

# Prior Statements as Substantive Evidence in Indiana

## I. INTRODUCTION

In general, prior statements are a declarant's statements concerning the same subject matter to which he later testifies in court. Prior statements may be either consistent or inconsistent with the declarant's later in-court testimony.

The extent to which prior statements are admissible as *substantive* evidence is unsettled in Indiana. In *Patterson v. State*,<sup>1</sup> the Indiana Supreme Court overruled previous Indiana decisions and held that some prior statements are admissible for substantive purposes. Subsequent cases, *Flewallen v. State*<sup>2</sup> and *Samuels v. State*,<sup>3</sup> raised questions as to the type of prior statements that will be substantively admissible. The scope of this Note is to review the background of *Patterson*, to examine the *Patterson* decision and the confusing line of cases which has followed in its wake, and to analyze the current status and probable future direction of the substantive use of prior statements in Indiana.

## II. THE ORTHODOX VIEW AND ITS CRITICS

In the earliest reported cases, there seemed to be no question that prior statements were admissible as substantive evidence.<sup>4</sup> This view was not abandoned until the nineteenth century.<sup>5</sup> It was replaced by what Dean Wigmore termed the "orthodox view"<sup>6</sup> that prior statements are not admissible as substantive evidence of the facts stated therein. So dominant was the rule<sup>7</sup> that in 1944 the Appellate Court of Indiana stated: "Under no principle of the law of evidence, of which we have knowledge or to which we have been referred, can such testimony [prior statements] be considered substantive evidence . . . ."<sup>8</sup>

Commentators and case law recognize three reasons for supporting the orthodox view which denies substantive evidential use of prior statements: (1) The prior statement was not made under oath

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<sup>1</sup>263 Ind. 55, 324 N.E.2d 482 (1975).

<sup>2</sup>368 N.E.2d 239 (Ind. 1977).

<sup>3</sup>372 N.E.2d 1186 (Ind. 1978).

<sup>4</sup>Annot., 140 A.L.R. 21, 22 (1942).

<sup>5</sup>*Id.*

<sup>6</sup>3A J. WIGMORE, EVIDENCE § 1018, at 998 (Chadbourn rev. ed. 1970). *See also* Annot., 133 A.L.R. 1454 (1941).

<sup>7</sup>*See* 98 C.J.S. *Witnesses* § 628 (1957).

<sup>8</sup>*Lee Bros., Inc. v. Jones*, 114 Ind. App. 688, 714, 54 N.E.2d 108, 118 (1944).

and therefore is not subject to the penalty for perjury, (2) the statement was not made before the trier of fact who could observe the declarant's demeanor in judging the credibility of the statement, and (3) when the prior statement was made, it was not subject to rigorous testing of its truthfulness by cross-examination.<sup>9</sup>

Despite the broad acceptance of the orthodox view among the nation's courts,<sup>10</sup> it was criticized by prominent commentators. Among the earliest questioners of the majority position were Judge Learned Hand and Dean Wigmore."<sup>11</sup>

Judge Hand's oft-quoted statement in the 1925 decision of *DiCarlo v. United States*<sup>12</sup> anticipated the view which many legal thinkers would later adopt:

The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.<sup>13</sup>

Unlike followers of the orthodox rule, Judge Hand emphasized the conditions under which the prior statement is presented to the jury, not the conditions under which the statement was originally uttered.

Dean Wigmore initially supported the orthodox position but later converted to favoring substantive use of prior statements.<sup>14</sup> Wigmore found that the reason for excluding prior statements—the non-availability of the declarant for cross-examination—was cured by the declarant's later presence in court where he could be ade-

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<sup>9</sup>See *California v. Green*, 399 U.S. 149 (1970); *Beavers v. State*, 492 P.2d 88 (Alaska 1971); *Harvey v. State*, 256 Ind. 473, 269 N.E.2d 759 (1971); *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969); *Gelhaar v. State*, 41 Wis. 2d 230, 163 N.W.2d 609 (1969), *cert. denied*, 399 U.S. 929 (1970); MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 245 (2d ed., E. Cleary 1972) [hereinafter cited as MCCORMICK'S HANDBOOK]. See also FED. R. EVID. 801(d) (Advisory Committee's Note); Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEGAL F. 309 (1970).

<sup>10</sup>See 98 C.J.S. *Witnesses* § 628 (1957).

<sup>11</sup>These scholars were described by Professor Charles McCormick as "the greatest judge of our day and . . . the greatest legal writer in our history." McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573, 583 (1947).

<sup>12</sup>6 F.2d 364 (2d Cir. 1925).

<sup>13</sup>*Id.* at 368.

<sup>14</sup>3A J. WIGMORE, *supra* note 6, § 1018.

quately cross-examined as to the basis for his prior remarks.<sup>15</sup> Additionally, Wigmore found an out-of-court statement could be just as useful as one made before a tribunal: "Psychologically of course, the one statement is as useful to consider as the other; and everyday experience outside of courtrooms is in accord."<sup>16</sup>

Professor McCormick added his prominent voice to those favoring substantive use of prior statements.<sup>17</sup> McCormick criticized the theory of accepting a statement for one purpose—impeachment—and not for another—substantive use. Its value in either case depends on the ability of the jury to give it some credibility:<sup>18</sup>

Unless the statement *may* be true, it does not have the effect of shaking the credibility of the testimony; and that it *may* be true is about all one means by accepting a statement as evidence of its truth. The notion that the judge and the jury may only say, "We know not which story is true; we only say that the witness blows hot and cold, and hence is not to be believed in either," demands a finical neutrality alien to the atmosphere of jury trial.

. . . The argument seems persuasive that if the previous statement and the circumstances surrounding its making are sufficiently probative to empower the jury to disbelieve the story of the witness on the stand, they should be sufficient to warrant the jury in believing the statement itself.<sup>19</sup>

Indeed, McCormick found that prior statements were generally more trustworthy than later testimony because the declarant's memory was presumably fuller and fresher.<sup>20</sup> McCormick emphasized that "memory hinges on recency,"<sup>21</sup> and that "the time element plays an important part, always favoring the earlier statement."<sup>22</sup>

Professor Edmund M. Morgan also joined those favoring substantive use of prior statements.<sup>23</sup> He found that the safeguards of trustworthiness were adequate when out-of-court declarants were in court and subject to full cross-examination.<sup>24</sup>

The debate over substantive use of prior statements has

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<sup>15</sup>*Id.*

<sup>16</sup>*Id.* at 996.

<sup>17</sup>MCCORMICK'S HANDBOOK, *supra* note 9, § 251; McCormick, *supra* note 11.

<sup>18</sup>McCormick, *supra* note 11, at 581.

<sup>19</sup>*Id.* at 581-82.

<sup>20</sup>*Id.* at 577.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* at 578.

<sup>23</sup>Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 195-96 (1948).

<sup>24</sup>*Id.*

centered on the adequacy of later cross-examination.<sup>25</sup> Can cross-examination delayed by weeks or months truly test truthfulness and accuracy to the same extent as immediate probing by an opponent? And, in the case of prior inconsistent statements, can there ever be effective cross-examination?

