475 nn. 310–11, 476 nn. 312–13 (“[W]hen a witness tries to repeat what are often casual remarks by another person at a time when the listener may not have even been aware of the importance of the remarks or that he will later be called upon to repeat them . . . the comment may be incomplete’ and . . . ‘details [may be] omitted which were unimportant to the declarant at the time but which may be crucial at a trial.’ . . . [Moreover,] inaccurate repetition is ‘more acute in oral statements.’” (second alteration in original) (quoting *Federal Rules of Evidence: Hearing on H.R. 5463 Before the S. Comm. on the Judiciary*, 93rd Cong. 302 (1974) [hereinafter *Hearing on H.R. 5463*] (statement of Herbert Semmel, Washington Council of Lawyers)).

⁷⁶ It is a requirement under both the New York, see *People v. Duncan*, 46 N.Y.2d 74, 80–81, 385 N.E.2d 572, 576, 412 N.Y.S.2d 833, 837–38 (1978) (requiring a party to lay foundation before impeaching on prior inconsistent statements of witness testifying at trial), and the federal approaches, see FED. R. EVID. 801(d)(1)(A), that the declarant making the prior inconsistent statement be able to testify at the trial.

⁷⁷ *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004) (“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the [Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a *particular* matter: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined.” (emphasis added) (citations omitted)). *But see Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (“[O]ut-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial. . . . [However,] [w]here [the] . . . primary purpose [is something other than proving past facts at a later criminal prosecution,] . . . the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.” (footnote omitted)).

⁷⁸ Kelly A. Kutler, Case Note, *Criminal Law: The Admission of Prior Inconsistent Statements as Substantive Evidence*, 60 TEMP. L.Q. 427, 432–33 (1987). The New York Court of Appeals has noted that the timing of a statement is relevant to whether it is more reliable because the declarant has a reduced ability to manufacture a false statement. See *People v. Brown*, 80 N.Y.2d 729, 734–35, 610 N.E.2d 369, 373, 594 N.Y.S.2d 696, 700 (1993) (“[S]pontaneous descriptions of events made substantially contemporaneously with the observations are admissible [as present sense impressions] if the descriptions are sufficiently

D. Justifications for the Federal Approach

1. Hearsay and Confrontation Issues

Hearsay already presumptively excludes out-of-court statements admitted for their truth.⁷⁹ For statements that are admitted as prior inconsistent statements to be used as substantive evidence, the declarant must be cross-examined by the opposing party.⁸⁰ Moreover, even if, under the Rules of Evidence, the declarant were deemed unable to testify and their testimony were admitted that way, through a dying declaration for example,⁸¹ the Confrontation Clause prohibits the admission of the evidence without a meaningful opportunity to cross-examine the declarant either at the trial or at a previous proceeding.⁸² As a result, the defendant does not lose out on the ability to cross-examine the declarant about the statement before it is admitted as substantive evidence.⁸³ However, it is no protection against statements that are admitted as impeachment evidence.⁸⁴ Protection for impeachment evidence is relegated to the sound discretion of the trial judge, who is in a unique position to evaluate evidence under the probative-prejudice comparison test of Rule 403.⁸⁵ Such a rule promotes simplicity and flexibility.

corroborated by other evidence.”). Federal courts have also noted the importance of time and reliability. *See* *White v. Illinois*, 502 U.S. 346, 355–56 (1992) (“A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one’s exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom.”); *see also* *Bemis v. Edwards*, 45 F.3d 1369, 1372 (9th Cir. 1995) (“[T]o qualify under either [present sense impression or excited utterance] exception[s], an out-of-court statement must be nearly contemporaneous with the incident described and made with little chance for reflection.” (footnote omitted) (citation omitted)).

⁷⁹ FED. R. EVID. 802.

⁸⁰ *Id.* at R. 801(d)(1)(A) (admitting statements as “not hearsay” if the declarant testifies and the adverse party has an opportunity to cross-examine the declarant).

⁸¹ *See id.* at R. 804(b)(2).

⁸² *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713 (2011).

⁸³ *See id.* at 2716.

⁸⁴ First of all, impeachment evidence is subject to Federal Rule of Evidence 607 and 613(b), not 801, 803, and 804. *See* FED. R. EVID. 607, 613(b). Second, the Confrontation Clause is no protection either. *See* *Williams v. Illinois*, 132 S. Ct. 2221, 2235 (2012) (“[T]he Confrontation Clause ‘does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.’” (quoting *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004))).

⁸⁵ *See* *Old Chief v. United States*, 519 U.S. 172, 180, 191 (1997) (noting that the trial judge has the discretion to admit evidence under Rule 403 subject only to an abuse of discretion standard on appeal).

