

NOTE

Hearsay in the Modern Age: Balancing Practicality and Reliability by Amending Federal Rule of Evidence 801(d)(1)(A)

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ABSTRACT

The Advisory Committee on the Federal Rules of Evidence is considering amending Federal Rule of Evidence 801(d)(1)(A) to make prior inconsistent statements captured on audiovisual devices admissible for their substantive value rather than solely for impeachment purposes. Although this proposed change allows litigants to leverage the benefits of digital technology, the proposal lacks the reliability guarantee inherent in the current hearsay rule, meaning that there is little or no indication that the declarant was speaking seriously or accurately. This Note proposes that any amendment to Federal Rule of Evidence 801(d)(1)(A) include a requirement that the declarant expressly consented to being recorded. Because people are less likely to be joking and more likely to speak precisely when they know that they are being recorded, such an express-consent provision would help ensure that the substance of any statements admitted under the amended rule is sufficiently reliable. By imposing such a requirement, this Note's proposal preserves the hearsay rule's primary purpose while allowing the rule to evolve in recognition of the advantages of modern technology.

* J.D., expected May 2019, The George Washington University Law School. I would like to thank Professor Stephen Saltzburg for inspiring this Note, my mother for proofreading numerous drafts, and my editors for providing invaluable feedback. I am also immensely grateful to everyone in The University of Richmond's Undergraduate Mock Trial Program who spent countless hours teaching me about hearsay.

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INTRODUCTION

As the American public is increasingly exposed to trial proceedings through the internet and television court dramas, misconceptions about the justice system are becoming more pervasive.¹ Specifically,

¹ See ROGER A. FAIRFAX JR., ADJUDICATORY CRIMINAL PROCEDURE 133 (2018); David B. Rottman, *Who Trusts the Trial Courts, to What Extent, and Why?*, in MOTIVATING COOPERATION AND COMPLIANCE WITH AUTHORITY 117, 123 (Brian H. Bornstein & Alan J. Tompkins eds., 2015) (explaining that “media representations help build people’s understanding of the purposes and version of truth-finding embodied by the judiciary”); Jesse Lava, “*Law & Order*” Myths vs. Reality, NAT’L COUNCIL ON CRIME & DELINQ.: NCCD BLOG (Aug. 22, 2013), <https://>

there seems to be a widespread belief that the rules governing trial practice—especially the Federal Rules of Evidence (“FRE”)—impede justice by keeping important information from the jury.² In reality, however, the FRE function as a procedural safeguard to ensure that flawed or unreliable evidence does not reach the factfinder and lead to improper or unfair verdicts.³ For example, the authentication requirement helps prevent incorrect verdicts based on botched forensic tests, while the expert qualification requirements ensure that witnesses using unsupported methods cannot improperly influence trials with “junk science.”⁴ Although some people believe that such boundaries lead to injustice, in actuality the FRE are designed to promote justice by ensuring that the evidence presented in court is reliable.⁵

The hearsay rule is a prime example of a limitation that enhances the reliability of evidence, as the rule’s main function is to keep out statements if their trustworthiness cannot be adequately assessed.⁶ If a witness could walk into court and simply relay any statement that she had heard, the justice system would hardly be just. If a witness could take the stand in a murder trial and state, “I heard my friend say that the defendant stabbed the victim to death,” an innocent person may very well end up facing the death penalty for a crime she did not commit. Without the ability to ascertain whether the witness’s friend had any basis for the accusation or a motive to lie, the factfinder may end up basing the verdict on an unreliable or false statement.

www.nccdglobal.org/newsroom/nccd-blog/law-order-myths-vs-reality [<https://perma.cc/7BAJ-6HUE>].

² See, e.g., Donald Trump (@realDonaldTrump), TWITTER (Dec. 1, 2017, 3:03 AM), <https://twitter.com/realDonaldTrump/status/936551346299338752> [<https://perma.cc/D8D3-TSSL>] (“The Kate Steinle killer came back and back over the weakly protected Obama border, always committing crimes and being violent, and yet this info was not used in court. His exoneration is a complete travesty of justice.”); Donald Trump (@realDonaldTrump), TWITTER (Dec. 1, 2017, 3:13 AM), <https://twitter.com/realDonaldTrump/status/936553863255031809> [<https://perma.cc/Q9SP-69XY>] (“The jury was not told the killer of Kate was a 7 time felon.”). Hundreds of thousands of President Trump’s Twitter followers have since favorited and retweeted these tweets, thus demonstrating a fundamental lack of understanding about FRE 404 and its importance in keeping out propensity evidence. See generally FED. R. EVID. 404.

³ See WILLIAM M. HART & RODERICK D. BLANCHARD, LITIGATION AND TRIAL PRACTICE 200–02 (6th ed. 2007) (“Each exclusionary rule is grounded in notions of fairness or sound public policy” and is “designed to promote truth, fairness, and efficiency”).

⁴ Sean Ryan, *Backfire: Abandoning the Abuse of Discretion Standard of Review for Daubert Rulings Shoots Trial Courts in the Foot*, 47 U. TOL. L. REV. 349, 350 (2016); see FED. R. EVID. 702, 901(b)(3).

⁵ See HART & BLANCHARD, *supra* note 3, at 202.

⁶ See FED. R. EVID. 801 (defining hearsay); Colin Miller, Response, *No Explanation Required? A Reply to Jeffrey Bellin’s eHearsay*, 98 MINN. L. REV. 34, 35 (2013).

It is with this reliability guarantee behind the hearsay rule in mind that this Note assesses the proposed amendment to FRE 801(d)(1)(A) from the Advisory Committee on the FRE. The proposed amendment would allow prior inconsistent statements captured on audiovisual recordings to be used substantively rather than solely for impeachment purposes, regardless of whether the prior inconsistent statements were made under oath in formal proceedings.⁷ While courts can be relatively certain that a declarant did in fact make a particular statement if it is captured on an audiovisual recording, this proposed amendment raises other issues concerning reliability that threaten the core function of the hearsay rule.⁸ A primary problem with this proposal is that it does not require the declarant to have given express consent to being recorded. Without such an acknowledgement from the declarant, there is no guarantee that the declarant was being truthful or even serious when making the statement, as the declarant may not have even known that she was being recorded. In contrast, such a guarantee is thought to exist when the prior inconsistent statement was made under oath and the declarant knew that she was being recorded.⁹

The amendment has faced a great deal of opposition from highly respected legal organizations such as the Innocence Project, which fears that the amendment would increase the number of wrongful convictions in federal court and in any states that adopt the FRE.¹⁰ If, however, the proposed rule were amended to include a provision requiring the declarant to have consented to being recorded, many of these concerns would be alleviated. Such a provision would allow courts to balance the benefits of using modern technology with the importance of ensuring that all evidence has a reliable basis for admission.

This Note seeks a middle ground on a contentious issue by striking a balance that allows the FRE to adapt to changing technology while ensuring that reliability remains the linchpin of admissibility.¹¹

⁷ See Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules 1 (Oct. 1, 2017) [hereinafter Oct. Capra Memorandum].

⁸ Cf. *id.* at 2–4 (discussing the potential reliability issues of the amendment and steps to address these issues).

⁹ See DENNIS D. PRATER ET AL., EVIDENCE 631 (5th ed. 2016).

¹⁰ See Memorandum from M. Chris Fabricant, Dir. of Strategic Litig., Innocence Project, to Advisory Comm. on the Fed. Rules of Evidence 1 (Sept. 1, 2017) [hereinafter Fabricant Memorandum].

¹¹ *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

Part I provides an introduction to the current hearsay rules and explains the importance of ensuring that statements are trustworthy and reliable before courts admit them for their substantive value. Part I also explains how amending FRE 801(d)(1)(A) the way that the Advisory Committee has proposed would potentially lead to numerous problems, many of which hinge on the proposal's lack of reliability guarantee. The inherent unreliability in the Advisory Committee's proposal, however, can be alleviated by adding a requirement that the declarant must have given express consent to being recorded, which is discussed in detail in Part II.

I. BACKGROUND

A. *Definitions and Basic Concepts*

This Section provides the background information necessary to understand the purpose of FRE 801(d)(1)(A) and the difference between substantive and impeachment evidence.

1. *Hearsay Definition and Application*

FRE 802 bars hearsay—defined in FRE 801 as a declarant's out-of-court statement offered to prove “the truth of the matter asserted”—from being admitted in court.¹² A “statement” is “a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion,” and a “declarant” is “the person who made the statement.”¹³ “[T]he truth of the matter asserted” means that the statement is being offered to prove its substance.¹⁴

The general purpose behind the hearsay ban is ensuring that statements are not allowed into evidence if the factfinder will not be able to properly assess their reliability.¹⁵ Here is a basic illustration of the hearsay rule and its purpose: X is testifying as a witness at trial and says, “Y told me that the car at the scene of the crash was red.” Y's statement to X was made out of court, so if the statement is offered to prove the truth of the matter asserted—that the car at the scene was red—then it is hearsay. Absent an applicable exemption or exception, X cannot testify to Y's statement because X has no way to answer

¹² FED. R. EVID. 801(c).

