The Forgetful Witness

David Greenwald†

If witnesses always told the truth and never forgot what they once knew, trials would be simpler affairs. But witnesses do, on occasion, lie, and they often forget. The technique of impeachment and the hearsay rule¹ combat these weaknesses of testimony, the first permitting exposure of falsehood or faulty memory, the second barring introduction of evidence that may be based on them. Both reflect the strong reliance the adversary system places upon cross-examination.² Impeachment is generally accomplished through cross-examination, and the policy of the hearsay rule would be much less persuasive if cross-examination’s ability to distinguish accurate from inaccurate testimony were doubted.³ But while cross-examination may indeed be a powerful device, it presupposes a witness who offers testimony that can be crossed. Perhaps the greatest challenge to the cross-examiner is not the witness who purports to know what he has never known or has forgotten, but rather the witness who purports to forget what in fact he knows.

When a witness says he forgets, prior statements made or adopted by him when he made no such claim offer a backup. The examiner may seek to refresh the witness’s recollection with such prior statements, and if the witness finds them useful at jogging his

† B.A. 1990, Harvard University; J.D. candidate 1993, University of Chicago.

¹ Hearsay, as defined in the Federal Rules of Evidence (“FRE”), is a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FRE 801(c). Hearsay is generally inadmissible. See FRE 802.

² See John Henry Wigmore, 5 A Treatise on the Anglo-American System of Evidence § 1367 at 32 (Little, Brown, Chadbourne, rev ed 1974) (cross-examination is a “vital feature” of the adversary system); Notes of Advisory Committee, Introductory Note: The Hearsay Problem, FRE, Art VIII (“The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental.”).

³ One of the reasons offered for exclusion of hearsay is that the person against whom it is offered has generally not had an opportunity to cross-examine the declarant. Indeed, when a statement has been probed at a prior hearing or deposition by the person against whom it is offered and the declarant is unavailable, the statement sheds its hearsay status. See FRE 804(b)(1).
memory, he may use them while testifying. But if the witness asserts, after reviewing them, that his memory remains blank, the statements’ status as hearsay complicates their admission.

The statements may, of course, be admissible under one of the many general hearsay exceptions, codified under Federal Rule of Evidence 803, including the important exception for recorded recollections. Moreover, a witness who testifies to a lack of memory becomes technically “unavailable” under Rule 804, which expands the set of hearsay exceptions under which a prior statement will be admissible. The forgetful witness’s past testimony becomes admissible upon an assertion of memory loss if the party against whom the testimony is now offered had an opportunity and a similar motive to examine the witness when the testimony was originally given. So too, Rule 804 accommodates the party calling a forgetful witness by permitting introduction of the witness’s statements against interest, statements under belief of impending death, and statements of personal or family history. But courts will not admit many statements, such as grand jury testimony, under any of the codified hearsay exceptions, notwithstanding the

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4 For the foundational requirements for using a written statement to refresh recollection, see Thomas A. Mauet, Fundamentals of Trial Techniques 111-13 (Little, Brown, 3d ed 1992). See also FRE 612 (permitting use of writing to refresh recollection before or during testimonial appearance).

5 An important qualification is that the witness may not be an opposing party. Statements of opposing parties (and authorized agents, employees, and co-conspirators) are “admissions” excluded from the definition of hearsay and thus are normally admissible. FRE 801(d)(2).

6 FRE 803(5) (“A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly.”). As it developed at common law, the exception required the record to have been made very soon after perceiving the event in question. See Edward W. Cleary, ed, McCormick on Evidence § 301 at 866 (West, 3d ed 1984). But, under Rule 803(5), the period after which memory may still qualify as “fresh” may extend beyond a few days. See, for example, United States v Patterson, 678 F2d 774, 779 (9th Cir 1982) (memory fresh in witness’s mind ten months after event, although “question admittedly [] a close one”). For purposes of this Comment’s discussion, it is assumed that prior statements will have been determined to be inadmissible as recorded recollections. For a treatment of this important exception, see Jack B. Weinstein and Margaret A. Berger, 4 Weinstein’s Evidence § 803(5)(01) to 803(17) (Matthew Bender, 1987 & Supp 1992).

7 A witness is also “unavailable” within the meaning of FRE 804 if the witness has a privilege not to testify, refuses to testify, is unable to testify because of illness, or is otherwise excusably absent. FRE 804(a).

8 See FRE 804(b)(1).

9 See FRE 804(b)(3).

10 See FRE 804(b)(2).

11 See FRE 804(b)(4).
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witness's inability to remember them. This Comment considers how courts wrestle with these statements from an evidentiary perspective.12

Courts often overrule a hearsay objection or permit impeachment when convinced a witness is only feigning forgetfulness. If the prior statements were sworn, courts admit the statements as substantive evidence under the exception for prior sworn inconsistent statements,13 despite the fact that present forgetfulness is not technically inconsistent with the prior statements. After a discussion of whether a criminal defendant can confront a forgetful witness within the meaning of the Sixth Amendment, this Comment examines the elements of this “feigned forgetfulness” exception to the hearsay rule, and its place under the Federal Rules of Evidence. It then considers the use of prior statements generally to impeach witnesses who claim to forget the substance of their prior remarks.

I. CONFRONTATION

Determining whether to allow prosecutors to introduce prior statements of witnesses who forget the facts memorialized in those statements requires trial judges to satisfy themselves first that admission will not violate the Sixth Amendment’s right of confrontation.14 For many years, whether an accused could adequately confront the declarant of a prior statement who testified at trial to a lack of memory regarding it was a nettlesome question. It is now less so, as the Supreme Court’s 1988 decision in United States v Owens15 has answered the question entirely or almost entirely with a “yes.”

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12 This Comment does not discuss the propriety of holding a forgetful witness in contempt. For examples of such exercises of the contempt power and statements of the applicable law, see Ex parte Hudgings, 249 US 378 (1919); In the Matter of Kitchen, 706 F2d 1266 (2d Cir 1983); In re Weiss, 703 F2d 653 (2d Cir 1983); United States v Appel, 211 F 495 (S D NY 1913) (Learned Hand).

13 “A statement is not hearsay if—(1) . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .” FRE 801(d)(1)(A). The rule is phrased as an exclusion from the definition of hearsay in FRE 801(c), rather than as an exception to FRE 802's general ban on the admission of hearsay. This distinction has no apparent interpretive significance.

14 “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” US Const, Amend VI. The amendment’s protections extend to state proceedings. Pointer v Texas, 380 US 400, 403 (1965).

The Sixth Amendment of the Constitution guarantees criminal defendants the right to "be confronted with the witnesses against" them. Read most narrowly, the clause assures the defendant only a right to see the persons who appear at trial to testify against him. But the clause has never been read so restrictively. "Confront" means something more, or at least something other, than "look at," and the term "witnesses" includes more than "persons who testify in court." 16 The chief abuse the clause seems to target is "trial by affidavit": prosecution based not upon the testimony of live witnesses but rather upon the introduction of transcribed statements of persons not present to vouch for them or to submit to cross-examination about them. 17

But the Confrontation Clause does not operate as a blanket bar against introduction of out-of-court declarations of persons who do not testify. The Supreme Court has "long rejected as unintended and too extreme" this reading which would "abrogate virtually every hearsay exception . . .." 18 If a witness is absent, hearsay that has sufficient "indicia of reliability" 19 or is generally admissible under a "firmly rooted" exception to the hearsay rule 20 may support a conviction. Moreover, if a witness does testify in court, prior statements falling within hearsay exceptions, whether firmly or weakly rooted, are admissible so long as there is an "opportunity" at the time of trial for cross-examination upon them. 21

Thus, when a witness claims a lack of memory about a prior statement, there are at least two ways to analyze a Sixth Amendment challenge to its admission. One can consider the witness to be effectively absent and ask whether the statement has sufficient

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16 "[The Court has assumed] that all hearsay declarants are 'witnesses against' a defendant within the meaning of the Clause . . . ." White v Illinois, 112 S Ct 736, 744 (1992) (Thomas concurring) (emphasis in original). But Wigmore doubted this reading of the "witnesses against" language, understanding it to require only opportunity to cross-examine testifying witnesses. Wigmore, 5 Evidence § 1397 at 155-59 (cited in note 2); White, 112 S Ct at 747 (Thomas concurring).