2. New York Rules of Professional Conduct

The New York Professional Rules can explain the approach to prior inconsistent statements as well. Attorneys have a duty to represent clients zealously.⁸⁶ However, an attorney has a duty of fairness to a court where a witness testifies falsely.⁸⁷ Under New York Professional Rule 3.3:

(a) A lawyer shall not knowingly: . . . offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.⁸⁸

The New York rules, which were restyled in 2009, used to provide that a lawyer could not correct a mistake if such a correction would violate a secret or confidence with a client.⁸⁹ They now provide:

If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected [under] Rule 1.6.⁹⁰

⁸⁶ See N.Y. RULES OF PROF'L CONDUCT r. 1.1 (2014) (codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 (2014)).

⁸⁷ See *id.* at r. 3.3.

⁸⁸ *Id.* The American Bar Association Rules are essentially the same. See MODEL RULES OF PROF'L CONDUCT r. 3.3 (2014). Note also that a lawyer must actually know that the witness's testimony would be false. See N.Y. RULES OF PROF'L CONDUCT r. 3.3 cmt. 8 ("The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's [actual] knowledge that evidence is false, however, can be inferred from the circumstances. . . . Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.").

⁸⁹ *People v. DePallo*, 96 N.Y.2d 437, 442, 754 N.E.2d 751, 754, 729 N.Y.S.2d 649, 651–52 (2001) ("[A] lawyer who receives information clearly establishing that . . . the client has, in the course of the representation, perpetrated a fraud upon a . . . tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, *the lawyer shall reveal the fraud to the affected . . . tribunal, except when the information is protected as a confidence or secret.*" (quoting NEW YORK CODE OF PROF'L RESPONSIBILITY DR 7-102(b) (2009) (codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.33(b) (2008) (amended 2009))) (internal quotation marks omitted)).

⁹⁰ N.Y. RULES OF PROF'L CONDUCT r. 3.3 cmt. 10.

The rule is slightly different with criminal defendants: a criminal defendant has a constitutional right, and as such a lawyer may not prevent a defendant from taking the stand and testifying falsely, even if the lawyer has actual knowledge that the defendant will testify falsely.⁹¹ However, a lawyer is supposed to merely take the testimony in narrative form and may not participate in the questioning of the criminal defendant; to do so could constitute assisting the client in perpetrating a fraud upon the court.⁹²

In addition, prosecutors have additional duties over and above those that all lawyers must follow. Under Rule 3.8, comment 1, “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. The responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”⁹³

The New York Rules of Professional Conduct are important because they hammer home one point above all the rest: “th[e] duty [not to proffer false evidence] is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.”⁹⁴ Exposing inconsistent statements made by a party’s own witness can be important to expose the truth, even if it hurts the party’s presentation of evidence.⁹⁵ The federal system’s wide latitude in attacking a witness’s knowingly false testimony provides an avenue for an attorney to advocate for the client while not abdicating his/her duties as an officer of the court.

⁹¹ *Id.* at cmt. 9; *see also* United States v. Dunnigan, 507 U.S. 87, 96 (1993). *But see* Nix v. Whiteside, 475 U.S. 157, 173–74 (1986) (noting that a defendant accepts his/her own fate when testifying falsely and the attorney has a professional duty not to facilitate such false testimony); *DePallo*, 96 N.Y.2d at 444, 754 N.E.2d at 753, 729 N.Y.S.2d at 651 (“[A] defendant’s right to testify at trial does not include the right to commit perjury.”); *Harris v. New York*, 401 U.S. 222, 225 (1971) (“Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.”). Comment 9 to Rule 3.3 is a little unclear on this point; it states that “[u]nless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant’s decision to testify,” suggesting that if a lawyer knew the testimony would be false, he/she could prevent the defendant from testifying. N.Y. RULES OF PROF’L CONDUCT r. 3.3 cmt. 9.

⁹² N.Y. RULES OF PROF’L CONDUCT r. 3.3 cmt. 7.

⁹³ *Id.* at r. 3.8 cmt. 1.

⁹⁴ *Id.* at r. 3.3 cmt. 5.

⁹⁵ *Id.* at r. 3.3(a)(3), 3.3(c) (requiring that an attorney licensed in New York correct false evidence even if it requires the disclosure of confidential statements that are otherwise protected under Rule 1.6).

IV. CASE STUDIES

Cases are often what drive changes in the law.⁹⁶ And it is true that “hard cases [can] make bad law.”⁹⁷ However, case studies are important to show how important proposed changes are to existing law. To be fair, at the time of this writing, I was unable to find any New York State cases that would have been affected by New York’s prior inconsistent statement law as contrasted from the federal approach. However, there are several important cases from other States that have been affected by prior inconsistent statements which, had they happened in New York, might have been decided differently. The fact that the unique facts involved in the cases cited below have not occurred in New York should not detract from the fact that this is a topic worthy of discussion and reconsideration, before another criminal defendant (or victim) must suffer the consequences of an inaccurate result.

