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Consistent Rules for Prior Statements: Advocating for the Substantive Use of Prior Consistent Statements in Massachusetts Courts

Paul Lewis*

I. PURPOSE

Presently, Massachusetts courts lag behind courts of federal jurisdiction with regard to the use of prior consistent statements at trial.[1] While the Advisory Committee notes accompanying Federal Rule of Evidence 801 explicitly state that "no sound reason is apparent why" prior consistent statements made under oath "should not be received generally [at trial],"[2] in Massachusetts, prior statements are not admissible for the truth of what they assert when they are consistent with testimony at trial.[3] Instead, pursuant to a variety of Massachusetts Supreme Judicial Court (SJC) and Appeals Court decisions, such prior statements are admissible only to suggest to the fact-finder that the

* J.D. Graduate, Boston College Law School, 2014; Judicial Law Clerk at the United States District Court for the District of Massachusetts. Special thanks to Assistant District Attorneys Donna Patalano, Jack Zanini, Allison Callahan, and the rest of the team in the Suffolk County District Attorney's Office Appeals Unit for their mentorship during the summer and fall of 2012; to Boston College Law School Professor and Greater Boston Legal Services Attorney, Mithra Merryman, for inspiring me to advocate for this type of reform; to Boston College Law School Professor R. Michael Cassidy for his guidance throughout; to the best editor I know, Diane Sherlock, for her help with this piece; and, finally, to the 2014-2015 Editorial Board of the *Suffolk University Law Review* for their thoughtful suggestions and incredibly hard work.

1. *Compare* FED. R. EVID. 801(d)(1)(B), *with* Commonwealth v. Zukoski, 345 N.E.2d 690, 693 (Mass. 1976). Federal Rule 801(d)(1)(B) explains that a statement that "is consistent with the declarant's testimony and is offered . . . to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying" is not hearsay, and therefore is admissible. FED. R. EVID. 801(d)(1)(B). Comparatively, the *Zukoski* court indicated that "a prior consistent statement is admissible only to show that the witness's in-court testimony is not the product of the asserted inducement or bias or is not recently contrived as claimed." 345 N.E.2d at 693.

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

3. *Zukoski*, 345 N.E.2d at 693.

witness is credible.[4] Contrastingly, when these statements are sufficiently inconsistent with testimony at trial, they are admitted for their full probative value.[5]

The reasoning that underlies Massachusetts courts' decision to substantively admit certain prior inconsistent statements at trial pertains primarily to those statements' inherent level of reliability.[6] Additionally, the reasoning that underlies Massachusetts courts' decision *not* to substantively admit prior consistent statements rests upon a fear that such statements may be unreliable.[7] Once Massachusetts appellate courts have deemed a certain type of statement sufficiently reliable for use at trial,[8] however, that type of statement's previously-gained status as a sufficiently reliable statement should not change based on the circumstances under which it is subsequently admitted.[9] Logically, a statement's inherent level of reliability cannot be affected by its use at trial occurring months, or even years, after the statement in question was made. Moreover, the substance of two consistent statements is intuitively more credible than that of a statement which is follows by an inconsistent statement. Nevertheless, Massachusetts courts have issued decisions that run contrary to common-sense intuitions on this matter.[10]

Furthermore, the SJC,[11] as well as other courts,[12] psychologists,[13] and scholars,[14] have observed that jurors are unable to appropriately differentiate

4. *See id.* (providing list of precedential case law); MASS. G. EVID. § 613 (2014).

5. *See* Commonwealth v. Daye, 469 N.E.2d 483, 495-96 (Mass. 1984), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005). In *Commonwealth v. Le*, the SJC expressly recognized that the portion of *Daye*'s ruling regarding the substantive use of prior inconsistent statements was unaffected by the court's decision. *See* 828 N.E.2d at 432 n.3 (citing MASS. G. EVID. § 801(d)(1)(A) (2014)); Commonwealth v. Clements, 763 N.E.2d 55, 57-58 (Mass. 2002); Commonwealth v. Sineiro, 740 N.E.2d 602, 607-09 (Mass. 2000) ("In [*Daye*], the court also addressed the substantive use of prior inconsistent statements made under oath. That aspect of *Daye* is unaffected by our decision today.").

6. *See id.* at 493-94.

7. *See* Deshon v. Merchs.' Ins. Co., 52 Mass. (11 Met.) 199, 209 (1846).