17 See California v Green, 399 US 149, 156 (1970) ("particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates . . . ."); Mattox v United States, 156 US 237, 242-43 (1895).

18 Ohio v Roberts, 448 US 56, 63 (1980).

19 Id at 65-66; Dutton v Evans, 400 US 74, 89 (1970).

20 Roberts, 448 US at 66. An inquiry into reliability is not necessary for statements admitted under hearsay exceptions with impressive historical pedigrees. See Bourjaily v United States, 483 US 171, 182-84 (1987) (co-conspirator's statement); White, 112 S Ct at 742 n 8 (spontaneous declarations and statements for purposes of medical diagnosis or treatment).

21 See Owens, 484 US at 559; Green, 399 US at 159-60.
"indicia of reliability" to merit admission. Or one can treat the witness as present, as he is, of course, and ask whether adequate "opportunity" for cross-examination exists. One might expect the first approach to yield a ready conclusion where the prior statement is grand jury testimony. Grand jury testimony, though given under oath and subject to the penalty of perjury, is offered ex parte, without any opportunity for cross-examination by the accused. It therefore strikingly resembles the "materials [such as affidavits] . . . historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process . . . ."22 Exclusion would seem appropriate. Nonetheless, even when witnesses are genuinely absent from trial, courts often admit their grand jury testimony when satisfied that it is reliable.23

The more natural approach treats the forgetful witness the way he is: present, physically if not quite mentally. This less metaphysical approach makes the relevant question different but no less difficult: to what extent does a government witness who denies recollection present an accused with an opportunity for cross-examination? At the time the Supreme Court first faced this question, it was clear that a declarant who asserted a privilege against testifying could not be confronted with respect to a prior statement.24 It was also clear that a witness who simply refused to testify, even without relying upon a valid privilege, was similarly unconfrontable; one might as well cross-examine a mannequin.25 In 1970, California v Green26 squarely presented the issue of the for-

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22 White, 112 S Ct at 747 (Thomas concurring).
23 Compare, for example, United States v Gomez-Lemos, 939 F2d 326, 329-32 (6th Cir 1991) (excluding grand jury testimony) and United States v Fiore, 443 F2d 112, 115 (2d Cir 1971) (same) with United States v Guinan, 836 F2d 350, 358 (7th Cir 1988) (admitting grand jury testimony); United States v Marchini, 797 F2d 759, 764-65 (9th Cir 1986) (same); and United States v Garner, 574 F2d 1144, 1144 (4th Cir 1978) (same). See also McKethan v United States, consolidated with Garner v United States, 439 US 936, 938 (1977) (Stewart dissenting from denial of certiorari) ("That the evidence was first given before a grand jury adds little to its reliability.").
25 See Douglas, 380 US at 420 (question whether assertion of privilege valid deemed immaterial to analysis).
getful witness, but five members of the Supreme Court declined to reach it.

A. *California v Green*

*California v Green* involved a government witness whose memory lasted just up until trial and then disappeared. The witness had made statements, clearly inculpating Green as a marijuana supplier, both to an investigator and at a preliminary hearing at which Green's attorney had cross-examined the witness. But at trial, about ten weeks after the alleged sale and two months after the preliminary hearing, the witness's memory of Green's role in the sale had vanished. After an unsuccessful attempt to refresh the witness's recollection with his prior statements, the prosecution introduced both—the statement to the investigator and the preliminary hearing testimony—as substantive evidence under the California Evidence Code's broad hearsay exception for prior inconsistent statements.

Green argued not that the witness's memory loss denied him the opportunity to cross-examine the witness, but, more broadly, that the admission of the prior statements, remembered or not, was itself unconstitutional. California's rule permitting the introduction of prior inconsistent statements for more than impeachment purposes was a reversal of traditional hearsay doctrine, which refused to admit prior statements of a witness generally. In rejecting the traditional rule, the California legislature had expressed its then progressive view that cross-examination upon a statement well after it had been made can neutralize its hearsay dangers, at least when the statement is inconsistent with present testimony.

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27 This is a slight overstatement. The Court was reviewing the California Supreme Court's invalidation of a rule exempting all prior inconsistent statements from hearsay strictures. See id at 150-51. The Supreme Court upheld the validity of the state rule, see id at 153, but held that the narrower issue—of whether the rule could be constitutionally applied to admit a statement now forgotten—was not appropriate for decision since the state court had not passed upon it. See id at 168-69.

28 Justices Marshall and Blackmun took no part in the decision. Justices Harlan and Brennan in respective concurring and dissenting opinions resolved the question and reached opposite results. See id at 188-89 (Harlan concurring) (forgetful witness available for Sixth Amendment purposes); id at 194 (Brennan dissenting) (unavailable).

29 Id at 151-52.

30 Id at 152. The state's codified exception was a recent one, having taken effect in 1967. Id at 150.

31 Id at 150-51, 155.

32 Id at 154-55.

The Supreme Court reached the identical conclusion in the Sixth Amendment context.

The conclusion flowed readily from the Court’s premise that the Confrontation Clause furthers the same triad of goals as the hearsay rule itself: insuring that judgments are based on sworn testimony whose declarants’ demeanors are observable, and which is susceptible to cross-examination. Introduction of the prior statements of a present witness could not frustrate the first two objectives regardless of whether the statements were consistent or inconsistent, sworn or unsworn. The traditional requirement that examiners lay a foundation for the introduction of prior statements by asking the witness to affirm or deny the making of the statement and its truth permitted the trier of fact to examine the demeanor of the witness as he commented upon the prior statement under oath.

The Confrontation Clause’s requirement of cross-examination of testifying witnesses, and “full and effective” cross at that, posed a somewhat greater difficulty. To be sure, the witness’s testimony at the preliminary hearing had been subjected to earlier cross-examination and the Court considered this enough, as even the prior, cross-examined testimony of absent witnesses had been held to withstand Confrontation Clause challenge. This reasoning could not, however, overcome an objection to the introduction of a witness’s uncrossed statements, such as the statement to the investigator. For this, the Court looked to California’s requirement of inconsistency. Present inconsistency could make up for the lack of past cross-examination, as the testifying witness would be forced by the inconsistency, in effect, to cross-examine himself. To affirm the truth of what he presently says in the face of a past contradiction would require the witness to attack his earlier statement as well as he could to preserve his credibility. The witness himself would supply the cross-examination that had not occurred earlier.