A. *Joseph Briggs*

The story of Joseph Briggs is a dated one, but it does show the importance of allowing prior inconsistent statements into evidence either as impeachment or substantive evidence. More importantly, because this case involved a murder trial, it shows how important evidence rules are when the stakes are highest. On September 12, 1904, at about 7:00 p.m., Hans Peterson was shot in Chicago while at his place of business on the corner of Lake and Robey streets during an apparent armed robbery.⁹⁸ Present in the store besides the decedent was William Portee, another employee in the store who was also shot by the same assailant, Joseph Briggs, John Leonard, John F. Smith, “a Mr. Carlton, a son of Peterson, a clerk named Knowles, [and] a boy about twelve years of age named Albert Piemental.”⁹⁹ As this case predated the use of DNA by over eight decades,¹⁰⁰ the Illinois Supreme Court noted that the entire trial

⁹⁶ See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 883–84 (2006) (discussing the importance of cases deciding controversies but also providing principles for future application).

⁹⁷ *Dodd v. Anderson*, 197 N.Y. 466, 469, 90 N.E. 1137, 1138 (1910).

⁹⁸ *Briggs v. People*, 76 N.E. 499, 500 (Ill. 1905); Robert Warden, *Joseph Briggs*, BLUHM LEGAL CLINIC, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/joseph-briggs.html> (last visited Oct. 20, 2014).

⁹⁹ *Briggs*, 76 N.E. at 500.

¹⁰⁰ The first use of DNA, following Dr. Alec Jeffreys recognition of its utility in criminal cases, occurred in American courts in 1986. Paul C. Giannelli, *The DNA Story: An Alternative View*, 88 J. CRIM. L. & CRIMINOLOGY 380, 380 n.2, 380–81 (1997) (book review); see also A. J.

hinged upon the eyewitness identification of the defendants.¹⁰¹ Briggs, Leonard, and Smith were indicted on September 29, 1904.¹⁰²

The trial commenced in February 1905.¹⁰³ Only Briggs was tried; there was no record that Smith or Leonard were tried.¹⁰⁴ The prosecution's case primarily rested upon the eyewitness testimony of three witnesses: William Portee, Albert Piemental, and Matilda Peterson.¹⁰⁵ There was no physical evidence linking Briggs to the murder, as neither the gun nor the robbery proceeds were ever recovered.¹⁰⁶ Ms. Peterson testified, over defense counsel's objection, that "she saw a young man come into the store of the deceased, whom she identified as the defendant, and that the deceased changed a \$10 bill for him."¹⁰⁷ Piemental also identified Briggs.¹⁰⁸

The evidence clearly had holes. First, Piemental was unable to initially identify Briggs at the police station, but at trial, following a leading question by the prosecution, responded that he was positive Briggs was the person who shot Peterson,¹⁰⁹ again over counsel's objection.¹¹⁰ Second, Portee testified on cross-examination that after he was taken to the hospital on the night of the shooting, he made certain statements to police.¹¹¹ The prosecution objected when defense counsel asked what Portee said to the officers, and the court sustained the objection and struck the question.¹¹² Defense counsel then attempted to use minutes from a coroner's report, where Portee made a statement saying that he could not positively identify that Briggs was the assailant.¹¹³ The prosecution again objected, and again, the court sustained the objection.¹¹⁴ Third and perhaps most egregiously, while Peterson positively

Jeffreys et al., *Individual-Specific 'Fingerprints' of Human DNA*, 316 NATURE 76, 76 (1985) (detailing the authors' finding of individual-specific DNA).

¹⁰¹ *Briggs*, 76 N.E. at 500 ("The guilt of the defendant, Briggs, depends wholly upon his identification as the man who did the shooting.").

¹⁰² *Id.* at 499.

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 500; Warden, *supra* note 98.

¹⁰⁶ Warden, *supra* note 98.

¹⁰⁷ *Briggs*, 79 N.E. at 500.

¹⁰⁸ *See id.* at 500-01.

¹⁰⁹ Warden, *supra* note 98.

¹¹⁰ *Briggs*, 79 N.E. at 501.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 502.

¹¹⁴ *Id.*

identified Briggs at trial,¹¹⁵ she testified on cross-examination as follows:

[Peterson:] I do not remember that I said to the desk sergeant, ‘Which one is Briggs?’ and I don’t remember that they all laughed. I don’t remember anything of the kind. I remember seeing him on the day before. I forget the date.

....

. . . I guess I met [the officer] outside [the police station] when I came in.

[Defense Counsel:] Was he the one you asked that question, ‘Which one was Briggs?’

[Peterson:] I do not know.

....

The court: The witness stated that she *never made* that statement.