¹³ FED. R. EVID. 801(a)–(b).

¹⁴ See Adrian Felix & Mor Wetzler, Presentation at the Am. Bar Ass'n Young Lawyers Div. Spring Conference: Getting It In: He Said, She Said (Dealing with Hearsay) (May 4, 2012), https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/getting_it_in_hearsay_presentation.authcheckdam.pdf [https://perma.cc/AM42-JR4Z].

¹⁵ See Miller, *supra* note 6.

questions about whether the car really was red. The party against whom the testimony is offered has the right to ask questions about details such as Y's proximity to the car, her eyesight, her memory, and her potential biases, but X cannot properly answer these questions about Y. Therefore, allowing X to relay Y's statement provides the factfinder with evidence about the car's color but denies the factfinder the necessary tools to assess whether it really was red.

If, however, Y's statement to X is offered for any purpose other than its truth value—for example, to show that Y remembered being at the accident scene after she left or that Y told other people about being at the accident scene—then it is not hearsay under FRE 801 and is not barred under FRE 802.¹⁶ As long as the nonsubstantive purpose is relevant and Y's statement to X conforms with all other FRE, it will be admitted. Unlike in the previous hypothetical where the factfinder was given evidence about the car's color but was unable to assess the accuracy of that evidence, here the accuracy of that evidence is not important because the factfinder is not being asked to determine whether the car was actually red.

Although a primary justification for the ban on hearsay is the inability to cross-examine the declarant, the FRE still consider out-of-court statements offered for their truth to be hearsay when they were made by someone who is testifying at trial and therefore is available for cross-examination.¹⁷ Numerous scholars have recommended that Congress change this rule, suggesting that declarant-witnesses' statements should not be hearsay because the witnesses are present in court and thus subject to further questioning on their out-of-court statements.¹⁸ Proponents of this change have offered many rationales for their recommendation, including that “the prior statement is by definition closer in time to the event described, and so is less likely to be impaired by faulty memory or a litigation motive.”¹⁹ The hearsay rule, however, remains unchanged, in part because of concerns that it would encourage parties in criminal and civil cases to “generate con-

¹⁶ When a statement is offered for a purpose other than its truth value, that purpose must still meet the definition of relevance to be admissible. FED. R. EVID. 401.

¹⁷ See PRATER ET AL., *supra* note 9, at 622 (explaining that even when a testifying witness made the out-of-court statement, that statement is still hearsay if offered for its truth value); Miller, *supra* note 6, at 40.

¹⁸ See PRATER ET AL., *supra* note 9, at 622 n.2 (discussing scholars' observations). The discussion of this broad viewpoint—that a witness's own out-of-court statements should not be hearsay—is provided only for additional context. This Note's focus is solely on amending FRE 801(d)(1)(A).

¹⁹ *Id.*

sistent statements before trial,” thus opening the door to potentially limitless testimony about prior statements and shifting the trial’s “focus . . . to the prior statements as opposed to the in-court testimony.”²⁰

The example above is useful in demonstrating how a declarant-witness’s own statements are still hearsay under the FRE. Suppose instead that X testifies as a witness at trial and says, “I told Y that the car I saw was red.” Even though X is on the stand and thus is subject to cross-examination about the statement, if X’s statement to Y is used to prove that the car in question actually was red, it is being offered for its truth and thus meets the definition of hearsay. Therefore, unless a hearsay exemption or exception applies, X cannot relay the prior statement that she made to Y. FRE 802 does not, however, bar X from testifying that the car she saw was red as long as she does not mention her out-of-court statement.

2. FRE 801(d)(1)(A) and Impeachment

Although the FRE still define a declarant-witness’s own out-of-court statements as hearsay, litigators can use the plethora of hearsay exceptions provided under FRE 803, 804, and 807, as well as the numerous exemptions to hearsay included in FRE 801, to get declarant-witnesses’ statements into evidence.²¹ This Note focuses on FRE 801(d)(1)(A), which deals with situations in which a declarant testifies in court and thus is subject to cross-examination.²²

If a witness makes a statement in court that is inconsistent with a prior unsworn statement that he made out of court, that prior inconsistent statement can be offered under FRE 613 solely to impeach the witness and show that he is either unreliable or untruthful.²³ In contrast, if that prior inconsistent statement was made “under penalty of perjury at a trial, hearing, or other proceeding or in a deposition,” it can be offered under FRE 801(d)(1)(A) not only to impeach the witness but also to prove the substance of the statement.²⁴

²⁰ *Id.* at 623.

²¹ See FED. R. EVID. 801(d), 803, 804, 806, 807; PRATER ET AL., *supra* note 9, at 625. The hearsay exemptions found in FRE 801(d) are also sometimes referred to as “exclusions.” See PRATER ET AL., *supra* note 9, at 625.

²² See FED. R. EVID. 801(d)(1)(A). Because the declarant in question must be testifying for a statement to be admissible under FRE 801(d)(1)(A), there are no Confrontation Clause issues with this rule either in its current form or in the form this Note proposes in Part III. See PRATER ET AL., *supra* note 9, at 865.

²³ See FED. R. EVID. 613(b).

²⁴ FED. R. EVID. 801(d)(1)(A).

Courts have explained that in order for prior statements to be “inconsistent” with in-court testimony under both the FRE relating to impeachment and FRE 801(d)(1)(A), they do not necessarily need to be “diametrically opposed or logically incompatible.”²⁵ Rather, inconsistencies are often subtler and “may be found in evasive answers, inability to recall, silence, or changes of position.”²⁶ Additionally, courts have explained that in certain instances, a declarant-witness’s claim during trial that he does not remember the event or prior statement can qualify as an inconsistency.²⁷ If the declarant-witness “*really does* lack memory of the underlying facts,” then there is no inconsistency, but if the declarant-witness is “*feigning* lack of memory,” then there is an inconsistency because he is “trying to use lack of memory as a lame excuse to distance himself from his previous statement.”²⁸ Trial courts have “considerable discretion in determining whether the witness’s memory loss is sincere or feigned and thus inconsistent with an earlier statement,” regardless of whether the evidence is being offered for its substance under FRE 801(d)(1)(A) or for impeachment purposes.²⁹

The car example above can also help illustrate the distinction between offering prior inconsistent statements as substantive evidence and offering prior inconsistent statements for impeachment purposes. Imagine that a declarant said in her deposition, “The car that I saw at the scene of the crash was red.” The declarant then comes to court and testifies, “The car that I saw at the scene of the crash was blue,” which is clearly inconsistent with the statement in her deposition. The declarant is present in court and subject to cross-examination about the prior inconsistent statement, so the crossing attorney can use her statement from her deposition, wherein she said that the car was red, to impeach her. Because the prior inconsistent statement was made under oath during a deposition, FRE 801(d)(1)(A) also allows it to be used as substantive evidence—in other words, to prove that the car at the scene actually was red.

Now imagine the same scenario, but this time the declarant’s prior inconsistent statement about the car being red was not made in a deposition; instead, she was not under oath when she made the statement to the police, who simply recorded her saying, “The car that I

²⁵ *United States v. Williams*, 737 F.2d 594, 608 (7th Cir. 1984); see PRATER ET AL., *supra* note 9.

²⁶ *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980).

²⁷ See PRATER ET AL., *supra* note 9, at 631–32.

²⁸ *Id.* at 632.

²⁹ *Id.*; see *United States v. Thompson*, 708 F.2d 1294, 1302 (8th Cir. 1983).

saw at the scene of the crash was red.” If the declarant comes to court and testifies that the car was blue, her unsworn prior inconsistent statement can be used to impeach her, but because it was not made under oath, the current version of FRE 801(d)(1)(A) does not permit it to be used as substantive evidence—meaning it cannot be used to prove that the car was actually red.