The two classic defenses of the orthodox view—stated in *State v. Saporen*<sup>26</sup> and *Ruhala v. Roby*<sup>27</sup>—focused on the deficiencies inherent in this type of “post-mortem” cross-examination.<sup>28</sup> These deficiencies were viewed so seriously in a later case<sup>29</sup> that the substantive use of prior statements was found to violate the confrontation clause of the United States Constitution.<sup>30</sup>

The defense of the orthodox rule in *Saporen* summarized in eloquent terms the position that after-the-fact cross-examination simply was not adequate:

Its [cross-examination] principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.<sup>31</sup>

The court stated that a substantive use rule would increase the temptation to manufacture evidence, allow the use of declarations extracted by harsh means, and enhance the opportunity to entrap witnesses.<sup>32</sup>

In *Ruhala*, the Michigan Supreme Court took great pains to demonstrate how substantive use of prior inconsistent statements shackled effective cross-examination. Using a hypothetical cross-examination, it illustrated that under the substantive use view, a

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<sup>25</sup>MCCORMICK'S HANDBOOK, *supra* note 9, § 251; Beaver & Biggs, *supra* note 9; Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43 (1954); Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613 and 607*, 75 MICH. L. REV. 1565 (1977).

<sup>26</sup>205 Minn. 358, 285 N.W. 898 (1939).

<sup>27</sup>379 Mich. 102, 150 N.W.2d 146 (1967).

<sup>28</sup>The orthodox rule in Minnesota was recently overruled by the adoption of MINN. R. EVID. 801, while the orthodox rule in Michigan was recently modified with regard to statements of identification by adoption of MICH. R. EVID. 801.

<sup>29</sup>*People v. Johnson*, 69 Cal. 2d 646, 655-56, 441 P.2d 111, 120-21, 68 Cal. Rptr. 599, 608-09 (1968), *cert. denied*, 393 U.S. 1051 (1969), *overruled by California v. Green*, 399 U.S. 149 (1970).

<sup>30</sup>“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” U.S. CONST. amend. VI.

<sup>31</sup>205 Minn. at 367, 285 N.W. at 901.

<sup>32</sup>*Id.*

witness could never totally recant his prior statement.<sup>33</sup> Instead of destroying a witness' credibility, the challenging attorney is left to "windmill fighting . . . . No matter how deadly the thrust of the cross-examiner, the ghost of the prior statement stands. His questions will always sound like attempts to permit the witness to explain *why* he changed his story before coming to court . . . ." <sup>34</sup>

Critics of the orthodox view were not convinced.<sup>35</sup> McCormick responded that the use of prior statements opened another avenue to truth, the finding of which was the very reason for the practice of cross-examination.<sup>36</sup> Morgan questioned why falsehood would harden

<sup>33</sup>The hypothetical included the following:

Q. William, you say that the man had to have been driving, is that right?

A. Yes.

Q. Did you see the man behind the wheel before the accident?

A. No.

. . . . .

Q. Isn't it possible that the man was thrown out of the car from the passenger's side and the woman was thrown across the front seat from the driver's seat?

A. Yes, that's possible.

Q. *Do you still say that the man had to have been driving?*

A. *No, I guess not.*

Now let us see whether the stale cross-examination of Burditt "*with respect to*" his statement, as envisioned by the Uniform Rule and advocated by Professor McCormick, would have the same effect:

. . . . .

Q. Isn't it possible that the man was thrown out of the car from the passenger's side and the woman was thrown across the front seat from the driver's side?

A. Yes, that's possible.

At this point, the cross-examiner is stymied. The crucial question which would give the witness a chance to change his story, "*Do you still say that the man had to have been driving?*" is meaningless. The witness has already testified that he is not still saying that the man had to have been driving. Instead of a plunge to the jugular, the examiner will have to be satisfied with applying a bandage. It would sound something like this:

Q. And isn't this the reason why the story you are telling us today is different from the story you told the police officer?

379 Mich. at 125-28, 150 N.W.2d at 157-58.

<sup>34</sup>*Id.* at 128, 150 N.W.2d at 158.

<sup>35</sup>Professor McCormick offered a point-by-point counterargument to Judge Stone opinion, McCormick, *supra* note 11, at 586-87.

<sup>36</sup>Too often the cross-examiner of a dubious witness is faced by a smooth, blank wall. The witness has been able throughout to present a narrative which may be false, yet is consistent with itself and offers no foothold for the climber who would look beyond. But the witness who has told one story aforesaid and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore.

*Id.* at 576-77.

any quicker than truth, and why delay would tend to cultivate corruptive influences rather than truthful ones.<sup>37</sup> The *Ruhala* court's dramatic view of cross-examination was also attacked for assuming that the opposing counsel will be able to destroy a witness "à la Perry Mason,"<sup>38</sup> an unlikely result in a jury trial free from script writers.

Possibly the orthodox rule's greatest weakness is the necessity for a limiting instruction to the jury.<sup>39</sup> Under the orthodox view, a witness' prior inconsistent statement is admissible for impeachment purposes. When such a statement is admitted, the jury is to be instructed that use of such evidence is limited to impeachment purposes.<sup>40</sup> It may not be used as substantive proof of the facts stated therein.

Scholars are nearly united in their belief that such an instruction is either not understood or not complied with by jurors.<sup>41</sup> McCormick termed such an instruction a "verbal ritual."<sup>42</sup> Rather than being computer-like machines, jurors gather impressions from all that goes on at the trial and make their decisions based upon those overall impressions.<sup>43</sup>

Defenses of the orthodox view—specifically the *Saporen* and *Ruhala* opinions—have not attempted to defend the actual effect, or lack thereof, of the limiting instruction. Professor Falknor, however, accepting the need for some use of the limiting instruction, admitted its shortcomings but contended there was "no other rational solution."<sup>44</sup>

The substantive use view has been criticized on grounds other than inadequate cross-examination. Beaver and Biggs<sup>45</sup> found poten-

<sup>37</sup>Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

<sup>38</sup>Graham, *supra* note 25, at 1571.

<sup>39</sup>Beaver & Biggs, *supra* note 9.

<sup>40</sup>McCORMICK'S HANDBOOK, *supra* note 9, § 251 n.62.

<sup>41</sup>See M. SEIDMAN, *THE LAW OF EVIDENCE IN INDIANA* (1977); Beaver & Biggs, *supra* note 9; McCormick, *supra* note 11. See also Annot., 133 A.L.R. 1454 (1941).

<sup>42</sup>McCormick, *supra* note 11, at 580.

<sup>43</sup>It stands to reason that jurors normally reach a decision as a spontaneous reaction to the entire mass of incidents at the trial as a whole, including the comportment of the witnesses, of the court, of the parties and of counsel. Perhaps they could not, and it seems that they do not, add each item of evidence to the scales of their deliberation, assigning to each item its own appropriate and due legal value, thence reaching a verdict by observing to which side the scales trip. Verdicts are not reached in any such manner; they are not attained by voluntary process, controllable with the precision of scientific instruments.

McCormick, *supra* note 9, at 321-22. See Annot., 133 A.L.R. 1454, 1466 (1941).

<sup>44</sup>Falknor, *supra* note 25, at 54.