[Defense Counsel:] I think that is unfair.¹¹⁶

The Illinois Supreme Court noted in particular in the final exchange, that “[t]he court, without any objection being made on behalf of the People, interrupted the examination . . .”¹¹⁷ At that point, defense counsel took exception, preserving the case on appeal.¹¹⁸ Briggs had a prior burglary conviction and had been paroled, but he testified that he was with another person at a different place at the time of the murder and had nothing to do with it.¹¹⁹ Importantly, the prosecution did not question the witnesses about their prior inconsistent statements but merely asserted to the jury that a significant amount of time had passed before they testified at trial.¹²⁰

The jury convicted Briggs and sentenced him to death by execution on June 16, 1905.¹²¹ The trial court originally required that bills of exceptions¹²² be filed by June 15, but his counsel made

¹¹⁵ *Id.* at 501.

¹¹⁶ *Id.* at 500 (emphasis added) (internal quotation marks omitted).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 500–01.

¹¹⁹ *Id.* at 500.

¹²⁰ Warden, *supra* note 98.

¹²¹ *Briggs*, 79 N.E. at 499; *see* Warden, *supra* note 98.

¹²² A bill of exceptions is “[a] formal written statement—signed by the trial judge and presented to the appellate court—of a party’s objections or exceptions taken during trial and the grounds on which they are founded.” BLACK’S LAW DICTIONARY 195 (10th ed. 2014). BLACK’S LAW DICTIONARY notes that the bill of exceptions “ha[s] largely been replaced by straight appeals under the Federal Rules of Civil Procedure.” *Id.*

no submissions on that date.¹²³ The trial court granted a one-week extension, and his counsel did file an appeal by that time.¹²⁴ On December 20, 1905, in a brief five-page opinion, the Illinois Supreme Court overturned the jury's verdict and remanded the case for a new trial.¹²⁵ It held in part that defense counsel should have been permitted to cross-examine the eyewitnesses and also that the trial court should not have made improper comments on the strength of the evidence to the jury.¹²⁶ On retrial, Briggs was acquitted.¹²⁷

To be fair, this case concerned the cross-examination of a witness, so even if this case had been tried under the New York rules, CPL section 60.35 would not have limited Briggs's attorney. Further, the circumstances surrounding how the statements were made is somewhat unclear (such as whether they were signed), but this case serves as an important narrative as to why questioning about prior inconsistent statements is vital, and how the outcome of the trial was changed because of that questioning.

B. Darryl Hunt

Darryl Hunt is a murder case that discusses the limitations and drawbacks of the federal approach, as adopted by North Carolina.¹²⁸ Deborah Sykes, a twenty-six-year-old editor for the *Winston-Salem Journal and Sentinel* was killed on August 10, 1984, at about 6:45 a.m.¹²⁹ She was found in a field a few blocks away from her place of work.¹³⁰ She had been raped, sexually assaulted, and suffered sixteen major stab wounds, which resulted in her death.¹³¹ Darryl

¹²³ *Briggs*, 79 N.E. at 499; see *Warden*, *supra* note 98.

¹²⁴ See *Briggs*, 79 N.E. at 499–500.

¹²⁵ *Id.* at 503.

¹²⁶ *Id.* at 501–03. It noted that the court incorrectly summarized Peterson's testimony that she did not remember whether she asked a policeman who Briggs was, instead saying that she denied that she made the statement. *Id.* at 501. Worse, he conflated O'Harra's statement that "the defendant" walked out of the store by saying that O'Harra meant that Briggs walked out of the store, over Briggs's counsel's assertion that "some defendant" might not be Briggs. *Id.* at 502.

¹²⁷ *Warden*, *supra* note 98.

¹²⁸ *Treml*, *supra* note 35, at 1236. A case that centered around similar issues, but where the prosecutor did not read the statement to the jury and where the court came to an opposite holding based on the New York rules, was *People v. Johnson*. *People v. Johnson*, 91 A.D.3d 1121, 1122–23, 936 N.Y.S.2d 748, 750–51 (App. Div. 3d Dep't 2012) (holding that the prosecution did not improperly bolster or impeach its own witness by bringing up the witness's history, but properly refreshed the witness's recollection).

¹²⁹ *State v. Hunt (Hunt I)*, 378 S.E.2d 754, 762 (N.C. 1989) (Mitchell, J., dissenting).