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34 See Green, 399 US at 158.
35 “Thus, as far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury . . . .” Id at 158-59.
36 Id at 158.
37 See Mattox, 156 US at 240-44 (approving admission of transcript of trial testimony given by witnesses who had since died).
38 Green, 399 US at 159-61.
39 “The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story . . . .” Id at 159.
The Court's premise—that confrontation serves the same goals as the hearsay rule—was convenient, permitting the Court to use the same arguments to rescue the rule from invalidation that had persuaded the legislature to recognize the hearsay exception in the first place. But these arguments put the Court in a box when it tried to address the next question: whether Green had adequate opportunity to confront the witness who did not contradict, but only forgot, what he said before. Such a witness did not "necessarily assume a position as to the truth value of his prior statement. . . ." To the contrary, he could assume no position at all, making him quite useless to the defense for attacking his prior statement. All the Court felt confident to do was to remand to the state court for a determination of whether the "lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause . . . ."40

Justice Harlan's concurrence attempted to extricate the Court from this bind, but the attempt required him to reject the very premise from which the Court had started. Confrontation was not a right to "full and effective cross-examination" but simply a right to have all available witnesses—witnesses who could be produced—presented at trial.42 Though language equating confrontation with cross-examination riddled previous opinions, Harlan harmonized the early cases and dicta as merely guaranteeing the attendance of witnesses who would testify against criminal defendants as surely as the Compulsory Process Clause assured the attendance of those who would testify in their favor.43 By conceiving the right as a right to have all witnesses who can attend do so, Harlan could explain why the Court had, on the one hand, countenanced the introduction of prior cross-examined testimony when a witness had died,44 as well as unsworn dying declarations,45 but had, on the other hand, excluded prior testimony where circumstances suggested that the disappearance of a witness was due to the government's carelessness.46 Since Harlan viewed confrontation as a mere attendance right, a witness's forgetfulness was immaterial. "The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-

40 Id at 160.
41 Id at 168-69.
42 Id at 182 (Harlan concurring).
43 Id.
44 See Mattox, 156 US at 244.
45 See id at 243-44, construing Mattox, 146 US at 151-52.
46 See Motes v United States, 178 US 458, 471 (1900).
judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. . . . The witness is, in my view, available."47

Opinions more recently preceding Green, however, complicated Harlan's analysis. Pointer v Texas,48 which bound state courts to respect the Confrontation Clause, had stated that "[i]t cannot seriously be doubted at this late date that the right of cross-examination is included in the right of [confrontation]."49 Particularly troublesome was Douglas v Alabama,50 which had disapproved of a prosecutor's attempt to refresh a witness's recollection with hearsay inculpating the defendant when the witness refused, without any valid privilege, to comment upon the alleged crime. In Douglas, the witness was plainly present, and his statement had not even been formally introduced into evidence. But it was the improper inference of truth that the jury might have drawn from hearing the statement without having the statement's utterance or substance established through cross-examination that condemned the Alabama court's procedure.51 For confrontation purposes, Douglas held, presence was not enough if it was only stonewalling.52

B. After Green

Green's remand to the state court to determine whether the witness's memory loss "so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause"53 left lower courts with little guidance for disposing of similar challenges. In the face of this ambiguity, some courts took shelter under Harlan's rationale for admission of hearsay by forgetful witnesses.

47 Green, 399 US at 188 (Harlan concurring).
48 380 US 400 (1965).
49 Id at 404.
51 See id at 419.
52 Justice Harlan reconciled Douglas with the views he expressed in Green by understanding it to require reversal only when the sole convicting evidence is hearsay. "The result in Douglas v. Alabama, to which I also still adhere, can be rationalized under this test since there the inadmissible confession 'constituted the only direct evidence' that petitioner had committed the murder." Green, 399 US at 187 n 20 (Harlan concurring). Harlan would have remanded Green for determination of whether the victim-witness's statement was too unreliable "as a matter of due process" rather than confrontation. Id at 189. See also Green, 399 US at 170 n 19.
53 Id at 168.
In the Second Circuit, for example, *United States v Insana*, a case decided two weeks prior to argument in *Green*, had established that memory loss was irrelevant. And notwithstanding the *Green* majority’s emphasis upon opportunity for “full and effective cross-examination” as the touchstone of confrontation analysis, several lower courts after *Green* found that simple opportunity for cross-examination of testifying witnesses, no matter how full or empty, would suffice for the purposes of the Sixth Amendment. On remand, the California Supreme Court affirmed Green’s conviction on this reasoning. And the Fourth Circuit followed suit a few years later in *United States v Payne*, where the admission of an unsworn statement of a witness who professed not only total lack of recollection at trial but also a partial lack at the time of the making of the statement, did not run afoul of the Confrontation Clause. The *Payne* court conceded that the memory loss at issue was more severe than in *Green*, but found Harlan’s seemingly absolute approach to be preferable because of the difficulty of drawing a line between memory loss so complete as to be unchallengeable and mere lapses which were not. The Third and Sixth Circuits similarly declined to draw any lines in *United States ex rel Thomas v Cuyler* and *United States v Distler* respectively.

Other courts did, if not draw, at least sketch lines. For the Eighth Circuit in *United States v Rogers*, the admission of a prior statement to impeach a witness who later forgot its substance did not run afoul of the Sixth Amendment because the court was satisfied of the minor role the statement had played. Other materials had “amply refuted” the testimony of the witness. Thus the out-of-court statement, considered as impeachment, was not crucial to the government’s case, and any inability on the part of the jury to weigh that statement’s credibility could not have

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*54* 423 F2d 1165, 1168 (2d Cir 1970).
*55* *Green*, 399 US at 159.
*56* *People v Green*, 3 Cal 3d 981, 92 Cal Rptr 494, 479 F2d 998, 1003-04 (1971).
*57* 492 F2d 449, 452-54 (4th Cir 1974).
*58* See id at 453-54. Even Harlan’s position was not quite as absolute as the *Payne* court and others made it out to seem. For though Harlan considered confrontation as the right merely to question available witnesses, his concurrence noted that due process concerns would arise if prior statements of witnesses who did not offer satisfying answers at trial served as the only basis for conviction. See note 52. See also *Bridges v Wixon*, 326 US 135, 153-54 (1945) (censuring convictions based solely upon “unsworn testimony of witnesses”).
*60* 671 F2d 954, 958-59 (6th Cir 1981).
*61* 549 F2d 490 (8th Cir 1976).
*62* Id at 500.
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The Rogers approach, emphasizing the weight the hearsay played in the conviction, enunciated the harmless-error principle in the confrontation context, without stating it as such. The error could be harmless where, as in Rogers, the hearsay provided only cumulative evidence or, presumably, where the hearsay was unusually reliable. Other courts also found forgetful witnesses confrontable if their memory losses were only partial. But the intuition for admission of the witnesses' statements was not so much satisfaction with the opportunity for cross-examination upon them, but rather suspicion that the memory losses were feigned. The courts in Vogel v Percy and United States v Shoupe rejected confrontation challenges where they found the witness's memory loss so "selective as to be incredible."  

C. United States v Owens

No federal appellate court held that a witness's memory loss made him unconfrontable until 1986, when the Ninth Circuit reversed the conviction of a prisoner for beating a corrections officer. The officer, though able to make an identification of the prisoner shortly after the beating, could not do so at trial. His memory of many events before and after the attack was absent as well because of the brain damage he had sustained, although he did recall making the identification while in the hospital. Under the circumstances, the Ninth Circuit considered the admission of the identification statement to violate the Sixth Amendment.  

The Supreme Court reversed. Recalling its earlier uncertainty in California v Green, the Court answered the question it
had left open there. The Court opted for Justice Harlan's reading, and held that the defense's opportunity to cross-examine the amnesic victim was adequate to satisfy confrontational constraints even if the cross-examination proved less satisfying than it might have otherwise. It was still possible to bring out on cross-examination the "witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination) the very fact that he has a bad memory." That the cross-examination might not achieve its objective was not problematic since "successful cross-examination is not the constitutional guarantee." The Court held, as Harlan had urged it to eighteen years earlier, that a witness's memory loss has no Sixth Amendment consequences.

To bolster its conclusion, the Court cited its recent opinion in Delaware v Fensterer. Fensterer presented a Sixth Amendment challenge to the admission of an expert opinion whose basis the expert had forgotten at trial. Here the Court held that the opportunity cross-examination had afforded to impugn the expert's present lack of memory satisfied the Confrontation Clause. For the six-member majority, Owens was indistinguishable. In both cases, the witness testified to the formation of a belief whose basis could not now be recalled. Cross-examination, though perhaps impaired, was not futile since the validity of the belief was open to impeachment by, if nothing else, the "very fact that [the witness] has a bad memory."