<sup>45</sup>Beaver & Biggs, *supra* note 9, at 315.

tial practical drawbacks in the doctrine's application such as manufactured evidence and increased perjury, greater confusion, and increased consumption of trial time.<sup>46</sup> Apparently, these problems have not materialized to any great degree as evidenced by the increasing number of states turning to the substantive use view.<sup>47</sup>

Various proposals have been advanced by those favoring substantive use. The different proposals reflect an effort to balance sufficient assurances that the prior statement was trustworthy against the desirability of getting all relevant information before the jury.<sup>48</sup>

The American Law Institute's Model Code of Evidence, published in 1942, called for abolishing all barriers established by the orthodox rule.<sup>49</sup> All prior statements were to be substantively admissible whether they were consistent or inconsistent without regard to the circumstances under which they were made. The Model Code required only that the declarant be in court and subject to cross-examination, or be unavailable. The declarant's later presence in court would be an adequate basis upon which the jury could judge the credibility of the declarant's earlier statement.<sup>50</sup>

The Uniform Rules of Evidence, proposed in 1953,<sup>51</sup> solidly favored substantive use of prior statements, but only statements made by declarants present and subject to cross-examination were to be admissible.<sup>52</sup> The statement had to be one which would have been admissible if the declarant had made it while testifying as a witness. Again, no distinctions were made between consistent and inconsistent statements.

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<sup>46</sup>*Id.*

<sup>47</sup>See notes 165 & 173 *infra*.

<sup>48</sup>See generally Graham, *supra* note 25.

<sup>49</sup>"Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination." MODEL CODE OF EVIDENCE Rule 503 (1942).

<sup>50</sup>*Id.*, Comment b to Rule 503.

<sup>51</sup>The proposed rules were later superseded by UNIFORM RULES OF EVIDENCE, adopted by the National Conference of Commissioners on Uniform State Laws in 1974.

<sup>52</sup>Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (1) Previous Statements of Persons Present and Subject to Cross Examination. A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness.

UNIFORM RULES OF EVIDENCE 63(1), *reprinted in* 4 S. GARD, JONES ON EVIDENCE 413 (6th ed. 1972).

McCormick's proposed rule,<sup>53</sup> however, drew distinctions between types of prior statements but on a different basis than consistency. He found witnesses' memories of oral statements to be "peculiarly faulty and fleeting."<sup>54</sup> The risk of mistransmission was greater than the probative value of such evidence. McCormick's rule required the prior statement be a signed or written statement, or testimony, or an unsworn oral statement which the declarant later acknowledges while testifying. Also, the rule required the declarant be in court and subject to cross-examination. Professor Falknor supported the McCormick rule with the additional provision that the declarant's statement refer to events or conditions which the declarant had an adequate opportunity to perceive.<sup>55</sup>

### III. SHIFT TO THE SUBSTANTIVE USE VIEW

Although the substantive use theory enjoyed wide support among commentators, its adoption in actual practice was quite limited until 1969.<sup>56</sup> Substantial acceptance began with two legal landmarks—the United States Supreme Court decision of *California v. Green*,<sup>57</sup> and the proposal and later adoption of the Federal Rules of Evidence.<sup>58</sup>

*Green* cleared the constitutional path for the substantive use of prior statements when the declarant was in court, available for cross-examination. In doing so, it rejected the California Supreme Court's holding that such use in a criminal case violated the defendant's constitutional right of confrontation.<sup>59</sup> In *Green* a declarant stated in a preliminary hearing that the defendant was his supplier of marijuana. At trial, the declarant changed his testimony and denied that Green had given him the illicit substance. Over objec-

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<sup>53</sup> A statement made on a former occasion by a declarant having an opportunity to observe the facts stated, will be received as evidence of such facts, notwithstanding the rule against hearsay if

(1) the statement is proved to have been written or signed by the declarant, or to have been given by him as testimony in a judicial or official hearing, or the making of the statement is acknowledged by the declarant in this testimony in the present proceeding, and

(2) the party against whom the statement is offered is afforded an opportunity to cross-examine the declarant.

McCormick, *supra* note 13, at 588.

<sup>54</sup>*Id.*

<sup>55</sup>Falknor, note 25 *supra*.

<sup>56</sup>The jurisdictions accepting substantive use of prior statements were limited to Alaska, *Hobbs v. State*, 359 P.2d 956 (Alaska 1961); California, CAL. EVID. CODE §§ 1235-36; New Jersey, N.J. R. EVID. 63(1).

<sup>57</sup>399 U.S. 149 (1970).

<sup>58</sup>FED. R. EVID. (1976).

<sup>59</sup>399 U.S. at 150-51, *overruling* *People v. Johnson*, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied*, 393 U.S. 1051 (1969).

tions, the declarant's prior inconsistent statement was admitted as substantive evidence.

While recognizing the similarity in the values protected by the sixth amendment and the hearsay rule, the Court held they were not synonymous; if the declarant is available *in court to be cross-examined* as to his prior inconsistent statement, no constitutional right is infringed.<sup>60</sup>

The second major development accepting the substantive use of prior statements was the adoption of Federal Rules of Evidence, initially proposed in 1969<sup>61</sup> with a revised draft published in 1971.<sup>62</sup> The rules were finally passed into law by Congress effective July 1, 1975.<sup>63</sup>

Proposed Rule 801(d)(1) provided that if the declarant testified at trial and was subject to cross-examination, *all* his prior *inconsistent* statements were admissible for substantive use. Prior *consistent* statements could be used substantively only after the declarant had been challenged, expressly or impliedly, on the grounds of recent fabrication or improper motive.<sup>64</sup>

The Advisory Committee commented that use of prior statements was a controversial area. With regard to prior inconsistent statements, the committee found that the traditional reasons for withholding such statements from substantive consideration—lack of oath, demeanor observation, and cross-examination—were not so significant as to merit the loss of the evidence.<sup>65</sup>

In noting the more restrictive position on prior consistent statements, the Advisory Committee stated it was “unwill[ing] to countenance the general use of prior prepared statements as substantive evidence.”<sup>66</sup> On the other hand, if opposing counsel wished to open the door to the substantive use of prior consistent statements by challenging the declarant's credibility, no reason existed why he should not be free to do so.<sup>67</sup>

Congress amended the proposed rules before their adoption.<sup>68</sup>

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<sup>60</sup>399 U.S. at 159.

<sup>61</sup>PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161 (1969).

<sup>62</sup>REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, 51 F.R.D. 315 (1971) [hereinafter cited as PROPOSED FED. R. EVID. (1971 draft)].

<sup>63</sup>Fed. R. Evid., Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C. app. at 539, 605 (1975)).

<sup>64</sup>PROPOSED FED. R. EVID. 801(d)(1) (1971 draft), *supra* note 62.

<sup>65</sup>*Id.* Advisory Committee Note at 575-76.

<sup>66</sup>*Id.* at 576.

<sup>67</sup>*Id.*

<sup>68</sup>For a general discussion of the reasons leading to the change in the PROPOSED FED. R. EVID. 801 (1971 draft) *supra* note 63, see Ordovery, *Surprise! That Damaging*

The final version of Federal Rule of Evidence 801<sup>69</sup> contains a greatly restricted provision on the substantive use of prior inconsistent statements, admitting them only if made under oath at a trial or other judicial proceeding.

The rule carried McCormick's doubt about admitting prior oral statements<sup>70</sup> an extra step. Congress required the solemnity of an oath and a judicial type of proceeding before a statement would be sufficiently trustworthy for substantive admission.