Many lawyers and legal scholars recognize that this distinction between substantive and impeachment evidence can be confusing, and in 1972, the Advisory Committee and the Supreme Court both proposed treating all prior inconsistent statements as hearsay exemptions regardless of whether they were made under oath.³⁰ These proposals were based on the theory that the declarant-witness is present at trial and therefore is subject to cross-examination on the prior statements, so there is no need to bar the statements.³¹ Congress, however, rejected their proposal, and the current language of FRE 801(d)(1)(A) only permits using prior inconsistent statements substantively when the statements were made under oath during a formal proceeding.³² The “formal proceeding requirement” was included “to assure that there would be no dispute as to whether the statement was even made,” while the “oath requirement” was put in place to “add a degree of reliability” to the substance of the statement.³³ There are, however, some states that take the approach proposed in 1972 and allow all prior inconsistent statements—sworn or unsworn—to be admitted for their substantive value.³⁴

Because the 1972 proposal was rejected and the FRE still state that an unsworn prior inconsistent statement can only be used for impeachment purposes, a judge presiding over a federal jury trial can offer the jury limiting instructions that they may only use the contradictory statement to assess the witness’s credibility and not for the

³⁰ See PRATER ET AL., *supra* note 9; Stephen A. Saltzburg, *Prior Inconsistent Statements and Substantive Evidence—Federal Rule 801(d)(1)(A): The Compromise*, 84 FORDHAM L. REV. 1499, 1499 (2016).

³¹ See Saltzburg, *supra* note 30.

³² See PRATER ET AL., *supra* note 9, at 631.

³³ *Id.*

³⁴ See *id.*; Saltzburg, *supra* note 30. Evidentiary rules in Alaska, Arizona, California, Colorado, Delaware, Georgia, Montana, Nevada, Rhode Island, South Carolina, Utah, and Wisconsin say that prior inconsistent statements of declarant-witnesses are not hearsay. Daniel J. Capra, *Prior Statements of Testifying Witnesses: Drafting Choices to Eliminate or Loosen the Strictures of the Hearsay Rule*, 84 FORDHAM L. REV. 1429, 1439–42 (2016). Arkansas requires the prior inconsistent statement to be under oath only in civil cases, whereas Wyoming requires the prior inconsistent statement to be under oath only in criminal cases. *Id.* at 1440, 1442.

truth of the matter asserted.³⁵ Although judges usually do not offer limiting instructions *sua sponte*, because limiting instructions risk drawing attention to a statement that the objecting party may not want, judges are required to give limiting instructions when the objecting party makes a proper request, and appellate courts consider refusal to offer such limiting instructions erroneous.³⁶ Limiting instructions, however, are often ineffective because juries do not always understand the difference between substantive and impeachment evidence, and judges have been known to err in determining which statements are actually being offered for their truth.³⁷

Therefore, because limiting instructions are often ineffective, the largest impact that the distinction between substantive and impeachment evidence has at the trial level is typically on what attorneys can argue during closing arguments.³⁸ Returning to the example about the color of the car, if the declarant made the prior inconsistent statement about the car being red while under oath in her deposition, the attorney can use that to argue in closing that the car was actually red. If, however, the declarant's prior inconsistent statement was unsworn and simply made in the video that the police recorded, the attorney can only use it to argue in closing that the declarant is an unreliable or untruthful witness. There are, of course, some trials in which prior inconsistent statements admitted for their substance under FRE 801(d)(1)(A) could be "sufficient as the sole proof of an allegation central to the litigation," but the factfinder is still free to decide whether to believe the substance of the prior inconsistent statement, the in-court testimony, or neither.³⁹

B. The Proposed Amendment to FRE 801(d)(1)(A) Currently Under Consideration

The Advisory Committee is currently considering a proposal to amend FRE 801(d)(1)(A).⁴⁰ The current draft of the rule (with the amended language that is under consideration in italics) is as follows:

³⁵ See PRATER ET AL., *supra* note 9, at 632.

³⁶ See *Adamson v. Cathel*, 633 F.3d 248, 259 (3d Cir. 2011); *United States v. Childs*, 598 F.2d 169, 176 (D.C. Cir. 1979).

³⁷ See PRATER ET AL., *supra* note 9, at 603–04.

³⁸ See Paul C. Giannelli, *Closing Argument: Prosecution Misconduct*, PUB. DEFENDER REP., Winter 1997, at 1, 2.

³⁹ PRATER ET AL., *supra* note 9, at 632. *Cf.* *United States v. Orrico*, 599 F.2d 113, 118 n.4 (6th Cir. 1979); Capra, *supra* note 34, at 1437.

⁴⁰ See Oct. Capra Memorandum, *supra* note 7, at 2.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and:

- (i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
- (ii) *was recorded by audiovisual means, and the recording is available for presentation at trial*⁴¹

Essentially, the new rule, FRE 801(d)(1)(A)(ii), would allow prior inconsistent statements recorded audiovisually to be used as substantive evidence regardless of whether the declarant made the statements under oath.⁴² Currently, such prior inconsistent unsworn statements can only be used for impeachment.⁴³ The Advisory Committee has also drafted language to add to the “Notes of Advisory Committee” that accompany FRE 801(d)(1)(A) to explain the amendment in further detail.⁴⁴ The drafted language states that the formal proceeding requirement is “unnecessarily restrictive” when an audiovisual recording makes it clear that the witness did in fact make the prior inconsistent statement, and it goes on to say that this amendment will help eliminate the need to draw the very “confusing” distinction between substantive and impeachment evidence.⁴⁵ The drafted language also makes clear that even if a statement could be admissible for its substance under the amended rule, parties still have the option to use it solely for impeachment purposes.⁴⁶

Perhaps the most important part of the Advisory Committee's Note is its clarification that the term “audiovisual” includes only statements made on both audio and video rather than one or the other—“off-camera” statements are deliberately excluded from this definition.⁴⁷ Of course, the FRE still allow statements captured through just

⁴¹ Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Committee on Evidence Rules 21 (Apr. 1, 2017) [hereinafter Apr. Capra Memorandum]. An additional proposed amendment to the rule that is not discussed in this Note is omitted.

⁴² See Oct. Capra Memorandum, *supra* note 7, at 1.

⁴³ See *id.*

⁴⁴ See *id.* at 2–3.

⁴⁵ Apr. Capra Memorandum, *supra* note 41, at 21–22.

⁴⁶ See Oct. Capra Memorandum, *supra* note 7, at 4.

⁴⁷ Apr. Capra Memorandum, *supra* note 41, at 5, 17–18 (explaining that requiring audio and video not only gives the jury more context in which to weigh the statement's credibility but

one form to be used for impeachment purposes, but in order for a statement to be used substantively under the new rule, it must meet the Advisory Committee's more stringent definition of "audiovisual."⁴⁸ The Advisory Committee decided on this definition in part because they found that having the statements available both to hear and to view is important to ensure that the statement was in fact made, which is a primary purpose for adopting this rule.⁴⁹ Additionally, having both audio and video is more reliable because it allows the trier of fact to determine whether the declarant made the statements under the influence of drugs or alcohol or because of coercion.⁵⁰

Essentially, the amendment under consideration recognizes that in the digital age, audiovisual technology offers certain guarantees that did not exist either at common law or when the FRE were first promulgated in 1973.⁵¹ If a statement is captured audiovisually, a court can be relatively certain that the declarant did in fact make the statement, or at least certain enough for the audiovisual recording to meet the preponderance standard for admissibility.⁵²

Several states have already adopted recording provisions that are even more inclusive than the audiovisual proposal currently under consideration for federal implementation, and the Advisory Committee is seeking to similarly modernize the FRE.⁵³

also avoids a whole host of potential issues including the controversy surrounding police body cameras).

⁴⁸ See FED. R. EVID. 613; Oct. Capra Memorandum, *supra* note 7, at 3; Apr. Capra Memorandum, *supra* note 41, at 5, 17–18.

⁴⁹ See Oct. Capra Memorandum, *supra* note 7, at 1, 3; Apr. Capra Memorandum, *supra* note 41, at 5.

⁵⁰ See Apr. Capra Memorandum, *supra* note 41, at 22.

⁵¹ See STAFF OF THE H. COMM. ON THE JUDICIARY, 113TH CONG., FED. R. EVID. vii historical note (Comm. Print 2014); Oct. Capra Memorandum, *supra* note 7, at 1.

⁵² See *Bourjaily v. United States*; 483 U.S. 171, 175 (1987); Oct. Capra Memorandum, *supra* note 7, at 1.