8. *See Daye*, 469 N.E.2d at 495-96 (admitting prior statements only when inconsistent with trial testimony).

9. *See, e.g.*, Commonwealth v. Belmer, 935 N.E.2d 327, 330 (Mass. App. Ct. 2010) (admitting "c. 209A affidavits that result in the issuance of an abuse protection order"); Commonwealth v. Newman, 868 N.E.2d 946, 948 (Mass. App. Ct. 2007) (admitting witnesses' testimonies from prior trial); Commonwealth v. Fort, 597 N.E.2d 1056, 1069 (Mass. App. Ct. 1992) (admitting testimony from probable-cause hearings); *see also Daye*, 469 N.E.2d at 495 (admitting grand jury statement).

10. *See* Commonwealth v. Zukoski, 345 N.E.2d 690, 693 (Mass. 1976).

11. *See* Commonwealth v. Daye, 469 N.E.2d 483, 494 (Mass. 1984) (acknowledging jurors' difficulty distinguishing between purposes for which evidence is admitted), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements).

12. *See* United States v. De Sisto, 329 F.2d 929, 933 (2d Cir. 1964) (calling instruction to consider evidence for approved purpose "a demand for mental gymnastics of which jurors are happily incapable").

13. *See* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions To Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 677-78 (2000).

14. *See generally id.* (discussing scholars' views).

between evidence that is admissible for the truth of what it asserts and evidence that is admissible only for a limited purpose. Therefore, "formally conferring probative status to such statements does no more than legitimize current practice."[15] Substantively admitting prior consistent statements, made under oath during a certain subset of prior proceedings, also would have the collateral benefit of strengthening these statements' likelihood of truth due to the potential for additional scrutiny at a subsequent trial.[16]

Finally, the fact that prior consistent statements are not substantively admissible is also quite problematic in the context of domestic violence prosecutions.[17] During the prosecution of their batterers, domestic violence victims find themselves in an inherently disadvantaged position on the witness stand.[18] Due to the cyclical and non-incident-specific nature of abusive relationships, in conjunction with the associated memory loss and prevalence of post-traumatic stress disorder (PTSD), domestic violence victim-witnesses are particularly susceptible to having their credibility impeached during cross-examination.[19] If my proposal is adopted (thereby rendering prior consistent statements made in affidavits that lead to an abuse prevention order substantively admissible, as well as the prior *in*consistent statements made in those affidavits),[20] prosecutors would virtually always be able to combat these credibility issues during trial by using these sworn statements as substantive evidence.

For the aforementioned reasons, I propose adopting a rule that would substantively admit prior consistent statements pursuant to conditions that have been established by a combination of prior Massachusetts decisions and the Federal Rules of Evidence Advisory Committee. Specifically, in this Article, I advocate for the substantive admission of prior consistent statements under the following conditions: the statement was made under oath at a prior proceeding; the statement was "made before the witness had an incentive to fabricate

15. *Daye*, 469 N.E.2d at 492.

16. *Cf.* Commonwealth v. Francis, 734 N.E.2d 315, 331-32 n.16 (Mass. 2000) (requiring affidavits to be signed under the pains and penalties of perjury). Declarants would be made aware that the statements they make are likely to be admitted at trial and that they may be indicted for perjury if their statements are found to be untrue. *Cf. id.*

17. *See* Commonwealth v. Cruz, 759 N.E.2d 723, 731 (Mass. App. Ct. 2001) (declining to admit, for substantive purposes, prior consistent statement in case involving domestic violence dispute).

18. *See* United States v. Wade, 388 U.S. 218, 257-58 (1967) ("[M]ore often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth . . . ."); Kathleen Waits, *Battered Women and Their Children: Lessons from One Woman's Story*, 35 HOUS. L. REV. 29, 41 (1998) ("[P]eople need to understand that battered women often do not think straight because of post-traumatic stress."); Deirdre Ewing, Note, *Prosecuting Batterers in the Wake of* Davis *and* Hammon, 35 AM. J. CRIM. L. 91, 106 (2007) ("The degree of control that batterers exert over their partners inevitably results in prosecutions having to go forward without the assistance of the victims.").

19. *See* Waits, *supra* note 18, at 41.