Congress has been criticized for changing the proposed rule.<sup>71</sup> At least one scholar proposed an amendment to rule 801;<sup>72</sup> however, it has not been changed since its enactment.

#### IV. INDIANA'S ADOPTION OF THE SUBSTANTIVE USE VIEW

As in other jurisdictions, the orthodox view was deeply entrenched in Indiana.<sup>73</sup> As early as 1884, the Indiana Supreme Court made clear that prior inconsistent statements were admissible only for impeachment purposes.<sup>74</sup>

The sometimes decisive effect of the orthodox view was graphically shown in the Indiana Supreme Court case of *McAdams v. State*.<sup>75</sup> In that burglary case, McAdam's wife and son were called to testify by the prosecution. Both denied that the defendant had made incriminating statements to them. The witnesses' prior written inconsistent statements were introduced for impeachment purposes only, and a conviction followed. The only other evidence against McAdams was the discovery of a stolen brown jar in McAdams' house and the defendant's flight to another county. The supreme court held that, without the prior statements as substan-

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*Turncoat Witness Is Still With Us: An Analysis of Federal Rules of Evidence 607, 801(d)(1)(A) and 403*, 5 HOFSTRA L. REV. 65 (1977).

<sup>69</sup>(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper motive . . . .

FED. R. EVID. 801(d).

<sup>70</sup>See note 54 *supra*.

<sup>71</sup>See M. SEIDMAN, *supra* note 41, at 35; Graham, *supra* note 25; Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9; Ordovery, *supra* note 68; Stalmack, *Prior Inconsistent Statements: Congress Takes a Compromising Step Backwards in Enacting Rule 801(d)(1)(A)*, 8 LOY. CHI. L.J. 251 (1977).

<sup>72</sup>Graham, *supra* note 25, at 1582-93.

<sup>73</sup>30 I.L.E. *Witnesses* § 245.

<sup>74</sup>*Allen v. Davis*, 101 Ind. 187 (1884).

<sup>75</sup>226 Ind. 403, 81 N.E.2d 671 (1948).

tive evidence, there was insufficient evidence to sustain the guilty verdict.<sup>76</sup> The conviction was reversed.<sup>77</sup>

The impact of the orthodox view was again shown in 1970 in *Glover v. State*,<sup>78</sup> a supreme court decision which overturned a second degree murder conviction because of insufficient evidence. The victim had been stabbed to death in an alley outside a tavern where earlier that evening the victim and a companion had been in an altercation with the defendant and the defendant's brother. Testimony placed the defendant in the vicinity of the tavern at about the time of the murder, but no physical evidence connected him to the crime.

At trial, the defendant's girlfriend testified that although she had observed a scuffle in the dark outside the tavern, she could not identify the participants. The court then admitted her grand jury testimony which positively identified the defendant as a participant in the fight. The majority held that the prior statement could not be used as substantive evidence, and therefore, there was no evidence linking the defendant to the crime.<sup>79</sup> This conviction also was reversed.<sup>80</sup>

The dissent stated that the jury apparently believed that the witness, either from fear or friendship, was withholding the identity of the defendant in her testimony. The dissent asserted that the determination of witness credibility was for the jury.<sup>81</sup>

Five years after *Glover*, the orthodox view was swept aside by the landmark Indiana case of *Patterson v. State*.<sup>82</sup> The Indiana Supreme Court made a clear pronouncement of its break from the orthodox view, stating that henceforth Indiana courts would accept the substantive use of prior statements.<sup>83</sup> The *Patterson* court's "clear" pronouncement, however, has been substantially clouded by holdings in subsequent cases.

In *Patterson*, an involuntary manslaughter case, two pretrial signed statements were given to police—one by Mrs. Patterson, the

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<sup>76</sup>*Id.* at 414, 81 N.E.2d at 676.

<sup>77</sup>*Id.* at 415, 81 N.E.2d at 678.

<sup>78</sup>253 Ind. 536, 255 N.E.2d 657 (1970) (3-2 decision) (Givan & Arterburn, JJ., dissenting).

<sup>79</sup>*Id.* at 539-40, 255 N.E.2d at 659.

<sup>80</sup>*Id.* at 540, 255 N.E.2d at 659.

<sup>81</sup>Justice Givan's dissenting opinion chided the majority opinion for not mentioning the prior positive identification before the grand jury. *Id.* at 540-41, 255 N.E.2d at 660 (Givan, J., dissenting).

<sup>82</sup>263 Ind. 55, 324 N.E.2d 482 (1975).

<sup>83</sup>"[T]he 'hearsay evidence' issue . . . is that issue that occasioned the grant of transfer, in hopes of making a clear pronouncement of our departure from an ancient application of the hearsay rule—one that we have more recently determined to be a misapplication." *Id.* at 56, 324 N.E.2d at 484.

defendant's wife, the other by Miss Robinson, a guest of the victim. Robinson testified for the prosecution. The defense attempted to impeach her by excerpts from her prior statement to police. The prosecution then introduced the entire statement into evidence. The statement was consistent with Robinson's earlier testimony, but was more detailed and therefore more incriminating. Mrs. Patterson's prior statement was also consistent with her testimony except for what the supreme court termed "one relatively minor aspect"<sup>84</sup> and it, too, was introduced into evidence by the prosecution.

In one paragraph, the supreme court upended the orthodox rule and held that prior statements could be used as substantive evidence. The court, in this paragraph, related a brief history of the orthodox rule in Indiana and stated the new holding; it discussed the views of commentators, the proposed uniform evidence codes, and the proposed and adopted Federal Rules of Evidence.<sup>85</sup> The court stated that both declarants were on the witness stand when the prior statements were offered, and that neither denied making or professed ignorance of the earlier statements. "It was, therefore, not necessary for the truth of the out-of-court assertions to rest upon the credibility of persons not present and then subject to cross-examination concerning the statements."<sup>86</sup>

In its limited discussion, the court indicated that the view adopted by *Patterson* was in accord with but not as liberal as the views of McCormick, Wigmore, and the Uniform Rules of Evidence.<sup>87</sup> The opinion, however, failed to set out those rules, or detail how Indiana's rule would differ from them. Additionally, the opinion stressed that both the proposed and adopted Federal Rules of Evidence required the availability of the declarant for cross-examination for prior statements to be admissible: "It is our judgment that this safeguard is of paramount importance and is adequate."<sup>88</sup>

The dissent<sup>89</sup> registered the classic objection to the substantive use view—that of an inadequate ability to effectively cross-examine the declarant.<sup>90</sup> Justice DeBruler found that later cross-examination would improperly center on the circumstances surrounding the making of the earlier statement, and not the truth of the statement itself.<sup>91</sup>

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<sup>84</sup>*Id.* at 57, 324 N.E.2d at 484.

<sup>85</sup>*Id.* at 57-58, 324 N.E.2d at 484-85.

<sup>86</sup>*Id.* at 58, 324 N.E.2d at 484.

<sup>87</sup>*Id.*

<sup>88</sup>*Id.* at 58, 324 N.E.2d at 485.

<sup>89</sup>*Id.* at 64, 324 N.E.2d at 488 (DeBruler, J., dissenting).