One may question the Court's analogy to Fensterer. An expert witness, like the witness in Fensterer, may be impeached by bad memory because it reflects adversely on his acuity and, by implication, his expertise. In contrast, the credibility of the prior statement of a fact witness, like the witness in Owens, would not appear to be affected by evidence that the witness generally has a poor memory unless the prior statement itself was made well after the event in question. The expert's memory loss is "self-impeaching" in a way that the fact witness's memory loss is not.

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74 See id at 559.
75 Id (citation omitted).
76 Id at 560.
78 See id at 21-22.
80 Owens, 484 US at 559.
81 See id at 570 (Brennan dissenting).
Notwithstanding the weakness of the analogy to Fensterer, Owens' answer to Green's question leaves little room for future argument for Sixth Amendment exclusion of prior statements of forgetful witnesses. By its own terms, Owens is the definitive answer to the Green question, and a narrow construction of its holding is probably improper. However, two arguments for exclusion may remain viable after Owens.

The Owens victim-witness did not recall the identity of his assailant at trial, but he did recall making the identification, and this circumstance may permit distinction. The opportunity to cross-examine a witness who recalls at least the making of a statement permits inquiry into the circumstances under which the statement was made. Such a witness may testify to circumstances that cast doubt on its veracity. For example, he may, by being able to recall the making of the statement, recall that he was lying or uncertain when he made it. A witness like the one in Owens, who recalls making an identification from mug shots, may also recall, upon cross-examination, conditions that will permit defense counsel to argue that the procedures used to procure the identification were suggestive. This line of inquiry was open to defense counsel in Owens, and in remarking upon the opportunities for cross-examination and confrontation that still exist when a witness pleads forgetfulness, the Owens Court was careful to note this one. Lines of inquiry like this—exploration of the witness's recollection of special circumstances that might permit a fuller evaluation of a statement's reliability—are of course blocked when not only the content but the making of the statement are forgotten.

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82 See Cowin v Bresler, 741 F2d 410, 425 (DC Cir 1984).
83 See Owens, 484 US at 556. Although declining to find an infringement of the confrontation right, the Seventh Circuit in DiCaro, a pre-Owens decision, found the witness's professed failure to recall not only the subject matter but the making of the prior statement a circumstance that made the case more difficult. 772 F2d at 1327.
85 See Owens, 484 US at 560. It did so, even though Harlan's Green concurrence, which Owens endorsed, had considered memory of the making of the statement to be as immaterial to Sixth Amendment analysis as memory of its substance. See Green, 399 US at 188 (Harlan concurring).
86 The Supreme Court's decision in Nelson v O'Neil, 402 US 622 (1971), does not reject this distinction. In O'Neil, the Court held that a co-defendant's failure to recall (or more accurately, denial of) the making of a statement that the prosecution had introduced to impeach the co-defendant's testimony did not make him unconfrontable. Id at 629-30. However, the O'Neil witness possessed (or at least claimed to possess) the kind of memory the Owens witness did not: memory of the facts underlying his alleged prior statement. The co-defendant in O'Neil vigorously denied that his prior statement inculpating the defendant
A second, post-Owens confrontation argument may still be available where there is reason to believe the forgetfulness is feigned. This may seem counterintuitive. Feigned forgetfulness suggests tampering by the defense, and, to be sure, a defendant who obstructs justice in this way forfeits the Sixth Amendment's protections. But feigned forgetfulness may be due to other causes, none of which are attributable to the defendant whose confrontation right is at stake. Even in the absence of defense intimidation, the witness may fear recrimination for unfavorable testimony. Or the witness may have lied at a grand jury proceeding, and, now regretful, may wish to minimize the impact of the lie without laying the solid foundation for a perjury conviction that inconsistent trial and grand jury testimony provide.

More significantly, it may be the prosecution that has induced the witness to assert forgetfulness. A prosecutor may have a witness who has made a helpful prior statement but whom he wishes to shield from meaningful cross-examination. Under the circumstances, the prosecutor might direct the witness to feign forgetfulness and hope that the judge will permit him to place the prior statement before the trier of fact under the guise of impeachment of the seemingly hostile witness. The old "voucher" rule, which barred parties from impeaching their own witnesses, was an attempt to bar ruses like this. But the modern Federal Rules permit impeachment on direct examination, so the danger of a prosecutor procuring forgetfulness as a means of placing hearsay before a jury exists. It is, of course, difficult to know whether this kind of prosecutorial misbehavior occurs to any significant extent. But since it is very close to the sort of prosecutorial misconduct the Confrontation Clause seems intended to prevent—trial by ex parte affidavit—an argument for beefing up the Clause's requirement of

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was true. Id at 624. Thus there was clearly opportunity for meaningful cross-examination of the declarant in O'Neil in a way there is not when the witness has memory of neither a statement's subject matter nor its utterance.

87 Where the statement is not one of identification, this is the only circumstance under which the statement is substantively admissible. See Section II.B.


89 As Judge Friendly observed in Taylor v Baltimore & Ohio Railroad Co., 344 F2d 281, 284 (2d Cir 1965), "mere failure of a witness to repeat a prior statement helpful to the proponent gives an exceedingly slight basis for drawing the inference [of witness intimidation]."

90 See text accompanying notes 137-139.

91 See FRE 607.
opportunity for cross-examination when the forgetfulness seems feigned may be viable even after Owens.

To draw a distinction between Owens and cases where the forgetfulness seems feigned might also help to square Owens with the Court's 1965 decision in Douglas v Alabama, a case Owens did not purport to overrule. In Douglas, the Court censured questioning of a defiantly silent witness about his recollection of a past statement where the prosecutor's objective seemed to be to sneak hearsay into the record. Douglas broadly held that present yet unresponsive witnesses are unconfrontable. Owens, whose opinion does not mention the case, necessarily narrows the Douglas holding; one way to understand what remains of Douglas is that it only applies to cases with a specter of prosecutorial misconduct. In Douglas, the Court detected misconduct in the prosecutor's questioning of a witness about a statement long after it became apparent that the witness would not respond. Where a government witness unconvincingly forgets and the prosecutor attempts to introduce a prior statement under Rule 801(d)(1)(A) or impeach with it under Rule 607, an inference of prosecutorial misconduct, though weaker, may still be tenable and may permit a distinction from Owens, in which the genuineness of the witness's memory loss seems to have been assumed.

II. SUBSTANTIVE ADMISSION

While the Confrontation Clause may not exclude witness statements whose basis or utterance has been forgotten, an additional question, present in both civil and criminal contexts, remains: whether the rules of evidence admit them. Prior statements of witnesses, when offered to prove what they assert, fall squarely within the definition of hearsay. As a result, traditional principles of evidence generally excluded them, or at least severely limited their use. Unless the statement came within an established hearsay exception, prior statements were admissible only as impeachment

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92 And of course where there are no special indicators of procurement by the defense.
94 Id at 419-20.
95 Justice Harlan proposed this means of understanding Douglas. "An additional factor would move me to stand by Douglas. It was a case of prosecutorial misconduct. By placing the witness on the stand and reading in the confession, the prosecutor, in effect, increased the reliability of the confession in the jury's eyes in view of the witness' apparent acquiescence as opposed to repudiation." Green, 399 US at 187 n 20 (Harlan concurring).
96 See note 1.
material—evidence offered only to cast doubt upon the truthfulness of a witness’s testimony.97

The sense of this strict view came from consideration of the three concerns underlying the hearsay rule: its preference for evidence that is given under oath by a person who is subject to cross-examination and whose demeanor may be observed by the trier of fact.98 The admission of prior statements does not square well with this preference. The trier of fact can observe only the present demeanor of a witness as he utters his present testimony; his demeanor at the time he made a prior statement is unobservable. And though some prior statements, such as those made at a deposition hearing, are given under oath and subject to cross-examination when made, past cross-examination concerning a prior statement is, all other things being equal, an inferior substitute for contemporaneous cross-examination: the present factfinder cannot observe the demeanor of a declarant as he makes a statement if he made it at a different proceeding.99