⁵³ See PRATER ET AL., *supra* note 9, at 631. Connecticut allows prior inconsistent, unsworn statements that are in writing or otherwise recorded by audiotape, videotape, or some other equally reliable medium. See Capra, *supra* note 34, at 1440. Hawaii allows prior inconsistent unsworn statements that are "recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement." *Id.* (quoting HAW. R. EVID. 802.1(1)(B)–(C)). Louisiana allows prior inconsistent unsworn statements to be used substantively only in criminal trials, as long as the assertions are corroborated by any additional evidence. See *id.* at 1441. North Dakota allows prior inconsistent unsworn statements to be used substantively in civil cases only. See *id.*

C. *Potential Problems with the Advisory Committee's Proposed Amendment*

The Advisory Committee's proposed amendment is open for public comment until February 2019 and has already been met with some concerns and criticism from lawyers, judges, and legal groups.⁵⁴ One potential problem with the proposal is the reliability (or lack thereof) of prior inconsistent statements that would become admissible under the Advisory Committee's proposal. As explained in the Introduction, the rationale behind FRE 801(d)(1)(A) in its current form is twofold: (1) the statement was almost definitely made, as demonstrated by its transcription or recording by a court reporter in a formal proceeding, and (2) it is less likely that the declarant would joke or speak inaccurately if she knew that she were being recorded and were under penalty of perjury.⁵⁵

Although the amendment in its current form meets the first portion of the rationale (certainty that the statement was made), it does not necessarily meet the second portion (the reliability guarantee behind the substance of the statement).⁵⁶ Although an oath is an absolute guarantee of neither truthfulness nor of accuracy in memory, the fear of going to prison for perjury likely makes people think more seriously about their statements and makes them less prone to lie.⁵⁷ If, however, a person is simply recorded making a statement in any situation, no matter how casual, there are no such similar guarantees of reliability, particularly if the declarant does not know that she is being recorded.⁵⁸ Although people may be more candid if they do not know that they are being recorded, they are also less likely to act "deliberately" or think as carefully about the accuracy of their statements and

⁵⁴ See *Proposed Amendments Published for Public Comment*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment> [<https://perma.cc/D7XG-837Z>]. See generally Oct. Capra Memorandum, *supra* note 7; Apr. Capra Memorandum, *supra* note 41; Fabricant Memorandum, *supra* note 10; Memorandum from Timothy Lau, Fed. Judicial Ctr., to Advisory Committee on Rules of Evidence (Feb. 27, 2018) [hereinafter Lau Memorandum].

⁵⁵ See PRATER ET AL., *supra* note 9, at 625; Miller, *supra* note 6, at 40.

⁵⁶ See Oct. Capra Memorandum, *supra* note 7, at 3; Apr. Capra Memorandum, *supra* note 41, at 14–15.

⁵⁷ See Miller, *supra* note 6, at 40 (explaining that statements made under oath are "more reliable than . . . 'run-of-the-mill' hearsay statement[s]").

⁵⁸ See Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J.L. & SOC. POL'Y 400, 405 (2012) (arguing police should record all custodial interrogations in part because "videotaping . . . promotes truth-finding by reducing lying . . . because . . . suspects . . . know they are being watched").

do not tend to “craft their words precisely.”⁵⁹ Because the predominant purpose of the hearsay rule is to keep out inaccurate and unreliable statements, the unreliability of statements made when a declarant does not know that she is being recorded is a serious concern.⁶⁰

This lack of reliability guarantee leads to a second problem with the Advisory Committee’s proposal—its potential to increase wrongful conviction rates—and explains the Innocence Project’s extreme opposition to the amendment.⁶¹ They worry that without a “reliability inquiry” into the truth value of the recorded statements, the rule “facilitates the introduction of . . . false accusations.”⁶² If a witness’s videotaped statement to the police contradicts that witness’s later statement at trial, the new rule could allow for the admission of the earlier, videotaped statement as substantive evidence. The Innocence Project is concerned because if the earlier statement is false, it is nevertheless admissible as substantive, “direct evidence of guilt,” even though the witness’s truthful statement in court would otherwise exculpate the defendant.⁶³

The Innocence Project worries not only about false prior inconsistent statements being used at trial to convict innocent defendants but also about the effect this new rule could have on the plea-bargaining process.⁶⁴ Specifically, they fear that prosecutors could use the new rule to “induce pleas in weak cases where there would otherwise be insufficient evidence of guilt, because a complaining witness” has been recorded making an “inculpatory, unsworn statement.”⁶⁵ Essentially, in such a situation the accused may fear that the trier of fact will believe the prior unsworn statement over the exculpatory trial testimony, and she may “make a rational decision to plead guilty, rather than risk trial.”⁶⁶ The Innocence Project demonstrates the legitimacy of their concern by explaining that “38 of the 351 people exonerated by post-conviction DNA exonerations pled guilty to crimes they did

⁵⁹ Bernard W. Bell, *Theatrical Investigation: White-Collar Crime, Undercover Operations, and Privacy*, 11 WM. & MARY BILL RTS. J. 151, 184 (2002); Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 243, 251 (2002).

⁶⁰ See Andrew Palmer, *The Reliability-Based Approach to Hearsay*, 17 SYDNEY L. REV. 522, 522 (1995) (discussing hearsay in the context of Australian law).

⁶¹ See Fabricant Memorandum, *supra* note 10, at 1. The Innocence Network joined the Innocence Project’s opposition to the amendment. See *id.*

⁶² *Id.* at 2.

⁶³ See *id.*

⁶⁴ See *id.* at 2–3.

⁶⁵ *Id.* at 2.

⁶⁶ *Id.*

not commit” and that “false witness statements or allegations contributed to over 50% of wrongful convictions nationwide.”⁶⁷

The Innocence Project also explains how this rule could negatively impact the appellate process, as just one inculpatory prior inconsistent statement being admissible for its substance “could provide the basis for upholding a conviction on appeal when a sufficiency of the evidence challenge is raised, . . . even where the complaining witness has recanted.”⁶⁸ Such false statements could also be used to justify “denying a defendant a new trial on post-conviction review,” despite the witness having provided exculpatory evidence when under oath at trial.⁶⁹ For these reasons, the Innocence Project is vehemently opposed to the audiovisual amendment and believes that the inherent unreliability of these unsworn statements “presents too great a threat of wrongful conviction.”⁷⁰

A third possible problem with the Advisory Committee’s proposal is that states with all-party-consent-to-recording laws would be unable to adopt the new rule. Although this problem is not nearly as critical to ensuring a fair system of justice as are the first two problems, the Advisory Committee’s proposed change could cause some difficulties for certain states. Even though states are under no obligation to adopt the FRE and thus this problem is not of particularly drastic concern, it is worth noting that the vast majority of states have adopted rules identical to the FRE.⁷¹ Federal law does not require all-party consent for the admission of audiovisual recordings, but 11 states do.⁷² Therefore, those 11 states would be unable to adopt the Advisory Committee’s proposed amendment to FRE 801(d)(1)(A) in its current form.

A fourth possible problem is that the Advisory Committee’s proposal could lead to an overabundance of available statements.⁷³ Specifically, critics fear that “[b]ecause formal trappings would not be

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.* at 3.

⁷¹ *See id.* at 1 (“[A]t least 38 states have adopted these rules and frequently amend their own rules when the Federal Rules are amended.”).

⁷² *See* MATTHIESEN, WICKERT & LEHRER, S.C., LAWS ON RECORDING CONVERSATIONS IN ALL 50 STATES 2 (2018), <https://www.mwl-law.com/wp-content/uploads/2013/03/LAWS-ON-RECORDING-CONVERSATIONS-CHART.pdf> [<https://perma.cc/G2D8-4VH2>] (explaining that although laws often refer to “two-party consent” requirements, the more appropriate term is “all-party consent” because every person on the recording—not just two people—must consent in these states).

⁷³ *See* Apr. Capra Memorandum, *supra* note 41, at 12–13.

required for admissibility, the amendment could potentially cover everything on YouTube, all kinds of employee statements when an employer anticipates litigation, and every video taken on every person's i[P]hone."⁷⁴ The Advisory Committee dubbed this the "proliferation problem" and has discussed the possibility that there would be an overabundance of available audiovisual recordings and that a plethora of statements would be admitted under this rule in virtually every litigation.⁷⁵

A fifth possible issue with the Advisory Committee's proposal is that this rule could lead people to record false statements intentionally in the hopes of admitting them substantively during trial.⁷⁶ There is some concern that "the rule would incentivize criminal defendants to record statements of associates" saying that the defendant was uninvolved in the criminal activity.⁷⁷ Those associates could then reap the benefits of cooperating with the prosecution and testifying against the defendant, all the while knowing that the defendant can admit the prior inconsistent statements for their truth.⁷⁸ These five concerns (especially when viewed holistically) demonstrate the negative impact that the Advisory Committee's proposal could have on the justice system and the ways in which it could erode the traditional protections that the hearsay rule affords litigants.

II. ANALYSIS

A. *The Solution: Adding an Express-Consent Requirement*

This Note supports adopting the Advisory Committee's proposed amendment, but only if certain vital changes are made. The Advisory Committee is correct in that audiovisual recordings provide relative certainty that the prior inconsistent statements were in fact made.⁷⁹ As currently written, however, the new rule provides few if any indicia of the statements' reliability. As explained above, the primary purpose behind the FRE 802 ban on hearsay is that the substance (or truth value) of hearsay statements cannot always be adequately determined, so offering such statements for their truth is improper without "circumstantial guarantees of trustworthiness."⁸⁰ Although under the re-

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* at 12–13.