<sup>90</sup>See *Ruhala v. Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967); *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939).

<sup>91</sup>263 Ind. at 65, 324 N.E.2d at 488.

Opinions in other states that have rejected the orthodox view by judicial decision provide an interesting contrast to the *Patterson* decision. Without exception, the reasoning in these cases is more detailed and provides specific guidelines as to which prior statements will henceforth be substantively admissible.

The Wisconsin Supreme Court overturned prior adherence to the orthodox position in *Gelhaar v. State*.<sup>92</sup> In that case, statements were given to police by two children concerning an altercation between their parents which led to the father's stabbing death. The statements given by the children shortly after the event incriminated their mother to a much greater degree than did their testimony at trial.

In allowing the prior inconsistent statements as substantive evidence, the unanimous court opinion relied heavily upon McCormick's reasoning, quoting extensively from his writings.<sup>93</sup> It ruled that the presence of the declarant, under oath and subject to cross-examination in front of the jury, provided an adequate procedural safeguard to allow the substantive admission of prior inconsistent statements.<sup>94</sup> The court also noted that prior statements were nearer the event and, therefore, were subject to less distortion.<sup>95</sup> The court also doubted the effectiveness of the limiting instructions to the jury.<sup>96</sup>

The *Gelhaar* holding set forth a specific rule,<sup>97</sup> adopting a modified version of the McCormick proposal.<sup>98</sup> The prior statement must have been written or signed by the declarant, or given as testimony, or acknowledged by the declarant while testifying. The declarant must be available for cross-examination. Finally, the substantive use is limited to prior inconsistent statements, specifically excluding prior consistent statements.<sup>99</sup>

The Kentucky Supreme Court rejected the orthodox view in *Jett v. Commonwealth*.<sup>100</sup> Citing Professor Morgan, the Kentucky court discussed the orthodox view and decided there were sufficient safeguards when the declarant was present as a witness and subject to cross-examination.<sup>101</sup> The reasoning of the Kentucky court's holding was less specific than that in *Gelhaar*; it did not address the

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<sup>92</sup>41 Wis. 2d 230, 163 N.W.2d 609 (1969), *cert. denied*, 399 U.S. 929 (1970).

<sup>93</sup>*Id.* at 241, 163 N.W.2d at 613-14.

<sup>94</sup>*Id.* 163, N.W.2d at 613.

<sup>95</sup>*Id.*

<sup>96</sup>*Id.* at 239-40, 163 N.W.2d at 613.

<sup>97</sup>*Id.* at 241-42, 163 N.W.2d at 614 (since superseded by WIS. R. EVID. 908:01(4)(a)).

<sup>98</sup>See note 53 *supra*.

<sup>99</sup>41 Wis. 2d at 241-42, 163 N.W.2d at 614.

<sup>100</sup>436 S.W.2d 788 (Ky. 1969).

<sup>101</sup>*Id.* at 792.

issue of prior consistent statements and, as the case itself involved a prior oral statement given to police, it was clear the Kentucky rule did not impose the burden that the prior statement be under oath or in writing.

In *Beavers v. State*,<sup>102</sup> the Alaska Supreme Court reaffirmed its position on the use of prior statements set out in *Hobbs v. State*.<sup>103</sup> The court in *Beavers* analyzed each of the reasons for the orthodox view, concluding that the rationale for the orthodox view does not stand up to critical scrutiny.<sup>104</sup> Instead of setting down specific rules for the admission of prior statements, however, *Beavers* followed *Hobbs*, stating that the admission of prior inconsistent statements as substantive evidence should be within the discretion of the trial judge.<sup>105</sup>

North Dakota rejected the orthodox position in *State v. Igoe*,<sup>106</sup> which borrowed a rationale almost verbatim from the Advisory Committee Note to the proposed Federal Rule of Evidence 801(d) (1).<sup>107</sup> After extensively quoting with favor from the committee's note, the North Dakota Supreme Court stressed the desirability of rules which would be compatible with the federal system and adopted the proposed federal rule, at least as to the only issue involved, prior inconsistent statements.<sup>108</sup>

The Arizona decision adopting the substantive use doctrine, *State v. Skinner*,<sup>109</sup> was decided the same year as *Igoe*. Like *Igoe*, *Skinner* also reflected the reasoning of the Advisory Committee Note, quoting extensively therefrom.<sup>110</sup> Additionally relying on the rationale of *California v. Green*<sup>111</sup> and the reasoning of Judge Learned Hand,<sup>112</sup> the Arizona court decided it was futile for the trier of fact to attempt to consider prior inconsistent statements for impeachment but not for substantive proof of the facts stated therein.<sup>113</sup>

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<sup>102</sup>492 P.2d 88 (Alaska 1969).

<sup>103</sup>359 P.2d 956 (Alaska 1961).

<sup>104</sup>492 P.2d at 94.

<sup>105</sup>*Id.*

<sup>106</sup>206 N.W.2d 291 (N.D. 1973).

<sup>107</sup>*Id.* at 294-96.

<sup>108</sup>*Id.* at 297. North Dakota has since adopted N.D. R. EVID. 801(d) which is very similar to the adopted FED. R. EVID. 801(d).

<sup>109</sup>110 Ariz. 135, 515 P.2d 880 (1973).

<sup>110</sup>*Id.* at 141-42, 515 P.2d at 886-87.

<sup>111</sup>399 U.S. 149 (1970).

<sup>112</sup>110 Ariz. at 142, 515 P.2d at 887 (quoting *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 934 (2d Cir. 1957)).

<sup>113</sup>110 Ariz. at 142, 515 P.2d at 887. Arizona has now adopted ARIZ. R. EVID. 801(d), which is identical to proposed FED. R. EVID. 801(d) (1971 draft), *supra* note 63.

The West Virginia Supreme Court in *State v. Spadafore*<sup>114</sup> rejected the orthodox rule in favor of Federal Rule of Evidence 801(d) (1), as adopted by Congress.<sup>115</sup> The West Virginia court noted the scholarly criticisms of the orthodox view. It discussed the Federal Rules of Evidence, both as proposed and as adopted, and the view developed by Judge Friendly which allows for substantive use of prior trial and grand jury testimony.<sup>116</sup> In requiring that prior statements be under oath, the court emphasized that there were special dangers in admitting *all* prior statements as substantive evidence.

While the Court recognizes that criminal defendants can often bring pressure to bear upon witnesses to compel a convenient loss of memory during the trial of a case, the sinister spectre of coerced statements made to the police in an *ex parte* manner is far more threatening. Frequently witnesses in criminal cases are implicated in the criminal activity at issue, . . . and the prosecutorial authorities can induce fear, a sense of guilt, and panic, in such a way as to cause distortion of the facts. In addition, out-of-court statements are subject to errors in transcription, outright misstatement by the officer preparing the statement for signature, and the errors of perception which are inherent in responses to leading questions.<sup>117</sup>

Each of these state decisions offered more detailed reasoning and clearer statements of the need to break with the orthodox view than did the *Patterson* decision. And each holding was more specific than the holding in *Patterson*, ranging from the very precise holdings in *Gelhaar*<sup>118</sup> and *Spadafore*<sup>119</sup> to a somewhat more general holding in *Jett*.<sup>120</sup>

Despite the shortcomings of the *Patterson* decision, it clearly put Indiana in the substantive use camp. Within the same year, the Indiana Supreme Court relied on *Patterson* in affirming the denial of post conviction relief in *Torrence v. State*.<sup>121</sup> Written by Justice DeBruler, who had dissented in *Patterson*, the opinion held that

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<sup>114</sup>220 S.E.2d 655 (W. Va. 1975).