These arguments, though logical, were only weakly persuasive to many who gave them much thought.100 Wigmore criticized the blanket bar because of what he considered to be its inordinate emphasis upon contemporaneous cross-examination. Although hearsay by a declarant not available to testify cannot of course be probed, a witness’s prior statement has been made by a declarant who is present and who can now comment upon it. “[T]he theory of the hearsay rule is that an extrajudicial statement is rejected because it was made out of court by an absent person not subject

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97 See Weinstein and Berger, 4 Weinstein’s Evidence § 801(d)(1)(a) at 801-128 to -129 (cited in note 6).
98 Notes of Advisory Committee, Introductory Note: The Hearsay Problem, FRE, Art VIII.
99 Testimony may also “harden” if cross-examination is postponed. See State v Saporen, 205 Minn 358, 285 NW 898, 901 (1939):
   The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. 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.
   See also Ruhala v Roby, 379 Mich 102, 150 NW2d 146, 156-58 (1967) (lamenting “windmill-fighting nature of stale cross-examination” upon prior statements).
100 See, for example, Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv L Rev 177, 193 (1948) (“Why does falsehood harden any more quickly or unyieldingly than truth? . . . Isn’t the opportunity for reconsideration and for benevolent influence by others even more likely to color the later testimony than the prior statement?”).
to cross-examination[ ]. Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement.\textsuperscript{101}

To the complaint that the demeanor of the declarant as he makes the statement is invisible to the trier of fact, Learned Hand, himself a former district court judge, thought he had an answer. “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 [is the truth], they are none the less deciding from what they see and hear of that person and in court.”\textsuperscript{102} The demeanor of the witness under oath, as he tries to explain or deny a prior statement, could reveal as much as viewing the witness when he originally made the statement.

Critics of the traditional rule also advanced affirmative arguments for admission of prior statements. McCormick thought their admission as substantive evidence not only did not offend the hearsay rule, but in fact advanced its overarching objective—securing reliable evidence.

[P]rior statements are not merely of equal reliability . . . but are superior in trustworthiness. This is the obvious truth, which the voluble readiness of witnesses tends to obscure, that memory hinges upon recency. The prior statement is always nearer and usually very much nearer to the event than is the testimony. The fresher the memory, the fuller and more accurate it is.\textsuperscript{103}

Those who wished to revise the traditional rule also questioned its effectiveness in the many cases in which a hearsay statement’s inconsistency with present testimony made it already admissible as impeachment evidence. True, a limiting instruction would accompany any impeaching use of the statement. But doubt as to the effectiveness and/or intelligibility of the instruction made even those who accepted the logic of the rule’s traditional arguments skeptical of the rule’s effectiveness.\textsuperscript{104} A final argument for the admission of prior statements is the ammunition such state-

\textsuperscript{101} Wigmore, 3A Evidence § 1018 at 996 (cited in note 2).
\textsuperscript{102} Di Carlo v United States, 6 F2d 364, 368 (2d Cir 1929).
\textsuperscript{104} See Weinstein and Berger, 4 Weinstein’s Evidence § 801(d)(1)(A)[01] at 801-134 & nn 1, 2 (cited in note 6).
ments offered against the "turncoat" or "flipped" witness—the witness who changes his story once he takes the stand.105

These criticisms and arguments were persuasive to the drafters of the Federal Rules of Evidence. Their original draft followed the example of Model Code of Evidence Rule 503 and Uniform Rule of Evidence Rule 63 in excluding a witness's prior statements from the very definition of hearsay,106 provided the witness is subject to cross-examination "concerning" them at trial. But the revised draft sent to Congress cut back on the breadth of this formulation, instead specifying in Rule 801(d)(1) only three situations in which a prior statement by a non-party witness107 "testifying at the trial or hearing and subject to cross-examination concerning the statement" would be admissible. The statement would be admissible if it were a "statement of identification,"108 the type at issue in Owens, a statement consistent with present testimony used to rehabilitate an impeached witness109 or, most important for this discussion, a statement "inconsistent with the declarant's testimony."110

Congress also added to the "inconsistent statement" exception111 the requirement that the statement have been made under oath and subject to the penalty of perjury.112 This amendment excluded run-of-the-mill inconsistent statements, but permitted the use of grand jury and deposition testimony against turncoat witnesses. Since these latter materials are stenographically transcribed, there is at least assurance that the statement offered has in fact been made, even if the guarantees of truthfulness the oath and perjury penalty provide are dubious.

The inconsistent statement provision is the primary field on which battles over prior statements of forgetful witnesses occur.

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106 See Weinstein and Berger, 4 Weinstein's Evidence § 801(d)(1)(01) at 801-131 to -132 (cited in note 6).
107 That is, a non-party who also is not involved in a conspirator, agent, or employee relationship with a party. See FRE 801(d)(2).
108 FRE 801(d)(1)(C).
109 FRE 801(d)(1)(B).
110 FRE 801(d)(1)(A).
111 This Comment refers to Rule 801(d)(1)(A) as an exception to the hearsay rule (FRE 802), even though it is technically an exclusion from the hearsay definition (FRE 801(c)). The distinction is immaterial. See note 13.
112 See FRE 801(d)(1)(A). The revision placed the exclusion in its current form: "A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. . . ." Id.
Two questions arise when a party seeks to introduce the prior
grand jury or deposition testimony of a witness who responds “I
don’t remember” to a question he once had the ability to answer:
first, whether the forgetful witness is “subject to cross-examina-
tion,” a condition of admission for all three types of prior state-
ments 801(d)(1) refers to; and second, whether the witness’s lack of
memory is inconsistent with his earlier testimony, as the
801(d)(1)(A) exception alone requires.

A. Subject to Cross-Examination Concerning the Statement

Rule 801(d)(1)’s requirement that the declarant of a statement
be present and “subject to cross-examination concerning the state-
ment” is rooted in the theory that present cross-examination about
a statement can be an adequate substitute for the cross-examina-
tion that failed to occur when the statement was made. Nevertheless, applying it to the case in which a witness is present to
testify but has forgotten either the basis for his statement or the
making of the statement puzzled even the Advisory Committee,
which questioned whether the requirement was satisfied when the
witness testified to a lack of memory. The question the Commit-
tee raised in the statutory context was similar, if not identical, to
the one Green posed in the constitutional context. And like the
question posed by Green, this one too Owens substantially
resolved.

Owens held that “subject to cross-examination concerning the
statement” simply expresses the requirement that a witness be
“placed on the stand, under oath, and respond[] willingly to ques-
tions.” Although the Court conceded that assertions of privilege
or restrictions on questioning might make a testifying witness not
subject to cross-examination, the scope of the statutory language
seemed to the Court to reach no further than the Sixth Amend-
ment’s. Like the Confrontation Clause, the rule assured only an
opportunity for cross-examination; it did not require the witness to

113 See Notes of Advisory Committee, FRE 801(d)(1).
114 See Notes of Advisory Committee, FRE 803(5). In explaining why it did not treat
recorded recollection as a definitional exclusion and place it in Rule 801(d)(1), the Commit-
tee explained: “That category [Rule 801(d)(1) hearsay exclusions] [ ] requires that declarant
be ‘subject to cross-examination,’ as to which the impaired memory aspect of the [recorded
recollection] exception raises doubts.” Id.
115 Owens, 484 US at 561.
116 See id at 561-62.
be subject to cross-examination as fully as the opponent might wish.\footnote{Id.}