⁷⁶ *See id.* at 13.

⁷⁷ *Id.*

⁷⁸ *See id.*

⁷⁹ *See* Oct. Capra Memorandum, *supra* note 7, at 1.

⁸⁰ Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 80 (1987).

quirements of FRE 801(d)(1)(A) the declarant must be present in court and subject to cross-examination about the statement in order for the statement to be admissible for its truth, this still does not always allow for a full assessment of the statement's reliability.⁸¹

The reliability guarantee behind the current version of FRE 801(d)(1)(A) is the presumption that if the prior statement was made under oath, the declarant was less likely to have been lying or joking; if a person knows that she is making a statement under penalty of perjury, she will probably consider her words carefully and seriously, thus making those prior statements "more reliable than the run-of-the-mill hearsay statement."⁸² Using that same logic, however, if a declarant made a statement recorded audiovisually but did not know that she was being recorded, there is little to no guarantee that she was speaking seriously or accurately, as such statements "may be made without reflection."⁸³ The Advisory Committee's proposal thus departs drastically from the reliability guarantee afforded by the current oath requirement.⁸⁴

Therefore, this Note suggests that proposed FRE 801(d)(1)(A) (ii) require that the declarant expressly consented to being recorded before the statement is admitted for its substance. This provision would require that the declarant either intentionally made the recording herself or expressly acknowledged on the audiovisual recording that she was being recorded. This alteration to the proposed amendment will not only provide a reliability guarantee for the prior inconsistent statements but will also help address other issues with the current amendment described below, most notably the potential threat that this new rule poses to those who have been wrongfully accused or wrongfully convicted.⁸⁵

The Advisory Committee could implement an express-consent provision by adding the following language (underlined below) to its proposed amendment (italicized below) of FRE 801(d)(1)(A):

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

⁸¹ See FED. R. EVID. 801(d)(1)(A).

⁸² Miller, *supra* note 6, at 40; see Apr. Capra Memorandum, *supra* note 41, at 6.

⁸³ ADVISORY COMM. ON EVIDENCE RULES, *Minutes of the Meeting of April 21, 2017*, in ADVISORY COMMITTEE ON RULES OF EVIDENCE: OCTOBER 2017 AGENDA BOOK 11, 25 (2017), http://www.uscourts.gov/sites/default/files/a3_0.pdf [<https://perma.cc/7B65-VQT7>]; see Apr. Capra Memorandum, *supra* note 41, at 6. *But see* Taslitz, *supra* note 58, at 405.

⁸⁴ Compare FED. R. EVID. 801(d)(1)(A), with Oct. Capra Memorandum, *supra* note 7, at 2.

⁸⁵ See Fabricant Memorandum, *supra* note 10, at 1.

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and:

(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; [or]

(ii) *was recorded by audiovisual means, and the recording is authenticated and available for presentation at trial, and either: the declarant created the audiovisual recording, or the audiovisual recording contains the declarant's express consent to being recorded on audio or video.*⁸⁶

There are multiple facets of this Note's proposed language that warrant further explanation.⁸⁷ First, this Note does not suggest that there should be one specific formula or talismanic phrase required for express consent. In some instances, express consent may be quite straightforward. For example, a declarant could look at the camera and say, "I consent to being recorded." That exact language, however, is not necessary for express consent to exist under this Note's proposal. For example, a declarant who says, "I know that I am being recorded," and then goes on to give a statement or answer questions has given express consent for the purposes of this rule. Evidence that the declarant intentionally (rather than accidentally) recorded herself would also suffice. Essentially, express consent would require either some clear acknowledgement from the declarant that her statements are being recorded or clear evidence that she intentionally recorded herself making the statements.

Second, despite the proposed requirement that the declarant consented to being recorded generally, she does not have to know that she is being recorded on *both* audio and video. Rather, a declarant's consent to an audio recording that is actually an audiovisual recording would suffice. For example, a declarant might say, "I know that I am being tape-recorded," or "I consent to an audio recording." This Note does not ask courts to spend time deciding whether she intended her statement to encompass a video recording or even knew that she was being videotaped, as the Advisory Committee's two primary ratio-

⁸⁶ Apr. Capra Memorandum, *supra* note 41, at 21–22. An additional proposed amendment to the rule that is not discussed in this Note is omitted.

⁸⁷ The basic concepts outlined in this Part should be explained in the Advisory Committee Note accompanying what would become FRE 801(d)(1)(A)(ii).

nales for requiring both audio and video—providing strong evidence that a statement was actually made and enabling factfinders to more fully assess the statement’s reliability—clearly are not impacted by this determination.⁸⁸ Even if a declarant believes that she is only being recorded on audiotape rather than on videotape, she still knows that there is a record of what she is saying and thus is likely to be more accurate and precise in her statements⁸⁹ Therefore, there is no reason to exclude an audiovisual recording that would be otherwise admissible under an amended version of FRE 801(d)(1)(A) merely because the declarant only consented to the audio aspect of the recording.

Third, although a declarant need not consent specifically to the video portion of the recording, if there is not clear evidence that she intentionally recorded herself, then her consent does need to be captured on both audio and video on the audiovisual recording itself. Without such a requirement, the express-consent provision would serve almost no purpose. For example, if the person who made the recording claims that he obtained the declarant’s consent before turning on the camera but the declarant says that she did not consent, it becomes a “he-said-she-said” scenario and forces courts to decide whom to believe. Such sideshows are inefficient when a simpler alternative—requiring evidence of express consent on the recording itself—exists.⁹⁰ Crafting a rule that is clear and efficient is important because too many additional costs “in the way of hearings, appeals, etc.,” overburden the justice system.⁹¹

Fourth, even though the rule could expand the consent requirement and allow the declarant to give either express or implied consent, loosening the consent provision in such a manner would lead to the same inefficiency discussed in the previous paragraph.⁹² There may be scenarios in which a declarant gives no verbal indication that she consents and yet a reasonable viewer might believe that she consented. For example, if a declarant is staring directly into the camera

⁸⁸ See Oct. Capra Memorandum, *supra* note 7, at 1; Apr. Capra Memorandum, *supra* note 41, at 5, 22.

⁸⁹ ADVISORY COMM. ON EVIDENCE RULES, *supra* note 83, at 25; see Taslitz, *supra* note 58, at 405. The reliability guarantee behind the express-consent requirement is discussed further *infra* Section II.B.

⁹⁰ See Apr. Capra Memorandum, *supra* note 41, at 15. This Note’s proposed requirement that a declarant’s consent be recorded audiovisually may mean that fewer recordings are admissible, but the current version of FRE 801(d)(1)(A) does not allow any such recordings into evidence, so this amendment is still an expansion of the rule’s current scope. See FED. R. EVID. 801(d)(1)(A).

⁹¹ Apr. Capra Memorandum, *supra* note 41, at 15.

⁹² See *id.*

the entire time she is speaking, that could potentially be an indication that she consented to being recorded. Many implied consent cases, however, would be much more complicated than that one. What if the declarant glances at the camera only a few times while speaking? Does this mean that she knows the camera is on and thus she gave implied consent to being recorded? What if the person who made the recording explains that the camera has a red light that flashes when it is on? Is the court supposed to infer that the declarant would have seen the flashing red light, would have known what that meant, and therefore must have impliedly consented? What if the declarant was giving a presentation to a group of people? Does this mean that she knew or should have known that the presentation was being recorded and thus gave her implied consent? Countless such unclear scenarios exist. For the sake of efficiency and clarity, the rule must draw a line somewhere, and allowing for the admission of only audiovisual recordings containing express consent is the most straightforward option.

Finally, it is worth noting that even in a jury trial, the judge will determine whether the declarant gave express consent on the audiovisual recording itself.⁹³ Like with other admissibility issues, the judge will admit the evidence if she finds that the statement satisfies the rule's requirements; in doing so, the judge is allowed to consider both admissible and inadmissible evidence.⁹⁴ Of course, it is important to remember that even if the judge finds that a particular videotape does not contain express consent and thus rules that it is inadmissible under the revised version of FRE 801(d)(1)(A), the recording could still be admissible for its truth under another enumerated hearsay exemption or exception, through the residual hearsay exception, or for impeachment purposes, as long as it conforms with all other FRE.⁹⁵

The car example in Part I of this Note can help illustrate how this proposed rule would operate. Suppose that X made a statement to Y, another person at the accident scene, saying, "The car that I saw was red." Imagine that Y witnessed the crash, watched the scene become very chaotic, and then eventually pulled out his iPhone to record what was happening, including X making her statement about the car being red.⁹⁶ X later testifies at trial and states, "The car that I saw at the scene of the crash was blue." Under the current version of FRE

⁹³ See FED. R. EVID. 104(a) advisory committee's note to 1972 proposed rule.