<sup>115</sup>*Id.* at 662-64.

<sup>116</sup>*Id.* at 661-64. See *United States v. De Sisto*, 329 F.2d 929, 932-34 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); *United States v. Kahaner*, 317 F.2d 459, 473-74 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).

<sup>117</sup>220 S.E.2d at 664.

<sup>118</sup>41 Wis. 2d 230, 163 N.W.2d 609 (1969).

<sup>119</sup>220 S.E.2d 655 (W. Va. 1975).

<sup>120</sup>436 S.W.2d 788 (Ky. 1969).

<sup>121</sup>263 Ind. 202, 328 N.E.2d 214 (1975).

prior statements were admissible as substantive evidence despite the declarant's repudiation of them on the witness stand.<sup>122</sup>

In the next year, in *Ortiz v. State*,<sup>123</sup> the supreme court approved the use of prior inconsistent statements, in affirming a first degree murder conviction. The prior statement was that of Ortiz' co-defendant Williams. The statement incriminated both Williams and Ortiz. On the stand, Williams denied the truth of the prior statement, but it was still admitted for substantive consideration. Despite the statement in *Patterson* that Indiana's rule was not as liberal as those of the commentators and of the proposed uniform evidence codes, the court cited *Patterson* for the rule that "extrajudicial statements are available as substantive evidence when the declarant is available at trial for cross-examination."<sup>124</sup> This position was the same as the Uniform Rules of Evidence,<sup>125</sup> and was more liberal than the McCormick position.<sup>126</sup>

In April 1977, the supreme court, in *Carter v. State*,<sup>127</sup> specifically held that both prior oral and prior written statements could be substantively admissible. In *Carter*, the trial court erred in instructing the jury that a witness' prior written statement could be considered as substantive evidence, but a prior oral statement could be considered for impeachment only. Nevertheless, the supreme court affirmed the first degree murder conviction on the grounds that the error was harmless.

The *Carter* opinion incorporated the rule developed in *Patterson* and *Torrence*; if the declarant is available for in-court cross-examination, his prior statement is substantively admissible—be it consistent or inconsistent, oral or written.<sup>128</sup> This rule, however, that developed in Indiana from *Patterson* to *Carter* included none of the safeguards advocated by McCormick,<sup>129</sup> indeed, it seemed identical with the Uniform Rule of Evidence 63(1)<sup>130</sup> allowing the use of *any* prior statement when the declarant was available for cross-examination.

Professor Seidman in his treatise on Indiana evidence law<sup>131</sup> praised the supreme court for its adoption of the substantive evidence position finding it identical with the *proposed* Federal

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<sup>122</sup>*Id.* at 205-06, 328 N.E.2d at 216.

<sup>123</sup>356 N.E.2d 1188 (Ind. 1976).

<sup>124</sup>*Id.* at 1194.

<sup>125</sup>See note 52 *supra*.

<sup>126</sup>See note 53 *supra*.

<sup>127</sup>361 N.E.2d 1208 (Ind. 1977).

<sup>128</sup>*Id.* at 1209-10.

<sup>129</sup>See McCormick, *supra* note 11, at 588.

<sup>130</sup>See note 52 *supra*.

<sup>131</sup>M. SEIDMAN, *supra* note 41.

Rules of Evidence,<sup>132</sup> but Professor Seidman's remarks were limited to consideration of prior *inconsistent* statements.<sup>133</sup> The Indiana Supreme Court has expressed none of the concerns about prior *consistent* statements that were built into the proposed federal rules. The federal requirement that a witness first be challenged on the basis of recent fabrication or improper motive was not required by the Indiana court, as was dramatically illustrated in the key case of *Flewallen v. State*.<sup>134</sup>

Flewallen appealed from a second degree murder conviction for the beating death of his eighteen-month-old stepdaughter. The trial court admitted several prior statements witnesses had made to police, the coroner, and the grand jury. The majority opinion summarized the nature of these statements: "Although there were some minor conflicts, most of the statements were consistent with the statements given by the witnesses on the stand, though the previous statements were more detailed in each case."<sup>135</sup>

Justice DeBruler's dissent<sup>136</sup> provided a more specific analysis. Twelve statements were admitted—five had been given to police, one to the coroner, and six to the grand jury. The prior statements of two witnesses, were read to the jury only after they had testified about the events. The other four witnesses were asked to authenticate their prior statements *before* being asked any questions requiring a substantive response.<sup>137</sup>

<sup>132</sup>*Id.* at 34-35.

<sup>133</sup>*Id.*

<sup>134</sup>368 N.E.2d 239 (Ind. 1977).

<sup>135</sup>*Id.* at 241.

<sup>136</sup>*Id.* at 243 (DeBruler, J., dissenting).

<sup>137</sup>The following excerpt from the record shows the extent of one witness' testimony prior to the introduction of her detailed prior statements given to police and the grand jury.

Q. Please state your full name to Judge Dietsch and the members of the Jury.

A. Golda Willis.

Q. Where do you live, ma'am?

A. 1304 Florence.

Q. In relation to 1310 Florence, could you tell us where that is on this sketch and you don't need to get down if you'll just let me indicate. This is the apartment of the Flewallen's.

A. Yes, sir.

Q. It has an "f" in the box?

A. Yes, sir.

Q. Could you tell us where . . .

A. I live the 3rd door from them.

Q. Which direction, ma'am, this way?

A. It would be going north.

Q. It has "G.W." in it right here. It that your apartment?

The majority treated *Patterson* as dispositive of the issue.<sup>138</sup> Because the declarants were in court and subject to cross-examination, there was no violation of the confrontation clause;<sup>139</sup> their prior statements were admissible.<sup>140</sup>

Justice DeBruler was not convinced. He characterized the prosecution's case as a "wholesale use of prior testimony and out-of-court statements of less than enthusiastic prosecution witnesses"<sup>141</sup> and thus not within the scope of *California v. Green*; the United States Supreme Court had not given the states free reign to prosecute by prior statements when live in-court testimony was equally available.<sup>142</sup> He concluded: "Permitting such evidence will cause criminal trials in this state to resemble trials in the English prerogative courts, whose reliance on *ex parte* affidavits to convict accused persons was a principal evil sought to be remedied by the constitutional guarantee of confrontation of one's accusers."<sup>143</sup> These concerns have been expressed by commentators who favor substantive use of prior statements.<sup>144</sup>

It appears that only Kansas courts, have gone as far as *Flewallen* in admitting prior statements.<sup>145</sup> Prior statements were

A. Yes.

Q. Mrs. Willis, do you recall giving a statement to the Evansville Police Department on the 31st day of August, 1974?

A. Yes, sir.

Q. Do you have a copy of that with you?

WITNESS PRESENTS STATEMENT

Q. Mrs. Willis, I'm handing you what has been marked for purposes of identification as State's Exhibit No. 14. Would you tell us what that is, please? Not reading it, but do you recognize it?