¹³⁰ *Id.*

¹³¹ *Id.*

Hunt was indicted on December 10, 1984,¹³² and was brought to trial.¹³³ Three prosecution witnesses identified him as the man they had seen near the time of the murder.¹³⁴ Their testimony, best summarized by the North Carolina Supreme Court, is as follows:

The first witness had driven past a black man and a white woman walking closely together near the field where the victim's body was later found. The witness identified [the] defendant less than one month later from photographic and in-person lineups. A second witness walking by the same field at around 6:40 a.m. actually observed the assault and called to report it. The witness testified that he had gotten a good look at the face of the assailant, whom he identified in court as [the] defendant. This witness had also identified [the] defendant in photographic and in-person lineups. The state's third witness was employed by a hotel in downtown Winston-Salem. At approximately 6:45 a.m. he had seen a black male enter the hotel lobby and go directly to the men's room. The witness testified that he had seen this man on at least three other occasions when the man had asked to use the restroom. Because on this occasion the man remained so long in the restroom, the employee asked a security guard to tell him to leave. The employee entered the restroom about a half-hour later and saw red-tinted water in the sink and bloody paper towels. Although this witness did not make a connection between the man he had seen and [the] defendant until he saw the latter's picture in the paper almost a year after the murder, he positively identified [the] defendant as the man who had used the restroom.¹³⁵

Hunt and four other witnesses testified that Hunt remained in a friend's house until sometime after 7:00 a.m.¹³⁶

The major issue stemmed from the prosecution's fourth major witness: Marie Crawford, a fourteen-year-old prostitute who testified about her close relationship with Hunt.¹³⁷ Ms. Crawford testified that she had gone to the prosecutor's office but could not recall whether she had given the prosecutor or a police detective a

¹³² State v. Hunt (*Hunt II*), 457 S.E.2d 276, 279 (N.C. 1994).

¹³³ *Hunt I*, 378 S.E.2d at 754.

¹³⁴ *Id.* at 755.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

statement.¹³⁸ The prosecution sought to refresh Crawford's recollection with two statements she had made to police officers and signed.¹³⁹ While she admitted that it was her signature on the statements, she denied knowledge or memory of them.¹⁴⁰ The prosecutor read the statements, which greatly undermined Hunt's alibi defense to the witness:

[O]n August 10th Mr. Darryl Hunt and Sammy Mitchell were at Motel 6 and Darryl Hunt and Sammy Mitchell left the room at about 6:00 a.m. and that they were both wearing black shirts and black pants and Darryl told me he was going to call a cab. The next time I saw Darryl was about 9:30 a.m. and he was nervous when he came back to the motel room and he said he needed a drink. Darryl had mud or grass stains on his pants knees[.]

[A]bout two weeks ago me and Darryl were at Motel 6 and Darryl was saying some stuff about the white lady that got killed downtown and Darryl said that Sammy did it when we were watching the Crimestoppers on the news and the television and I said to Darryl I wish I knew who killed that lady because I could use the money and Darryl said Sammy did it and he f***ed her too.¹⁴¹

Defense counsel objected to the refreshed recollection, but the court overruled the objection and Crawford later repeatedly denied making the statements.¹⁴² The statements were read in their entirety to the jury through an officer to whom Crawford gave the statements.¹⁴³ Defense counsel objected, but the trial court admitted the statements, giving the jury limiting instructions that the testimony was only admitted for impeachment purposes.¹⁴⁴ The defendant was convicted of first degree murder and sentenced to life imprisonment.¹⁴⁵

The North Carolina Supreme Court overturned the defendant's conviction on the basis that the prosecution was improperly permitted to impeach its own witness.¹⁴⁶ The court began by laying out the history of impeaching a party's own witness: "[T]he

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 755–56 (alterations in original).

¹⁴² *See id.* at 756.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 756–57.

¹⁴⁵ *Id.* at 754.

¹⁴⁶ *Id.* at 754–55.

'overwhelming weight of [federal] authority' with regard to the use of . . . Federal Rule of Evidence 607 . . . has long been 'that impeachment by prior inconsistent statement may not be permitted where employed as a *mere subterfuge* to get before the jury evidence not otherwise admissible."¹⁴⁷ The court also noted that "[i]t is the rare case in which a federal court has found that the introduction of hearsay statements by the state to impeach its own witness was not motivated primarily (or solely) by a desire to put the substance of that statement before the jury."¹⁴⁸ The court concluded that there was no evidence that the prosecution had a good faith basis for questioning Crawford about her previous statements: "there was little if anything of value to the state in Marie's testimony . . . [m]oreover, the state appeared to know before Marie was called to the stand that she would not cooperate by reiterating her prior statements."¹⁴⁹ This was made all the worse by the trial court's instructions which attempted to limit the testimony, but still resulted in the statements being heard by jury.¹⁵⁰ Finally, the State's effort to use the officer to whom Crawford made the statement to corroborate was improper as the officer had no personal knowledge of these statements.¹⁵¹ The dissent agreed with the majority that the admission of the statements was in error, but believed that the overwhelming majority of evidence (primarily from the other three witnesses) rendered the error harmless.¹⁵²

The defendant was retried, reconvicted, and resentenced without the errors that occurred in the first trial.¹⁵³ Of course, it would be wrong to say that procedural rights are not important even where the defendant is obviously guilty,¹⁵⁴ and I make no such assertion here, however, I question whether the error in allowing the jury to see the witness's statement is error at all, given the limiting instructions provided by the court. To be sure, under New York's current evidence setup, the statement met all the requirements of a statement that is impeachable (it was signed by the witness) under

¹⁴⁷ *Id.* at 757 (alterations in original) (quoting *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975)) (citing *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir.), *withdrawn in part on other grounds*, 771 F.2d 82 (5th Cir. 1985)).