The chief argument the Court offered for this narrow reading of Rule 801(d)(1) was a comparison of the rule's language with that of Rule 804(a)(3).\footnote{Id at 562-64.} Rule 804 contains an assortment of hearsay exceptions that apply when the witness “testifies to a lack of memory of the subject matter of [his] statement”\footnote{FRE 804(a)(3) (emphasis added).} or is otherwise “unavailable.” The precision of this language contrasts with the vagueness of 801(d)(1)’s “concerning the statement” phrase, and the Court believed had the drafters of 801(d)(1) wished to give the “subject to cross-examination” requirement some teeth, they could have specified that the witness be subject to cross-examination concerning the subject matter of the statement.\footnote{Owens, 484 US at 562.} This phrasing would have more clearly expressed an intent to exclude statements describing underlying events the witness has now forgotten, and, as 804(a)(3) demonstrated, was well within the drafters’ vocabulary.\footnote{See id.}

The Court’s comparison with 804(a)(3) has force, but perhaps not enough to support the argument which the Court was trying to make. To be sure, it would be odd to read 801(d)(1) to require perfect memory of the subject matter of the witness’s testimony. It would be odd not just because of the contrasting language of 804(a)(3), but also because one of the reasons for admitting prior statements and identifications (as in Owens) is the superior quality of memory at the time such statements are made. But to say that 801(d)(1) does not require perfect memory is not to say that it requires none at all, as the Owens Court did.

And by giving the “subject to cross-examination” language of 801(d)(1) the limited scope it did, the Court brought the language close to being surplusage. Rule 801(d)(1) already requires the declarant to be “testif[y]ng] at trial” and most testifying witnesses will also be “subject to cross-examination” in the narrow Owens sense by virtue of their testimonial appearance.\footnote{Owens does state the additional requirement that the witness “respond willingly” to questions on cross-examination, so if the witness in-}

\footnote{Of course, if the statement is an oral one, recounted through a later witness, it may be necessary to recall the declarant to satisfy the rule.}
The Forgetful Witness

vokes a privilege or refuses to answer outright on cross-examination, he is not "subject to cross-examination" within the meaning of 801(d)(1). But introduction of a prior inconsistent statement under 801(d)(1)(A) is already subject to Rule 613(b)'s requirement that an opponent be "afforded the opportunity to interrogate the witness thereon."124 "Subject to cross-examination concerning the statement" adds little to this under the interpretation adopted in Owens.

Perhaps a more satisfying reading of the phrase "subject to cross-examination concerning the statement" in the context of Rule 801(d)(1)(A)—and one that could be reconciled with Owens—would insist that the witness have a memory of making the statement though not necessarily its basis. This reading assures that the cross-examiner will at least be able to elicit testimony about the circumstances under which the statement was made.125 It also fits well with the language and structure of the Federal Rules. The reading avoids the problem of redundancy with the opportunity requirement of Rule 613126 and gives the phrase "concerning the statement" some flesh. At the same time, it accounts for the difference in wording between 804(a)(3) and 801(d)(1), the first requiring lack of memory as to "the subject matter" of a state-

124 FRE 613(b): "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." The only clear difference between Rule 613(b) and Owens' reading of Rule 801(d)(1) is that the protections of Rule 613(b), unlike the "subject to cross-examination" requirement of 801(d)(1), may be dispensed with where the interests of justice or the impracticalities of recalling a witness so require. However, where the extrinsic evidence is introduced not only to impeach but as substantive evidence under Rule 801(d)(1), the case against exercising such discretion will be very strong. "The need for a full explanation is particularly great under the federal rules in those instances where the inconsistent statement may be given substantive effect. . . . Prior inconsistent statements that determine whether the case can reach the jury or that relate to crucial testimony should almost never be admitted if foundational requirements can be, but have not been, met." Weinstein and Berger, 3 Weinstein's Evidence § 613[04] at 613-28 to -29 (cited in note 6).

125 The fact that a forgetful witness remembered making a particular statement contributed to the holding that the witness was subject to cross-examination in United States v Bigham, 812 F2d 943, 946 (5th Cir 1987). And in United States v DiCaro, the court recognized "that in many or perhaps most cases in which the witness suffers a total memory lapse concerning both the prior statement and its contents, the witness cannot be considered subject to cross-examination concerning the statement under the Rule." 772 F2d at 1323 (holding nonetheless that the witness, who claimed a total memory lapse, was subject to cross-examination).

126 For an example of this redundancy after Owens, see United States v Bonnett, 877 F2d 1450, 1462 (10th Cir 1989) (both 801(d)(1) and 613(b) require giving witness opportunity to deny or explain inconsistency).
ment, the second only speaking of cross-examination "concerning" one. *Owens*’ holding may be amenable to this narrow construction, as the victim-witness there did recall making the identification.\(^{127}\)

**B. Inconsistency**

*Owens* concerned statements of identification, admitted under Rule 801(d)(1)(C), for which lack of clear recollection at trial is expected. The exception for prior grand jury or deposition testimony, where forgetfulness at trial may seem more suspect, appears in Rule 801(d)(1)(A). Here the rule requires not only that the witness be "subject to cross-examination concerning" the testimony, but also that the testimony be "inconsistent" with that offered at the present trial.

The law of evidence, even as it excluded prior witness statements as substantive evidence, traditionally permitted the limited use of prior inconsistent statements to impeach.\(^{128}\) The test of inconsistency for impeachment has been fairly loose. To be inconsistent, a statement does not have to be directly contradictory. Inconsistency by implication or omission satisfies the test.\(^{129}\) But it is hard to argue that the statement "I don't remember" is even impliedly inconsistent with past knowledge.\(^{130}\) Present failure of recollection does not in any way contradict the existence of knowledge formerly held.

Out of frustration and a suspicion of witness-tampering more than anything else, judges often hold that prior statements forgotten by witnesses are inconsistent enough to impeach their lack of memory when they disbelieve the witnesses’ assertions of memory lapse.\(^{131}\) The same occurs with prior statements introduced as substantive evidence, even in the face of a statutory inconsistency re-

\(^{127}\) 484 US at 556.

\(^{128}\) See Notes of Advisory Committee, FRE 801(d)(1)(A).

\(^{129}\) "It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it is sought to contradict." *United States v Barrett*, 539 F2d 244, 254 (1st Cir 1976).

\(^{130}\) One must of course distinguish those situations in which speakers carefully say "I don't recall that" or "I don't remember that happening" to simply mean "no." See, for example, *United States v Williams*, 737 F2d 594, 607 (7th Cir 1984) (witness qualified answer "to the best of [my] memory").

\(^{131}\) See, for example, *United States v Rogers*, 549 F2d 490, 496 (8th Cir 1976) and text accompanying note 88.
quirement. Judges often admit the grand jury testimony of witnesses who deny remembering its substance at trial, relying upon Rule 801(d)(1)(A), and appellate courts have upheld the admissions. As in the impeachment context, a broad notion of "inconsistency" informs decisions construing 801(d)(1)(A). Inconsistency "may be found in evasive answers, . . . [or] silence," and "a purported change in memory can produce 'inconsistent' answers." As Judge Friendly stated in United States v Marchand, "if a witness has testified to [certain] facts before a grand jury and forgets . . . them at trial, his grand jury testimony . . . falls squarely within Rule 801(d)(1)(A)." Most courts have agreed, at least to the extent that the memory loss appears to be feigned.