A. Yes, sir, I do.

Q. Is that a statement which you gave on the 31st day of August, 1974?

A. Yes, sir.

Q. It has three pages?

A. Yes, sir.

Q. I'll show you what has been marked for purposes of identification as State's Exhibit No. 15, is that an accurate transcription to the best of your recollection of your Grand Jury testimony?

A. That's right.

MR. REDWINE: The State offers to introduce State's exhibits 14 and 15. Record at 443-44, *Flewallen v. State*, 368 N.E.2d 239 (Ind. 1977).

<sup>138</sup>This issue was decided by *Patterson v. State* . . . 368 N.E.2d at 241.

<sup>139</sup>*Id.* at 241 (citing *California v. Green*, 399 U.S. 149 (1970)).

<sup>140</sup>368 N.E.2d at 241.

<sup>141</sup>*Id.* at 243.

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* at 244.

<sup>144</sup>See MCCORMICK'S HANDBOOK, *supra* note 9, at § 251; Falknor, *supra* note 25.

<sup>145</sup>*State v. Taylor*, 217 Kan. 706, 538 P.2d 1375 (1975); *State v. Bagemehl*, 213 Kan. 210, 515 P.2d 1104 (1973); *State v. Jones*, 204 Kan. 719, 466 P.2d 283 (1970).

admitted under the Kansas statutory evidence rule<sup>146</sup> which required only that the declarant be available for cross-examination, and that the statement would have been admissible if it had been made by the declarant while testifying.

Illustrative of these Kansas cases is *State v. Jones*.<sup>147</sup> A stepfather was convicted of the statutory rape of his seven-year-old stepdaughter. The victim's maternal grandmother testified about statements made to her by the victim. The statement was made in the victim's hospital room ten days after the incident. The Kansas Supreme Court approved substantive use of the prior statement even though the girl was not in the courtroom at the time the grandmother testified. The court held the girl's presence in the judge's library was adequate availability, and because of her age and the emotional nature of the proceedings, she could be cross-examined largely by leading questions to which she could answer "yes" or "no". The Kansas Supreme Court found this to be adequate to allow the substantive use of the prior statement to which the grandmother testified.<sup>148</sup>

*Flewallen* remained an undisputed statement of Indiana law for only five months. In March, 1978, in *Samuels v. State*,<sup>149</sup> the supreme court signaled a withdrawal from *Flewallen* and a possible rethinking of the *Patterson* decision.

The opinion in *Samuels* made it evident that *Flewallen* was not likely to be followed in future cases: "It appears that the rule drawn from *Patterson* may well be in need of reconsideration. To the extent that it has, on some occasions, been used to support the admission of out-of-court statements as a mere substitute for available in-court testimony, it has been misapplied."<sup>150</sup> Furthermore, the opinion suggested that the entire issue of substantive admission of prior statements may have been wrongly decided in *Patterson*.<sup>151</sup> Thus, the supreme court appeared to seriously threaten the validity of *any* use of prior statements as substantive evidence. Yet there was no specific overruling or limiting of *Patterson*, nor did the opinion give

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<sup>146</sup>KAN. STAT. § 60-460 (Supp. 1977).

<sup>147</sup>204 Kan. 719, 466 P.2d 283 (1970).

<sup>148</sup>*Id.* at 729, 466 P.2d at 292. As a post-script to this case, the daughter was made a ward of the court following the natural mother's insistence that the stepfather would return to live with the mother and her daughter after the stepfather's release from prison. *In re Armentrout*, 207 Kan. 366, 485 P.2d 183 (1971).

<sup>149</sup>372 N.E.2d 1186 (Ind. 1978).

<sup>150</sup>*Id.* at 1187.

<sup>151</sup>"Whether or not the jury was entitled to consider them as substantive evidence, is another question—a question the defendant insists was erroneously decided in the *Patterson* case. Even assuming that *Patterson* was decided erroneously, however, the defendant has presented no error in his case." *Id.*

guidelines as to the supreme court's future course on substantive use other than that it was not likely to follow *Flewallen*. It appears that the court in *Samuels* wanted to signal a prompt withdrawal from the *Flewallen* position. Its entire discourse on the issue in *Samuels* was dicta. It need not have been included in the opinion since the substantive use challenge had been waived by the appellant's failures to request a limiting instruction from the trial court and to set out the specific error in his motion to correct errors.<sup>152</sup>

#### V. PRIOR STATEMENTS: WHAT DIRECTION NOW?

The development of the law in other jurisdictions suggests that Indiana will not completely reject the *Patterson* substantive use position. Although several states have recently rejected the admission of prior statements for substantive use,<sup>153</sup> no state which has adopted the substantive use view later retreated entirely to the orthodox position.

A trio of 1978 Indiana Supreme Court cases appear to confirm that *Patterson* will not be rejected—*Rogers v. State*,<sup>154</sup> *Stone v. State*,<sup>155</sup> and *Williams v. State*.<sup>156</sup> All were the result of separate appeals by co-defendants found guilty of first degree murder at a joint trial. In each, the *Patterson*-type use of a prior statement as substantive evidence was approved.<sup>157</sup>

The prior statement involved in the three cases was made by a co-defendant, James. James was also charged in the crime, but had entered a plea bargain agreement. At trial, James took the stand for the prosecution. He denied any knowledge of the shooting incident, and claimed his prior statements made to police and in open court at his sentencing were the result of police threats. The trial court permitted introduction of his prior statements as substantive evidence.

In *Rogers*,<sup>158</sup> the court did not make mention of the dispute over or reconsideration of *Patterson*. In a brief section, the opinion stated that the declarant was present and subject to cross-examination, therefore, the prior statement came within the *Patterson* rule and was substantively admissible.<sup>159</sup>

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<sup>152</sup>*Id.*

<sup>153</sup>See *State v. Burns*, 173 Conn. 317, 377 A.2d 1082 (1977); *Woodall v. State*, 235 Ga. 525, 221 S.E.2d 794 (1975); *People v. Gant*, 58 Ill. 2d 178, 317 N.E.2d 564 (1974); *State v. Granberry*, 491 S.W.2d 528 (Mo. 1973); *State v. Pope*, 287 N.C. 505, 215 S.E.2d 139 (1975); *Commonwealth v. Gee*, 467 Pa. 123, 354 A.2d 875 (1976).

<sup>154</sup>375 N.E.2d 1089 (Ind. 1978).

<sup>155</sup>377 N.E.2d 1372 (Ind. 1978).

<sup>156</sup>379 N.E.2d 449 (Ind. 1978).

<sup>157</sup>379 N.E.2d at 450, 377 N.E.2d at 1375, 375 N.E.2d at 1092.

<sup>158</sup>375 N.E.2d 1089 (Ind. 1978).

<sup>159</sup>*Id.* at 1092.