¹⁴⁸ *Hunt I*, 378 S.E.2d at 758.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 759.

¹⁵¹ *Id.*

¹⁵² *Id.* at 763 (Mitchell, J., dissenting).

¹⁵³ *Hunt II*, 457 S.E.2d 276, 279 (N.C. 1994).

¹⁵⁴ *See, e.g., Crawford v. Washington*, 541 U.S. 36, 62 (2004) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

CPL section 60.35.¹⁵⁵ And it is perhaps error to exclude this relevant evidence (even if only for impeachment purposes) on the basis that the witness's testimony did not affirmatively damage the prosecution's case;¹⁵⁶ she merely stated that she did not recall giving the statement despite acknowledging her signature on both.¹⁵⁷ Moreover, the Federal Rules of Evidence provide that "[p]arties can resort to introducing prior inconsistent statements 'where the trial court, in its discretion, determines that it is necessary to alleviate the harshness of subjecting a party to the mercy of a witness who is recalcitrant or who may have been unscrupulously tampered with.'"¹⁵⁸ Moreover, the Federal Rules of Evidence do not require affirmative damage to the party.¹⁵⁹ In short, the Federal Rules of Evidence would have allowed the trial judge to exercise his/her discretion, subject to Rule 403,¹⁶⁰ and make a decision based on a fair presentation of the evidence rather than a rigid regime that took five more years to end up at the exact same result: conviction.¹⁶¹ To be fair, while the court concluded that the statements would have violated Rule 403 anyway,¹⁶² that should be the focus of the inquiry, not the final point towards the end of a decision; there may certainly be close calls that would otherwise satisfy Rule 403 but for the restrictive impeachment measures.

C. Scientific Experiments

It can be difficult to measure what a difference an inconsistent statement can make in the context of a trial, but studies have been done to measure this difference in a clinical setting, with surprising results. Ninety-one volunteers were individually taken to a room "where they were joined by another subject, dressed either in street

¹⁵⁵ See N.Y. CRIM. PROC. LAW § 60.35 (McKinney 2014).

¹⁵⁶ See *People v. Fitzpatrick*, 40 N.Y.2d 44, 51, 351 N.E.2d 675, 679, 386 N.Y.S.2d 28, 32 (1976).

¹⁵⁷ *Hunt I*, 378 S.E.2d at 756.

¹⁵⁸ *Treml*, *supra* note 35, at 1244 (quoting *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975)).

¹⁵⁹ FED. R. EVID. 607; Michael H. Graham, *The Relationship Among Federal Rules of Evidence 607, 801(D)(1)(A), and 403: A Reply to Weinstein's Evidence*, 55 TEX. L. REV. 573, 575. *But see* *Treml*, *supra* note 35, at 1255 (noting that North Carolina's law after *Hunt* requires affirmative damage to impeach one's own witness). "[A] party can call a witness whose testimony is helpful and then 'attempt to impeach him, about those aspects of his testimony which conflicted.'" *Id.* at 1244 (quoting *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir. 1980)).

¹⁶⁰ See *Treml*, *supra* note 35, at 1254.

¹⁶¹ *Hunt II*, 457 S.E.2d 276, 279 (N.C. 1994).

¹⁶² *Hunt I*, 378 S.E.2d at 759.

clothes or in a police uniform” and told that they would be viewing a short film to evaluate an eyewitness’s testimony.¹⁶³ After being told that accuracy was essential, they viewed a film regarding the speed of two cars.¹⁶⁴ The volunteer and the subject were then separated, and the volunteer completed a questionnaire about how fast the car was going.¹⁶⁵ Some of the volunteers were asked to sign their statement and others were not.¹⁶⁶ The actual speed of the cars in the film was thirty miles per hour.¹⁶⁷ Half of the volunteers overheard a subject who was selected to be interviewed say that the first car was moving forty-five miles per hour and the second car at sixty miles per hour.¹⁶⁸ Two weeks later, the volunteers were given another individual questionnaire and for this questionnaire, all the “volunteers were required to sign it.”¹⁶⁹ Researchers were evaluating whether the volunteers’ estimate of the second car would be affected by whether they signed the first questionnaire and overheard a subject say a speed different than the speed the volunteers reported.¹⁷⁰ The researchers concluded that the volunteers who signed their first statement “were more resistant to [the] influence” of the subject’s conclusions that they overheard.¹⁷¹ Moreover, they noted that while

authority figures were able to influence eyewitness reports through various techniques such as leading questions or the provision of false information . . . early commitment by eyewitnesses “in the form of signed statements appear[ed] to be an effective technique for protecting an eyewitness’s testimony from the influence of authorities encountered during the judicial process.”¹⁷²

In other words, by using the very tools New York already requires for the admission of prior inconsistent testimony by a party’s own witness for impeachment (signing it or stating it under oath),¹⁷³ New York has quite possibly increased the veracity of the statement

¹⁶³ Walsh & Posner, *supra* note 70, at 479 (citing Norman J. Bregman & Hunter A. McAllister, *Eyewitness Testimony: The Role of Commitment in Increasing Reliability*, 45 SOC. PSYCHOL. Q. 181, 182 (1982)).