⁹⁴ See *id.*

⁹⁵ See FED. R. EVID. 608, 613, 807.

⁹⁶ Notice that because of the delay between the crash and Y making the recording, the

801(d)(1)(A), the prior statement that Y filmed would only be admissible for impeachment purposes rather than as substantive evidence because it was not made under oath in a formal proceeding. Under the new version of the rule that this Note proposes, however, the filmed statement would also be admissible for substantive purposes if X gave express consent to Y's recording her. In this scenario, express consent would exist if the recording showed X saying that she consented to being recorded or stating that she knew she was being recorded and continuing to speak. It would also be substantively admissible if X had made the recording herself while using the phone in "selfie mode" (meaning that she was visible in the image). If, however, she did not take the recording herself or make an express on-camera statement indicating her consent, it would still only be admissible for its truth under another hearsay exemption or exception or for impeachment purposes.

B. Addressing Problems with the Advisory Committee's Proposal by Imposing an Express-Consent Requirement

The five major criticisms of the Advisory Committee's proposal are either solved or alleviated by implementing the express-consent requirement.⁹⁷ The first problem with the Advisory Committee's proposed amendment to FRE 801(d)(1)(A) is the lack of a reliability guarantee. As courts have explained, the linchpin of admissibility is reliability.⁹⁸ When a declarant gives express consent to being recorded, she is less likely to be lying or joking.⁹⁹ An analogous rationale is reflected in Connecticut's hearsay rule, which allows a declarant-witness's prior written statements to be admitted for their substance regardless of whether they were made under oath, as long

prior statement likely would not constitute a present-sense impression or an excited utterance. See FED. R. EVID. 803(1)–(2).

⁹⁷ For a detailed explanation of the five major criticisms of the Advisory Committee's proposal, see *supra* Section I.C. The express-consent provision was specifically tailored to address the first three problems. Although the express-consent provision may be somewhat beneficial to addressing the last two problems, those are largely insignificant regardless of whether the rule contains any type of consent requirement.

⁹⁸ *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

⁹⁹ See *United States v. Valdez-Soto*, 31 F.3d 1467, 1472 (9th Cir. 1994); PRATER ET AL., *supra* note 9, at 858 (explaining that a primary factor judges consider when admitting statements under the residual hearsay exception is whether the declarant appeared to consider the statement carefully before making it and stating that declarants are more "likely to consider the accuracy of . . . statements" that are made in "formal circumstances or pursuant to formal duties").

as the declarant signed them.¹⁰⁰ This rule recognizes that signing the statement is a form of a reliability guarantee, as a person who signs her name to a statement is probably going to be more careful, accurate, and precise than someone who does not. Therefore, Connecticut's rule is in that way analogous to the express-consent provision proposed in this Note and reflects a similar reliability guarantee.

The express-consent provision is also closer to the reliability guarantee inherent in the current version of FRE 801(d)(1)(A) than is the Advisory Committee's proposal. When a declarant makes statements under oath in a formal proceeding, as the existing rule requires, she is probably more careful in choosing her words and trying to remember details because she is aware that there is a record of what she is saying; it is precisely because of the oath requirement's formality that these statements are thought to be reliable.¹⁰¹ Therefore, the express-consent requirement will serve a similar purpose as the current oath requirement, thus "provid[ing] some assurance that the out-of-court version is especially worthy of belief."¹⁰² It is critical that the prior inconsistent statement have "some guarantee" of being "sufficiently reliable" before the FRE permit "the rejection of trial evidence in favor of hearsay."¹⁰³

Once again, the car example can demonstrate the enhanced reliability that the express-consent requirement provides. In the scenario in Section II.A with the iPhone recording, X is likely to be more precise and accurate in her description of what has occurred if she knows that Y is recording her. If, however, she has no idea that Y is recording her statement, she may just make an off-handed comment about what color she thinks the car was without being certain or making a serious attempt to recall specific details. Therefore, the express-consent requirement brings the amended rule closer to the current reliability guarantee that the oath and formal proceeding requirements provide.

The second problem—the one that the Innocence Project specifically raised in their response to the Advisory Committee's request for comment—expands upon the unreliability issue addressed above. The Innocence Project fears that the lack of a reliability guarantee will

¹⁰⁰ See *State v. Whelan*, 513 A.2d 86, 92–93 (Conn. 1986). See generally CONN. CODE OF EVID. § 6-10 (2000).

¹⁰¹ See PRATER ET AL., *supra* note 9, at 858; see also *Valdez-Soto*, 31 F.3d at 1472; Miller, *supra* note 6, at 40.

¹⁰² Liesa L. Richter, *Seeking Consistency for Prior Consistent Statements: Amending Federal Rule of Evidence 801(d)(1)(B)*, 46 CONN. L. REV. 937, 965 (2014).

¹⁰³ *Id.*

increase wrongful convictions.¹⁰⁴ Imposing an express-consent requirement, however, acts as an additional safeguard by increasing the likelihood that the declarant was being precise and accurate when making the prior statement.¹⁰⁵ Therefore, the enhanced reliability provided through the consent provision can help alleviate many of the Innocence Project's concerns; if there is a lesser chance that the prior statement on the audiovisual recording was inaccurate, then it follows that there is a lesser chance of an innocent person being wrongfully convicted due to an inaccurate prior statement.

The third problem with the Advisory Committee's proposal—that states with all-party consent laws would not be able to adopt the new rule—is also solved by implementing the consent requirement. Although this issue alone is not particularly severe, it is still worth noting that an express-consent provision enables all states to adopt the amended rule if they so choose, regardless of their own laws' varying consent requirements for recordings. Therefore, the consent requirement will make it easier for the approximately 38 states that follow the FRE to continue doing so if they wish.¹⁰⁶

The fourth problem critics of the proposed amendment have expressed is the “proliferation problem,” or an overabundance of available audiovisual recordings that could be admitted under the revised rule.¹⁰⁷ Various members of the Advisory Committee have specifically responded to these concerns and explained why this is not actually a serious problem and why the availability of more evidence is potentially beneficial to our justice system.¹⁰⁸ One reason for their lack of concern is the fact that the average person recording videos does not know about the rule or understand the difference between substantive and impeachment evidence.¹⁰⁹ As one member of the Advisory Committee explained, a person who records something only because of a change in FRE 801(d)(1)(A) would have to go through the following thought process: “I would not record this statement under ordinary circumstances, but I am going to record this one, because then it can be used not only for impeachment purposes but as substantive evi-

¹⁰⁴ See Fabricant Memorandum, *supra* note 10, at 2.

¹⁰⁵ See *Valdez-Soto*, 31 F.3d at 1472 (explaining the statements in question “possessed substantial indicia of reliability” because the defendant made the statements in an interview where he knew that a translator was contemporaneously recording what he said); PRATER ET AL., *supra* note 9, at 858.

¹⁰⁶ See Fabricant Memorandum, *supra* note 10, at 1.

¹⁰⁷ See Apr. Capra Memorandum, *supra* note 41, at 12–13.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 12.

dence.”¹¹⁰ Such forethought seems unlikely for those unfamiliar with the intricacies of the FRE.¹¹¹ Even if the proliferation problem were serious, the express-consent requirement would undoubtedly alleviate the problem because it would narrow the number of available recordings to those wherein the declarant gave express consent to being recorded.

The fifth problem opponents of the change have brought to light is that it could incentivize people to record false statements.¹¹² As the Advisory Committee has explained, this is probably not a significant issue, nor would it be a significant issue even without a consent requirement, for the same reasons detailed in the previous paragraph.¹¹³ Additionally, a review of states’ evidentiary rules indicates that fake recordings probably will not be problematic. California, for example, has an even broader version of FRE 801(d)(1)(A) than what the Advisory Committee is proposing, and neither judges nor practitioners have expressed concerns about courts admitting an abundance of false recordings.¹¹⁴ To the extent that it is a problem, however, the consent requirement would make false statements much less likely, as the person recording the false statement would not only need the foresight to record the false statement but would also have to know about the express-consent requirement. It is fairly safe to say that the average person does not know anything about FRE 801(d)(1)(A), let alone any changes that are made to it.¹¹⁵

Finally, and perhaps most significantly, the express-consent requirement serves as a happy medium that could enable the Advisory Committee’s proposal to actually become law.¹¹⁶ Attorneys and legal scholars are sharply divided about whether a witness’s own statements should be defined as hearsay and whether hearsay exemptions should be expanded.¹¹⁷ Although the Advisory Committee’s proposal is still in preliminary stages of discussion, it has already garnered both strong

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *See id.* at 13–14.