See, for example, Williams, 737 F2d at 608 ("[W]e do not read the word 'inconsistent' in Rule 801(d)(1)(A) to include only statements diametrically opposed or logically incompatible"). If it is a defendant who seeks to introduce the transcript of a forgetful witness's grand jury testimony, it may be admitted as the "former testimony" of an "unavailable" witness, without regard to inconsistency. See FRE 804(b)(1). See also United States v Salerno, 112 S Ct 2503, 2508-09 (1992) (construing exception). The lack of memory renders the witness unavailable, FRE 804(a)(3), and if the court is satisfied that the prosecution's motive to test the accuracy of the witness's grand jury statement was "similar" to the motive it had at trial, the statement is admissible. FRE 801(b)(1). See, for example, United States v Miller, 904 F2d 65, 68 (DC Cir 1990) (citing cases). The court may not be so satisfied, however, if the issue the statement concerns has assumed a much greater significance at trial than it did before the grand jury. See Salerno, 112 S Ct at 2512 (Stevens dissenting). In this case, a defendant facing a forgetful witness must turn, just as the prosecution must, to Rule 801(d)(1)(A). United States v Dennis, 625 F2d 782, 795 (8th Cir 1980). Williams, 737 F2d at 608. 564 F2d 983 (2d Cir 1977). Id at 999.

See United States v Distler, 671 F2d 954, 958 (6th Cir 1981) (one and one-half years between grand jury proceedings and trial; not improper to admit forgotten grand jury testimony under 801(d)(1)(A)); United States v Whitaker, 619 F2d 1142, 1149 n 12 (6th Cir 1980). For state cases, see Annotation, Denial of Recollection as Inconsistent with Prior Statement so as to Render Statement Admissible, 99 ALR3d 934 (1980 & Supp 1992).

See Bigham, 812 F2d at 946-47 ("selective memory loss [ ] more convenient than actual"); DiCaro, 772 F2d at 1322 (suspicion of feigned forgetfulness made witness's grand jury testimony inconsistent); United States v Thompson, 708 F2d 1294, 1301-02 (8th Cir 1983) (no abuse of discretion in admission of prior testimony since forgetful witness "recalcitrant"); United States v Collins, 478 F2d 837, 838-39 (5th Cir 1973) (pre-federal rules; unbelievable lack of memory permitted admission of prior trial testimony; admissible today under FRE 804(b)(1)).

See also People v Green, 3 Cal 3d 981, 92 Cal Rptr 494, 479 P2d 998 (1971) (state counterpart to Rule 801(d)(1)). The Green court characterized a memory lapse as an "implied denial" of prior testimony, and hence impliedly "inconsistent." Id at 1002. This concept of an "implied denial" is misleading though. If triers of fact draw any inference at all from an assertion of memory loss, it is probably that the witness wishes to hide a matter that he is inclined to affirm rather than deny. Accordingly, the denial of recollection is more like an "implied affirmation" or "adoption" of the prior testimony. See Michael H. Graham,
The reason for this interpretation of the inconsistency language is clear enough: judges have little patience with the turncoat witness, and appellate courts wish to afford trial judges broad discretion to frustrate his efforts. But however understandable this impatience is, substantive admission of the backup statements does seem to compromise the values the hearsay rule advances. The purpose of substantive evidence is to assist proof. Evidence helps to prove only when it is reliable, and the requirement of inconsistency should be understood as a means of easing the concerns generally attending the admission of hearsay. Rule 801(d)(1)(A) does not insist upon inconsistency because it points to untruthfulness; the inconsistency requirement serves a different purpose. As the Advisory Committee observed, "the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand ...." Thus the requirement of inconsistency appears in Rule 801(d)(1)(A) because it helps to insure that the conflict between current and former accounts will smoke out the falsehood inherent in at least one of them.

Lack of memory makes it impossible to achieve the "thorough exploration" the drafters of the Federal Rules contemplated. Instead of trying to explain away the inconsistency presented by a prior statement, the forgetful witness must let the statement stand. If he remembers making the statement and forgets only its basis, he can try to offer reasons why his recollection might not have been accurate then. But the underlying fact the statement is being offered to prove stands alone, facing no challenge from a competing, non-hearsay account. The dialectic sought by the inconsistency requirement does not arise; the trier of fact is left with only a single piece of hearsay to mull over, one that has only an oath to give it any stamp of reliability.

The courts are undoubtedly correct that the turncoat witness is a target of Rule 801(d)(1)(A). But the "inconsistency" language of Rule 801(d)(1)(A) suggests that the drafters had in mind a particular type of turncoat: one who changes his story, rather than falsely forgets it. Both turncoats obstruct the truthfinding process;

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The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness, 56 Tex L Rev 151, 162 (1978). The "implied adoption" characterization however would be too powerful. It would direct admission of all prior statements disingenuously forgotten regardless of the conditions under which they were made, since adopted statements of any kind, sworn or unsworn, pose "no hearsay problem." Notes of Advisory Committee, FRE 801(d)(1).

140 Notes of Advisory Committee, FRE 801(d)(1)(A).
both are equally guilty of perjury. But the turncoat who only clams up does less damage than the one who offers contradictory testi-
mony,\textsuperscript{141} and only the latter will offer the trier of fact an opportunity to “observe [the witness’s] demeanor . . . as he denies or tries to explain away the inconsistency.”\textsuperscript{142} In light of this policy, the judicial willingness to stretch the meaning of “inconsistency” should be, if not puzzling, a bit unsettling nonetheless.

III. IMPEACHMENT

Introduction of prior inconsistent statements, sworn or un-
sworn, has traditionally been held proper if used for the limited purpose of impeachment.\textsuperscript{143} Despite repeated doubt as to the effec-

\textsuperscript{141} Indeed, he may do no damage at all. See Graham, 56 Tex L Rev at 172-73 (cited in note 139).

\textsuperscript{142} Notes of Advisory Committee, FRE 801(d)(1)(A), quoting the California Law Revision Commission’s comment on a similar state provision. But see the House Judiciary Committee’s Report on Rule 804(a)(3), which defines a witness as “unavailable” if he testifies to a lack of memory. “Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant’s testimony as to his lack of memory.” HR Rep No 93-650, 93d Cong, 2d Sess 13 (1973), reprinted in 1974 USCCAN 7075, 7088 and following Notes of Advisory Committee, FRE 804, citing United States v Insana, 423 F2d 1165, 1169-70 (2d Cir 1970). The placement of the House Committee’s comment in 804(a)(3) is odd, since the comment appears to operate as a gloss upon 801(d)(1)(A).

\textsuperscript{143} See Notes of Advisory Committee, FRE 801(d)(1)(A). The impeacher must lay a foundation for the impeachment by asking the witness if he remembers making the statement and remembers it contradicting his present testimony. If he does recall, the impeachment is complete, and many courts hold that the impeachment need not and, indeed, cannot be “proven up” with extrinsic evidence. See, for example, United States v Soundingsides, 820 F2d 1232, 1240-41 (10th Cir 1987); United States v Cline, 570 F2d 731, 735 (8th Cir 1978). See also Cleary, ed, McCormick on Evidence § 37 at 79 (cited in note 6). But some courts admit even admittedly inconsistent statements, reasoning that parties should be allowed to highlight the inconsistency. See United States v Lashmett, 965 F2d 179, 182 (7th Cir 1992); Williams v United States, 403 F2d 176, 179 (DC Cir 1968); United States v Browne, 313 F2d 197, 199 (2d Cir 1963). See also Wigmore, 3A Evidence § 1037 at 1044-46 (1970) (cited in note 2).