¹⁶⁴ Walsh & Posner, *supra* note 70, at 479.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 479–80.

¹⁷⁰ *See id.* at 480.

¹⁷¹ *Id.*

¹⁷² *Id.* (quoting Bregman & McAllister, *supra* note 163, at 183).

¹⁷³ *See* N.Y. CRIM. PROC. LAW § 60.35.1 (McKinney 2014).

to the point that it should be admitted as substantive evidence. After all, some of the concerns about admitting substantive evidence at the federal level were that witnesses would not accurately report unless they knew of the seriousness and consequences of their statements.¹⁷⁴ By making witnesses sign statements or make them under oath, they are certainly aware of the consequences.¹⁷⁵ Of course, New York's historical reasons and hearsay skepticism would still remain by admitting these "extra-judicial" statements, but these experiments at least demonstrate that the danger of admitting the statements might be exaggerated.

V. CONCLUSION

Based on the evidence presented in this article, and the committee testimony supporting expansion, the federal approach strikes a more appropriate balance of admitting the most reliable information while affording individuals the opportunity to confront witnesses. I used the term "more appropriate" throughout this article because I do not suggest that either approach is correct or incorrect. There are certainly arguments to be made for both, and at one time, the New York approach might have been the optimal approach because it was safer and ensured more reliability, even if it let in less evidence.

This discussion dovetails with another topic in evidence law: whether jurors can accept evidence as impeachment evidence and not use it as substantive evidence based on limiting instructions. As I noted previously, there are times when lay jurors may not be able to take evidence merely as impeachment, and not substantive evidence.¹⁷⁶ The *Fitzpatrick* court cogently commented:

In the train of the[] development[] [of impeachment evidence being presented in criminal trials], it soon became apparent that there were concomitant dangers in the use of out-of-court statements for impeachment of witnesses' credibility. Despite judicial instructions advising juries that such material was to go only to credibility, it was difficult to avoid having juries, when actually confronted with

¹⁷⁴ *Hearing on H.R. 5463, supra* note 75, at 302.

¹⁷⁵ *See id.*

¹⁷⁶ *See supra* note 1 and accompanying text; *see also* Treml, *supra* note 35, at 1236 ("A crafty attorney may [introduce impeachment testimony] . . . in hopes that the jury will ignore the judge's limiting instructions which admitted these statements for credibility purposes only and not as substantive evidence.").

dramatically cogent impeachment evidence, treat it as though it were in fact direct evidence of guilt or innocence in criminal trials.

....

There was, moreover, increased concern [after impeachment became allowed in criminal trials] that the prosecution might misuse impeachment techniques to get before a jury material which could not otherwise be put in evidence because of its extrajudicial nature.¹⁷⁷

However, the Second Circuit aptly explained away any concerns the *Fitzpatrick* court had in *United States v. Freeman*:

We do not limit our repudiation of the pernicious rule against impeachment of one's witness to instances in which the witness is an 'adverse party' or 'hostile.' The search for truth is not to be confined by any such limitation

'The fact is that the general prohibition, if it ever had any basis in reason, has no place in any rational system of investigation in modern society and all attempts to modify or qualify it so as to reach sensible results serves only to demonstrate its irrationality and to increase the uncertainties of litigation.'¹⁷⁸

Further, the United States Supreme Court recognized in 1971, five years after the *Miranda v. Arizona* decision,¹⁷⁹ that a defendant's right to testify does not include the right to commit perjury on the stand, allowing for the admission of a confession in violation of *Miranda*, even though it is not admissible as evidence in the prosecution's case-in-chief.¹⁸⁰ I agree that our system depends on

¹⁷⁷ See *People v. Fitzpatrick*, 40 N.Y.2d 44, 49–50, 351 N.E.2d 675, 678, 386 N.Y.S.2d 28, 31 (1976) (footnote omitted). The court then noted that "[a] number of authorities have pointed out that the potential for prejudice in the out-of-court statements may be exaggerated in cases where the person making the statement is in court and available for cross-examination and, under such circumstances, favor their admission as evidence-in-chief." *Id.* at 50 n.1, 351 N.E.2d at 678 n.1, 386 N.Y.S. at 31 n.1 (citing *United States v. Freeman*, 302 F.2d 347, 351 (2d Cir. 1962); Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573, 575–77 (1947); Note, *Prior Statements of One's Own Witness to Counteract Surprise Testimony: Hearsay and Impeachment Under the "Damage" Test*, 62 YALE L.J. 650, 658–61 (1953)).