¹¹³ *See id.* at 12–14.

¹¹⁴ *See id.* at 13.

¹¹⁵ *See id.* at 14.

¹¹⁶ Although the sharp division in the legal community regarding expanding hearsay exemptions was not discussed in Part I as one of the five major problems with the Advisory Committee’s proposal, as a practical concern these differing opinions need to be taken into account. Because this Note’s suggested rule occupies a middle ground between the traditional rule and marked expansion of the rule, it would be more likely to garner the necessary support from the Advisory Committee, the Supreme Court, and Congress.

¹¹⁷ *See PRATER ET AL., supra* note 9, at 622–23.

support from some groups and staunch opposition from others.¹¹⁸ The express-consent requirement represents a compromise. It does not purport to change the federal approach that generally treats a witness's own out-of-court statements as hearsay, and it significantly curtails the number of audiovisual recordings that would be admissible under the amended rule. It also acknowledges, however, that certain technological advances have fundamentally changed the way society operates and provides our justice system with an opportunity to embrace such changes. The drafters of the FRE cannot pretend that technology has not advanced, but they also cannot pretend that such advances necessarily provide all the same reliability guarantees found in the existing FRE. Therefore, the express-consent requirement can serve as a middle ground that accounts for both the practicality of allowing for the use of modern technology and for the reliability guarantee underlying the traditional hearsay rule.

C. Addressing Potential Objections to Amending FRE 801(d)(1)(A) and Imposing an Express-Consent Requirement

This Section addresses five potential objections that could be made to the express-consent provision and explains how the express-consent provision either already addresses the criticisms or outweighs those concerns.

1. Objection 1: An Express-Consent Requirement Is Not as Reliable as an Oath Requirement

Although there are undoubtedly lawyers, scholars, and organizations who will continue to have concerns about the substantive admissibility of unsworn audiovisual recordings, the express-consent provision is sufficient to ensure reliability. The primary benefit of requiring a recording to have both audio and video is that it gives the factfinder a better opportunity to assess and weigh the evidence.¹¹⁹ For example, if a declarant is drunk or being coerced, this will likely be discernible on a videotape in a way that it may not be on an audiotape.¹²⁰ Additionally, FRE 801(d)(1)(A) only applies when the declarant is also a witness, so the declarant is available for further questioning on the circumstances surrounding the recording.¹²¹ She

¹¹⁸ See Apr. Capra Memorandum, *supra* note 41, at 3; Fabricant Memorandum, *supra* note 10, at 1.

¹¹⁹ See Apr. Capra Memorandum, *supra* note 41, at 15.

¹²⁰ See *id.*

¹²¹ See FED. R. EVID. 801(d)(1)(A); Apr. Capra Memorandum, *supra* note 41, at 15.

may be able to explain the inconsistency or any circumstances surrounding the audiovisual recording that may not be readily apparent to the factfinder.¹²² Much of trial involves opposing parties eliciting inconsistent or contradictory evidence, and it is the factfinder's responsibility to weigh all of the evidence in coming to a verdict.¹²³

Additionally, even the current version of FRE 801(d)(1)(A) does not lead to complete accuracy and truthfulness. Because the current rule requires a witness to have made a prior inconsistent sworn statement before that statement is admissible for its substance, the declarant must necessarily have been incorrect or lying either when making the prior statement or when testifying in court.¹²⁴ Because she is under oath while making both statements, this strongly indicates that being under oath is far from an absolute guarantee of trustworthiness. Therefore, with the express-consent requirement acting as an additional safeguard, there is little reason not to allow the factfinder to decide which (if either) statement to believe.

Furthermore, even if a prior inconsistent statement does fall under FRE 801(d)(1)(A), the jury is still allowed to hear it for impeachment purposes under the current rules.¹²⁵ Although limiting instructions are available when a statement is not offered for its truth, as explained in Part I of this Note, many legal scholars and even judges believe that limiting instructions are essentially useless and that "we're kidding ourselves" to think juries understand them or are able to properly apply them.¹²⁶ Therefore, the absence of a limiting instruction is unlikely to have any drastic effects on trials.

2. *Objection 2: The Amendment Would Only Benefit the Prosecution*

The Innocence Project's response to the Advisory Committee's proposal suggests that they believe such a change will serve primarily as a benefit to the prosecution and a detriment to the defense,¹²⁷ but there are many situations in which this new rule could actually aid the defense. Imagine a criminal case in which a defendant expected the declarant to testify on her behalf, but then right before trial the prosecution offers the declarant a deal, and the declarant agrees to testify

122 See Apr. Capra Memorandum, *supra* note 41, at 15.

123 See *id.*

124 See FED. R. EVID. 801(d)(1)(A).

125 See FED. R. EVID. 613, 806.

126 Apr. Capra Memorandum, *supra* note 41, at 4; see PRATER ET AL., *supra* note 9, at 603.

127 See generally Fabricant Memorandum, *supra* note 10.

for the prosecution. If the defendant has recorded (with the requisite consent) the declarant's prior statements that favor her case, these statements will now be admissible not only to impeach the declarant but also to prove that the facts contained in the declarant's prior statement are true. Allowing for the substantive use of audiovisual recordings could also prove beneficial to either party in civil cases. For example, if there is a party in a civil case who is worried about a certain witness changing her testimony at trial, that party could simply record the witness's statements (with the requisite consent) prior to trial without incurring the costs associated with a deposition,¹²⁸ assuming that a deposition is not otherwise necessary.

Furthermore, the prospect of using audiovisual recordings substantively at trial will likely encourage the government to record more parts of its investigations, specifically custodial interrogations.¹²⁹ This will help ensure that "confessions are solid and trustworthy,"¹³⁰ as recording has proven to be an excellent means of "detering risky interrogation techniques" that result in false confessions.¹³¹ Recording also improves the overall quality of interviews and interrogations because police officers do not need to stop and take notes, and it enables supervisors to watch the tapes and provide feedback to the interrogators, thus creating more training opportunities.¹³² Additionally, recording interrogations enables police and prosecutors "to review tapes to weed out suspect cases before they reach juries that may believe false tales," further alleviating the Innocence Project's fears about reliability.¹³³ "[P]sychological research demonstrate[s] the grave risk of unreliability of unrecorded confessions and the equally grave risk that jurors are not well-equipped to spot such unreliability," but when there is a recording, jurors can better assess the confession (regardless of whether it is admitted substantively or merely for impeachment purposes);¹³⁴ this is particularly important because of "the

¹²⁸ See Jeff Bennion, *Why Do Video Depositions Cost So Much?*, ABOVE L. (June 27, 2017, 1:33 PM), <http://abovethelaw.com/2017/06/why-do-video-depositions-cost-so-much> [<https://perma.cc/NXP7-TAN7>].

¹²⁹ See Apr. Capra Memorandum, *supra* note 41, at 12.

¹³⁰ JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS 18 (2009), [http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project\(07\).pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project(07).pdf) [<https://perma.cc/B47G-HKSW>] (quoting David Angel, Deputy Dist. Attorney, Santa Clara Cty.).

¹³¹ Taslitz, *supra* note 58, at 405 (discussing the benefits to police of recording statements).

¹³² See *id.*

¹³³ *Id.*

¹³⁴ *Id.* at 427.

overwhelming weight that confessions carry at trial.”¹³⁵ The benefits of recording custodial interrogations are clearly extensive, especially when compared to the “minimal costs” such recordings will impose on the police.¹³⁶ Furthermore, studies involving “the more than 450 police departments that currently record demonstrate that even if suspects know they are being recorded, it makes no difference in obtaining their cooperation,”¹³⁷ so the express-consent requirement will not impede the effectiveness of custodial interrogations. Essentially, encouraging the police to record interrogations through an expansion of FRE 801(d)(1)(A) will make audiovisual recordings a “powerful truth-finding tool” that enhances rather than diminishes reliability to benefit both defendants and police.¹³⁸

3. *Objection 3: People Are More Candid and Honest When Unaware of the Recording*

Some research suggests that people are more candid and honest when they do not know that they are being recorded, and thus an argument could be made that the express-consent requirement actually works against reliability.¹³⁹ If the FRE accepted this theory, however, FRE 801(d)(1)(A) would not have needed an oath requirement in the first place. When a person is under oath in a deposition or other formal proceeding, she knows that the court reporter is recording her words, and yet FRE 801(d)(1)(A) still finds prior inconsistent statements made under oath to be more reliable than those made when a person was not aware that her words were being recorded.¹⁴⁰ In fact, our entire trial process demonstrates that it favors testimony elicited from witnesses who are aware of the gravity of the situation and understand the importance of testifying accurately.¹⁴¹ Film and television dramas may frequently depict sudden courtroom outbursts and mid-trial confessions, but in reality, much of what witnesses say is generally

¹³⁵ JUSTICE PROJECT, *supra* note 130, at 2.