If the witness denies making the statement, the impeachment is incomplete, and extrin-
sic evidence of the statement must be introduced to complete it. If the witness cannot recall making the statement, the impeachment is also incomplete and must be proven up with extrinsic evidence. This latter point is sensible and well-established, see id § 1037 at 1042-43, but apparently not so well known. The issue is still frequently litigated. See, for example, Walker v State, 581 S2d 570, 571 (Ala Crim App 1991); State v Stanfield, 562 S2d 969, 974 (La App 1990). And the Fifth Circuit seems to follow the opposite rule for no apparent reason, other than what may be confusion as to what must be “inconsistent” to satisfy the requirements of impeachment. See United States v Devine, 934 F2d 1325, 1344-45 (5th Cir 1991) (extrinsic evidence of inconsistent statement only admissible if witness denies having made it; forgetting is not equivalent to denial); United States v Ballewiero, 708 F2d 934, 939-40 (5th Cir 1983) (Since witness did not recall making statement inconsistent with trial testimony, “there is clearly no rationale for the introduction of a prior ‘inconsistent’ state-
tiveness of jury instructions limiting consideration of out-of-court statements to the issue of credibility, courts have been confident of their ability to regulate the impeachment process to prevent it from becoming a subterfuge for placing otherwise inadmissible hearsay before a jury. The chief regulation of impeachment that courts have laid down has been the obvious one—that the impeaching material must be inconsistent with testimony. This rule is nothing more than the familiar rule of relevance—that evidence must be probative upon the issue on which it is offered. Statements that are not at least indirectly inconsistent do not make it less likely the witness is telling the truth.

When a witness says he forgets, the basic rule holds that present lack of recollection is not inconsistent with past knowledge. As the Ninth Circuit stated in *Kuhn v United States*, “where the witness gives no testimony injurious to the party calling him, but only fails to render the assistance which was expected by professing to be without knowledge on the subject, there is no reason or basis for impeachment . . . .” But, as is the case for Rule 801(d)(1)(A)’s statutory requirement of inconsistency, an exception exists in the impeachment context when the witness’s disavowal of memory seems incredible. Thus, an unbelievable assertion of memory loss dilates the already broad definition of inconsistency. Again, experience rather than logic offers the reason. “[T]he astute

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144 “Where a witness merely states that he does not remember, he cannot be impeached by the showing of former statements with respect to the facts which he claims not to remember . . . .” 98 CJS, Witnesses § 583 at 559 (West, 1957), quoted in Weinstein and Berger, 3 Weinstein’s Evidence § 607[06] at 607-102 n 38 (cited in note 6). See also *New Mexico Savings & Loan Ass’n v United States Fidelity and Guaranty Co.*, 454 F2d 328, 336 (10th Cir 1972); *Taylor v Baltimore & Ohio Railroad Co.*, 344 F2d 281, 284 (2d Cir 1965); *Westinghouse Electric Corp. v Wray Equipment Corp.*, 286 F2d 491, 493 (1st Cir 1961). Compare *United States v Hankish*, 502 F2d 71, 78 (4th Cir 1974) (trial judge has discretion whether to allow use of prior statements during cross-examination of forgetful witnesses).


146 *Rogers*, 549 F2d at 496 (“claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent”); *Insana*, 423 F2d at 1170. See also *United States v Shoupe*, 548 F2d 636, 643 (6th Cir 1977) (impeachment of witness with memory “so selective as to be incredible” proper, but extensive use of prior statement violated defendant’s right to fair trial); *Thompson*, 708 F2d at 1299-1301 & n 2 (“claimed inability to recall [inconsistent] when disbelieved”); but statements admitted substantively because witness effectively adopted them).
liar is sometimes impregnable unless his flank can be exposed to an attack of this sort."\textsuperscript{147}

Apart from inconsistency, impeachment by prior statement has been subject to the test of collateralness, formulated succinctly by Wigmore: "Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independently of the self-contradiction?"\textsuperscript{148} Contradiction cannot be engaged in for its own sake; the contradiction must go to a material, non-collateral matter. This requirement survives even under the codified Federal Rules as it is nothing more than a specific application of the relevance principle expressed in Rule 401: that evidence must be probative on a material issue to be admissible.\textsuperscript{149} To say that a witness has made a false "collateral" assertion is simply to say that a contradictory statement will be immaterial. The only purpose for which impeaching hearsay is admissible is to demonstrate that the witness has lied about a non-collateral matter. When the lie goes to a collateral matter, there is no reason for its exposure.

To apply this principle rigorously to impeachment of a witness who has not changed his story but has only forgotten it is difficult. The witness has testified only to a lack of memory, but state of memory is not a material issue. Courts have seemed to solve this problem by adopting what has been called an "implied denial" theory.\textsuperscript{150} Adopting the "implied denial" theory (on which the state court in \textit{Green}\textsuperscript{151} relied to justify substantive admission of prior statements) means positing that the witness's answer stands for the precise opposite of the proposition asserted in the prior statement. This conception of impeachment should readily permit introduction of the entirety of a prior statement, since the whole statement perfectly cancels the "denial" implicit in the witness's assertion of memory loss. The fiction usefully disposes of concerns about collateralness. For if a witness, by saying "I don't remember X," is understood to say "Not X," the implied assertion "Not X" hurts the impeaching party's case so long as X is a material, non-collateral issue.

\textsuperscript{147} Wigmore, 3A \textit{Evidence} § 1043 at 1061 (cited in note 2).
\textsuperscript{148} Id § 1020 at 1010 (distilling holding of \textit{Attorney General v Hitchcock}, 1 Exch 91, 99 (1847)). See also Weinstein and Berger, 3 \textit{Weinstein's Evidence} § 607\[06\] at 607-106 & n 54 (cited in note 6).
\textsuperscript{149} See FRE 401; FRE 402.
\textsuperscript{150} See Graham, 56 Tex L Rev at 172 n 102 (cited in note 139).
\textsuperscript{151} See 479 P2d at 1002. See also note 139.
The implied denial is, of course, a sleight of hand at best. “Constructive denial” would be a better term. Nonetheless, it is a necessary fiction. For to take the statement “I don’t remember” for what it is—a simple denial of recollection—destroys the entire basis for impeachment. Memory loss per se is never a material issue, only the facts forgotten are.

But it may be easier to indulge the fiction here than when the impeaching statement is being used for substantive purposes under Rule 801(d)(1)(A). The danger that the prior statement will not face competition from a conflicting account at trial—the danger the inconsistency requirement of Rule 801(d)(1)(A) seeks to avert—is less when the statement is used for impeachment only. Here at least the jury will be instructed not to consider the statement’s substance at all. Accordingly, even if the jury does not imply a denial from the lack of recollection, it has at least been directed not to construe an affirmation of any matter from the impeaching statement either. Though the fiction of inconsistency remains, it is less troubling.

CONCLUSION

The forgetful witness offers a puzzle for evidentiary theory and practice. Present in one sense, he is nonetheless absent in another, and the testimony he offers, while on its face neutral, has the potential to derail a party’s case where the party calling him expects a more substantial account. The modern codified rules of evidence do not ignore the forgetful witness. They permit parties to refresh his recollection or to introduce prior cross-examined testimony and statements against interest on the theory that he is “unavailable.” Yet when the memory loss is incredible, the cases hold that he is very available, available enough to be subject to cross-examination and available enough to be impeached as if he had given fuller testimony.

It may be hard to quibble with the results. Incredible forgetfulness is often a sign of witness tampering, and a system which always takes such claims at face value runs the risk of being had. But the countermeasures taken also pose risks. Admitting prior grand jury testimony as “inconsistent” statements under the statutory rule exempting such statements from the definition of hearsay ignores the meaning and purpose of the inconsistency language.

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They also permit introduction of recorded recollections, an important exception to the hearsay rule not discussed here. See note 6.
and results in the introduction of evidence that has many of the traditional hearsay dangers. Permitting impeachment with even less reliable hearsay places before the trier of fact evidence which will almost certainly stand for more in the jury's collective mind than the proposition that the witness is lying about his memory, a result that goes beyond what pure considerations of relevance would dictate. These risks may well be outweighed by the dangers turncoat witnesses pose. If so, the expansive view of inconsistency the cases espouse has common sense backing it up. But it is hard to fit the holdings of the cases within the framework of the modern law of evidence. To the student of evidence, the welcome courts afford to the unconvincing forgetful witness's statement presents a distinct exception to the hearsay rule, one not accounted for by any of those codified in the Federal Rules.