In *Stone*,<sup>160</sup> the majority opinion made an attempt to pull together the earlier cases and dispel some of the confusion. The opinion stated that *Patterson* and *Torrence* had opened the door for the substantive use of prior statements, but *Samuels* had warned against overextending that rule to allow prior statements as a substitute for live testimony.<sup>161</sup> This case, the court held, was clearly one where substantive use of the prior statement was permissible: "The State brought forth the text of [the declarant's] statements only after he testified in a manner inconsistent with them, and therefore they were admissible in evidence under the *Patterson* rule as originally conceived."<sup>162</sup> It must be noted, however, that *Patterson* dealt basically with prior consistent, not inconsistent, statements. *Williams*<sup>163</sup> disposed of virtually all its issues, including use of prior statements, by relying on the decisions in *Rogers* and *Stone*.<sup>164</sup>

This trio of decisions indicates that the supreme court's desire to allow prior statements as substantive evidence survived *Samuels*. The basic premise that the safeguards for truth—oath, demeanor observation and cross-examination—are adequately protected when the declarant is available for cross-examination would seem fixed in Indiana law, at least with regard to prior inconsistent statements.

Although the current Indiana position is clearer than in the period immediately following the *Samuels* decision, exactly what types of prior statements are to be substantively admissible is still in doubt. Specifically, two issues remain unresolved: (1) What type of prior *inconsistent* statements will be admissible as substantive evidence?; and (2) under what conditions will prior *consistent* statements be admissible?

As to the first question, a substantial number of jurisdictions follow the Federal Rules of Evidence and require that prior inconsistent statements must be made under oath in a judicial type hearing in order to be admissible as substantive evidence.<sup>165</sup> The reasoning behind this rule is the susceptibility of non-judicial statements to mistransmission, and the possibility that they may have been made under pressure.<sup>166</sup>

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<sup>160</sup>377 N.E.2d 1372 (Ind. 1978).

<sup>161</sup>*Id.* at 1375.

<sup>162</sup>*Id.*

<sup>163</sup>379 N.E.2d 449 (Ind. 1978).

<sup>164</sup>*Id.* at 450.

<sup>165</sup>State v. Spadafore, 220 S.E.2d 655 (W. Va. 1975); ARK. R. EVID. 801(d); ME. R. EVID. 801(d)(1); MINN. R. EVID. 801(d)(1); NEB. REV. STAT. § 6 27-801(4) (a) (1975); N.D. R. EVID. 801(d)(1).

<sup>166</sup>See State v. Spadafore, 220 S.E.2d 655 (W. Va. 1975); MCCORMICK'S HANDBOOK, *supra* note 9, § 251.

It does not appear that Indiana will move in this direction, however. The *Carter* decision specifically stated there was no difference between prior oral and prior written statements for substantive purposes.<sup>167</sup> No subsequent Indiana decision has suggested an oath be required for substantive admissibility.

The second and more unsettled question is when will prior consistent statements properly be available for substantive use. The uncertainty that remains was illustrated by the recent Indiana Court of Appeals memorandum decision of *Boles v. State*.<sup>168</sup> In *Boles*, a witness was called to the stand and asked to identify her two prior statements made to police. The detailed statements were then read into evidence.<sup>169</sup> The witness was then questioned about the incident. These questions evoked answers consistent with, but more general in nature than the prior statements. After discussing *Flewallen*, the court commented that the supreme court in *dicta* had stated that prior statements could not be used as a mere substitute for live testimony. In upholding the substantive use of the statements involved, Judge Lybrook concluded:

Any reconsideration of the *Patterson* doctrine will have to come from the Supreme Court. It suffices here to say that Jordan's pretrial statements were not used as "mere substitutes" for available in-court testimony. The State not only read the statements to the jury but also elicited testimony from Jordan from the stand as to several particulars concerning the incident in question. Although the statements were more comprehensive than Jordan's trial testimony, they were not used as "mere substitutes."<sup>170</sup>

The *Boles* opinion adopted a very limited interpretation of *Samuels'* mere substitution language, leaving any differing interpretation for future supreme court decisions. Under this interpretation, it appears an attorney could get a witness' prepared statement before the jury for substantive purposes by introducing the statement, then questioning the witness generally as to the matters stated therein.

The potential dangers in allowing unbridled use of prior consistent statements have been addressed both by the Advisory Committee to the Federal Rules of Evidence<sup>171</sup> and by Professor McCormick.<sup>172</sup> The Federal Rules of Evidence, McCormick's proposed rule, and the overwhelming number of states which have broken

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<sup>167</sup>361 N.E.2d 1208, 1210 (Ind.), *cert. denied*, 434 U.S. 866 (1977).

<sup>168</sup>No. 1-877-A-187 (Ind. Ct. App. Sept. 7, 1978).

<sup>169</sup>Record at 184-89.

<sup>170</sup>No. 1-877-A-187 at 5.

<sup>171</sup>FED. R. EVID. 801(d).

<sup>172</sup>See MCCORMICK'S HANDBOOK, *supra* note 9, § 251.

with the orthodox view allow substantive use of prior consistent statements only after the witness' credibility has been attacked.<sup>173</sup> This safeguard prevents the abuses and dangers of using prior prepared statements as evidence. But if opposing counsel wishes to open the door to such statements by attacking the witness' credibility, he may be allowed to do so.<sup>174</sup>

One can only surmise what position will emerge in Indiana concerning prior consistent statements. Although, as noted in *Boles*, the changes in the *Patterson* rule must come from the Indiana Supreme Court. The better view would be that in order to prevent wholesale use of prepared testimony, prior consistent statements should be admissible as substantive evidence only when the credibility of the witness has been challenged. The adoption of the rule in Indiana would avoid the over-extension of the *Patterson* rule apparent in *Flewallen* and would provide a firm guideline for the state's legal profession.

## VI. CONCLUSION

The Indiana Supreme Court in *Patterson* did not draw any distinctions between the emerging Indiana position and the positions of commentators and proposed uniform evidence codes. Its decision overruled the established orthodox rule and left in its place an imprecise rule allowing the substantive use of prior statements. This rule was overextended in *Flewallen*, causing a withdrawal from that position in dictum in *Samuels* only five months later. The decision in *Rogers* made clear that the Indiana Supreme Court will continue to allow the use of prior statements as substantive evidence. As to prior inconsistent statements, it seems apparent they will be admissible for substantive purposes regardless of whether they are written or oral, under oath or not. As to prior consistent statements, the issue is still in doubt, but the better rule would allow such statements in evidence only after the credibility of the witness had been challenged.

The law regarding prior statements and their use as substantive evidence in Indiana is clearer now than during the period following the *Samuels* decision. Nevertheless, three years after *Patterson*, there is less clarity about the specific Indiana rule than existed in many states in which the initial departure from the orthodox rule set forth more detailed guidelines for the substantive admission of prior statements.

STEPHEN M. TERRELL

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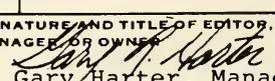
<sup>173</sup>ARIZ. R. EVID. 801; ARK. R. EVID. 801; CAL. EVID. CODE §§ 791 & 1236; FLA. STAT. ANN. § 90-801 (1979 Special Pamphlet); ME. R. EVID. 801; MINN. R. EVID. 801; NEB. REV. STAT. § 27-801; NEV. REV. STAT. § 51.035 (1973); N.M. STAT. ANN. § 20-4-801 (1970); N.D. R. EVID. 801; UTAH R. EVID. 63(1); WIS. STAT. ANN. § 908.01.

<sup>174</sup>See PROPOSED FED. R. EVID. 801, Advisory Committee's Note; MCCORMICK'S HANDBOOK, *supra* note 9, § 251.

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