¹³⁶ *See id.* at 2, 8 (“In surveys of the more than 450 police and sheriff’s departments that record, no officers have reported that the costs were prohibitive enough to warrant abandoning the practice.”).

¹³⁷ *Id.* at 5.

¹³⁸ *See id.* at 18 (quoting William Geller, Former Assoc. Dir., Police Exec. Research Forum); *id.* at 7 (describing how the officers in police departments that have adopted recording policies have responded “enthusiastically” to the practice); Apr. Capra Memorandum, *supra* note 41, at 12.

¹³⁹ *Cf.* Slobogin, *supra* note 59, at 232–34 (explaining that people act differently when they know that they are being recorded).

¹⁴⁰ *See* FED. R. EVID. 801(d)(1)(A); Miller, *supra* note 6, at 35, 40.

¹⁴¹ *See* Capra, *supra* note 34, at 1437; Richter, *supra* note 102, at 965.

planned or rehearsed in advance.¹⁴² Witnesses are not usually brought into court without notice and told to answer a rapid-fire series of questions in the hopes of catching them off guard and eliciting the truth. On the contrary, attorneys often prepare witnesses extensively before they take the stand, and witnesses can see the court reporter making a record of what they are saying during trial.¹⁴³ Our justice system has chosen precision and accuracy over spontaneity,¹⁴⁴ and if Congress approves an amendment to FRE 801(d)(1)(A), such an amendment should contain an express-consent provision reflecting that same policy choice.

Furthermore, amending FRE 801(d)(1)(A) will not lessen the role of FRE 403, nor will it prevent judges from screening evidence to ensure that it comports with all other FRE.¹⁴⁵ If a declarant's statements on an audiovisual recording are so patently false that no reasonable person could possibly believe them or the statements were clearly coerced, then the judge can still refuse to admit the recording.¹⁴⁶

4. *Objection 4: The Factfinder Should Receive and Weigh All of the Evidence*

Another potential argument against implementing an express-consent provision is that the factfinder is responsible for weighing all of the evidence and thus there is no need for such a requirement.¹⁴⁷ Under this rationale, however, almost all of the FRE would become superfluous and there would be little or no limit on what is admissible. Although the factfinder is ultimately responsible for weighing the evidence, our system still places boundaries on what evidence the factfinder sees.¹⁴⁸ If there is evidence that tends to mislead the jury, the court does not just say, "Oh, well. They'll weigh all of the evidence and figure it out."¹⁴⁹ If an expert witness cannot demonstrate the relia-

¹⁴² Compare Capra, *supra* note 34, at 1433, with *LEGALLY BLONDE* (Metro-Goldwyn-Mayer 2001) (featuring a scene set during a murder trial in which the main character cross-examines the defendant's stepdaughter and gets her to confess to being the true murderer).

¹⁴³ See Capra, *supra* note 34, at 1433.

¹⁴⁴ See FAIRFAX, *supra* note 1, at 133 ("As compelling as the classic legal television show depictions might be, the last-minute bombshell introduction of a surprise witness or a case-breaking piece of evidence undermines the quality of justice and the truth-seeking function of criminal litigation."); Capra, *supra* note 34, at 1437.

¹⁴⁵ See FED. R. EVID. 104, 403.

¹⁴⁶ See FED. R. EVID. 403.

¹⁴⁷ See Apr. Capra Memorandum, *supra* note 41, at 15.

¹⁴⁸ See *id.*

¹⁴⁹ See FED. R. EVID. 403.

bility of her methods, the court does not simply let the jury decide whether her conclusion is accurate based on its own outside knowledge.¹⁵⁰ If a lay witness tries to testify to someone else's state of mind, the court does not merely shrug its shoulders and allow the jury to determine whether it is possible to be certain of someone else's mental state.¹⁵¹ Similarly, the hearsay rule intentionally sets boundaries on which statements factfinders are allowed to hear, and the rule makes every effort to keep out statements if the factfinder will be unable to properly assess their reliability.¹⁵² Making audiovisual recordings substantively admissible is wise only if certain safeguards (such as the express-consent requirement) exist to serve as reliability guarantees.

5. *Objection 5: There Are Costs to Imposing an Express-Consent Requirement*

One potential downside of imposing a consent requirement rather than simply allowing all prior inconsistent statements captured audiovisually into evidence is that courts will have to spend time and resources deciding whether the declarant did in fact consent. The Advisory Committee has explained that it does not want to go the route of some states and impose an additional requirement that the recorded statement was not made “under circumstances that indicate unreliability,” as it believes doing so would lead to additional costs such as hearings and appeals to determine whether the circumstances indicate unreliability.¹⁵³ An express-consent provision, however, is much more specific than the vague phrase “circumstances that indicate unreliability,” and thus it would not be nearly as time consuming or difficult for courts to determine whether a statement meets the express-consent requirement.¹⁵⁴ As previously explained, the express-consent provision that this Note proposes only requires either that the declarant made the recording herself or that she made statements indicating consent on the audiovisual recording itself. Implied consent is not allowed under this Note's proposal, specifically to prevent the lack of clarity and unnecessary costs that would undoubtedly ensue.

Even if asking courts to determine whether express consent existed before an audiovisual recording is admitted for its substance im-

¹⁵⁰ See FED. R. EVID. 702.

¹⁵¹ See FED. R. EVID. 602.

¹⁵² See Richter, *supra* note 102, at 965–66 (explaining the importance of hearsay exemptions having some form of a reliability guarantee).

¹⁵³ Apr. Capra Memorandum, *supra* note 41, at 14–15.

¹⁵⁴ See *id.*

poses a minor cost upon them, such a small cost is worth ensuring that the new rule has the necessary reliability guarantees that underpin the traditional hearsay rule.¹⁵⁵ Taking the time to consider whether a declarant consented to a recording is worthwhile if doing so prevents the increase in wrongful convictions that the Innocence Project fears will result from the Advisory Committee's amendment. Furthermore, lowering wrongful conviction rates in itself benefits the criminal justice system by increasing efficiency and avoiding future civil lawsuits from those who were wrongfully convicted.¹⁵⁶

Additionally, allowing audiovisual recordings under FRE 801(d)(1)(A) will lower costs in other ways regardless of any consent requirement. As previously explained, allowing for the admission of audiovisual recordings will encourage the police to record more parts of their investigations, specifically custodial interrogations.¹⁵⁷ This will, in turn, reduce the number of frivolous motions to suppress confessions that defendants claim police improperly elicited, as there will be little purpose in bringing a motion to suppress if the audiovisual recording shows no such improper police conduct.¹⁵⁸ Therefore, even if taking time to determine whether a declarant gave express consent does prove to be somewhat of an additional cost, there are other ways in which the rule will decrease costs. In the aggregate, the benefits of implementing an express-consent requirement far outweigh any minimal costs.

CONCLUSION

Congress should implement the Advisory Committee's proposed amendment to FRE 801(d)(1)(A) and make prior inconsistent statements captured audiovisually admissible for their substance, but they should do so only if the amendment includes a provision requiring that the declarant gave express consent to being recorded. Without such a provision, there is little or no indication that the declarant was speaking seriously or accurately, and thus the rule is not providing the same kind of reliability guarantee inherent in the current hearsay rule.¹⁵⁹ Reliability must remain the linchpin of admissibility if our justice system is to function properly, but the drafters of the FRE also cannot afford to ignore the positive impact that audiovisual recordings

¹⁵⁵ See Richter, *supra* note 102, at 965–66.

¹⁵⁶ See JUSTICE PROJECT, *supra* note 130, at 8; Fabricant Memorandum, *supra* note 10, at 1.

¹⁵⁷ Apr. Capra Memorandum, *supra* note 41, at 12–13.

¹⁵⁸ Taslitz, *supra* note 58, at 406, 409.

¹⁵⁹ See *id.* at 405; Park, *supra* note 80, at 80.

could have both at trial and on the justice system as a whole.¹⁶⁰ Therefore, adopting the amendment with a consent provision serves as a middle ground by preserving the fundamental aspects of the traditional hearsay rule while also “bring[ing] the law of evidence into the 21st century” to provide litigants with the numerous benefits of modern technology.¹⁶¹

¹⁶⁰ *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

¹⁶¹ Lau Memorandum, *supra* note 54, at 66.