¹⁷⁸ *Freeman*, 302 F.2d at 351 (quoting 1 EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 64–65 (1954)).

¹⁷⁹ *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

¹⁸⁰ *Harris v. New York*, 401 U.S. 222, 224–25 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." (citations omitted)).

It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal

jurors being able to accept limiting instructions; however, where there is scientific support for admitting statements for their truth, all things being equal, it would be more beneficial to our trial process to simply allow the jurors to consider the evidence as truth and avoid the never-ending discussion on the usefulness of limiting instructions.

Finally, both New York and the federal rules have a failsafe for ensuring that unfairly prejudicial evidence that substantially outweighs the probative value of the evidence may be excluded by the trial court.¹⁸¹ I do not advocate for expanding the admission of prior inconsistent statements as far as other countries do, allowing for use as substantive evidence even where the statements are not formally made.¹⁸² I, however, merely advocate for a “compromise between the traditional and modern positions by according substantive weight only to those prior inconsistent statements made during formal proceedings,” where the threat of perjury would heighten the importance of telling the truth, and the availability of cross-examination at trial would suffice.¹⁸³

While it is possible that the New York rules of evidence have a different rationale than the federal rules, it is more likely that both rules have the same purpose: to admit as much relevant evidence as is reasonably feasible and let the jury make credibility determinations.¹⁸⁴ One could argue that by narrowing the admissibility of prior inconsistent statements, the trial judge has

method by which evidence in the Government’s possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. *See id.* at 224 (quoting *Walder v. United States*, 347 U.S. 62, 65 (1954)) (internal quotation marks omitted). New York does not deviate from the federal standard. *See People v. Washington*, 51 N.Y.2d 214, 219–20, 413 N.E.2d 1159, 1161–62, 433 N.Y.S.2d 745, 747 (1980).

¹⁸¹ The federal rules have an express rule for this determination. FED. R. EVID. 403; *see also id.* at R. 609, 703 (imposing higher probative value versus unfair prejudice tests for prior crimes of the defendant and for admission of facts supporting an expert opinion even where the facts were not otherwise admissible). New York has no codified rules on point but does retain the same basic idea that evidence whose unfair prejudice outweighs the probative value should be excluded. *See, e.g., People v. Caban*, 14 N.Y.3d 369, 374–75, 927 N.E.2d 1050, 1052–53, 901 N.Y.S.2d 566, 568–69 (2010) (holding that evidence was properly admitted since the probative value did not outweigh the danger of unfair prejudice); *People v. Scarola*, 71 N.Y.2d 769, 777, 525 N.E.2d 728, 732, 530 N.Y.S.2d 83, 86 (1988) (upholding the lower court’s decision to exclude evidence because it was deemed unreliable); *People v. Agina*, 103 A.D.3d 739, 743, 959 N.Y.S.2d 275, 279–80 (App. Div. 2d Dep’t 2013) (holding that the lower court erred in allowing the evidence because the risk of unfair prejudice outweighed the evidence’s probative value).

¹⁸² *See supra* note 27 and accompanying text.

¹⁸³ Kutler, *supra* note 78, at 434.

¹⁸⁴ *See* Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1620; *supra* note 70 and accompanying text.

exceeded the traditional role of gatekeeper to determine admissibility¹⁸⁵ and has stepped too far into the jury's role.¹⁸⁶ As we have seen, this argument is not an esoteric one to be dismissed at the end of an evidence class; it has real-world consequences for defendants and can have effects for years to come.¹⁸⁷ It is clear that, even with defendants' rights in mind, the more appropriate system for prior inconsistent statements is the federal method. It is a system better balanced to allow substantive evidence for statements made close to the event in question especially where the declarant is on the stand and can be cross-examined. It is a system that lets the jury sort out the credible from the incredible but gives it all the information from which to reach a verdict.

¹⁸⁵ *See, e.g.*, *Styles v. Gen. Motors Corp.*, 20 A.D.3d 338, 342, 799 N.Y.S.2d 38, 42 (App. Div. 1st Dep't 2001) (Catterson, J., concurring) (citing *Clemente v. Blumenberg*, 183 Misc. 2d 923, 932, 705 N.Y.S.2d 792, 798 (Sup. Ct. Richmond Cnty. 1999)).

¹⁸⁶ *See, e.g.*, *People v. Romero*, 7 N.Y.3d 633, 644–46, 859 N.E.2d 902, 909–11, 826 N.Y.S.2d 163, 170–72 (2006).

¹⁸⁷ *See supra* Part IV.A–B.