20. *See* Commonwealth v. Belmer, 935 N.E.2d 327, 330 (Mass. App. Ct. 2010) (admitting for substantive purpose inconsistent statement made in affidavit leading to abuse prevention order).

testimony"; the statement is clearly that of the witness, not of the interrogator, and is free of coercion; there is "an opportunity for effective cross-examination of the declarant at trial"; the testimony is consistent with the declarant's testimony; the testimony is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; and "other evidence tending to prove the issue [must be] presented."[21]

II. BACKGROUND

A. The Federal Rule

The rule prohibiting hearsay testimony did not exist in its present form prior to the 1700s.[22] Before then, jurors were required to inform themselves about the facts of a case *before* trial.[23] Prior to the formation of the rule prohibiting testimony resembling what we now refer to as "hearsay," legislators and judges had no qualms with the concept of a witness's in-court testimony being corroborated by that witness's earlier consistent statements.[24] Moreover, these prior consistent statements were de facto admitted for substantive purposes because they were not accompanied by a limiting instruction.[25] During the 1700s, as the rule prohibiting hearsay testimony developed and became universally applied, prior consistent statements were gradually stripped of their admissibility, substantive or otherwise.[26]

Over time, the admissibility of prior consistent statements reemerged, along with the idea that witness credibility could not be supported unless it was called into question by an opposing party.[27] However, both federal and state courts were reluctant to extend the applicability of these statements to that of substantive admissibility.[28] Subsequently, courts developed specific conditions

21. *See infra* notes 160-67.

22. *See* FED. R. EVID. 801 (defining various terms); Edward D. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. REV. 231, 234 n.8 (1987) (discussing historical development of concept of hearsay). According to the Federal Rules of Evidence, *hearsay* is "a statement that . . . the declarant does not make while testifying at the current trial or hearing . . . [and is offered] in evidence to prove the truth of the matter asserted," where a *statement* is an oral or written assertion or "nonverbal conduct, if the person intended it as an assertion." FED. R. EVID. 801. A *declarant* is "the person who made the statement." *Id.* Rule 802 then states that "[h]earsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court." FED. R. EVID. 802.

23. *See* Ohlbaum, *supra* note 22, at 234 n.8.

24. *See id.* at 234-35.

25. *See id.*

26. *See id.* at 234 n.8.

27. *See* Ohlbaum, *supra* note 22, at 235. For example, in 1858, the Circuit Court for the District of Maine held that "testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it." United States v. Holmes, 26 F. Cas. 349, 352 (C.C.D. Me. 1858) (No. 15, 382).

28. *See* United States v. Leggett, 312 F.2d 566, 573 (4th Cir. 1962). As the Fourth Circuit noted in *Leggett*, "[i]t can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement today

for situations in which these prior consistent statements could be admissible to rehabilitate a witness.[29] Specifically, the Supreme Court held that a charge of fabrication was required, and that the prior consistent statement in question must have been made prior to the formation of the declarant's motive to fabricate.[30]

In 1975, the U.S. Congress promulgated the Federal Rules of Evidence, including Rule 801(d)(1)(B), which officially codified a requirement for the admission of prior consistent statements at trial.[31] Rule 801(d)(1)(B) codified much of the aforementioned common-law jurisprudence regarding when a prior consistent statement could be admitted.[32] Most significantly, however, the new rule also stated that if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the prior consistent statement, that statement "is not hearsay," meaning that it can be admitted for the truth of what it asserts; or in other words, it can be admitted *substantively*.[33] The Advisory Committee's notes that accompany Rule 801(d)(1)(B) read as follows:

> Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive

under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath" because the "idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth." *Id.* (quoting State v. Parish, 79 N.C. 610, 612-13 (1878)). Analyzing this trend, Professor Ohlbaum explained: "[p]ursuant to this view, prior consistent statements were no longer permitted on direct examination, but were admissible for rehabilitative purposes on redirect examination or through the testimony of witnesses who heard them." Ohlbaum, *supra* note 22, at 236 (footnote omitted).

29. *See* Ohlbaum, *supra* note 22, at 236-37. Professor Ohlbaum further explains that, in developing these conditions, courts focused on both the type of impeachment, as well as the time at which the prior statement was made. *Id.* at 237.

30. *See* Conrad v. Griffey, 52 U.S. (1 How.) 480, 491-92 (1850) ("[W]hen [statements] are made subsequent to other statements of a different character, as here, it is possible, if not probable, that the inducement to make them is for the very purpose of counteracting those first uttered."); *see also* Di Carlo v. United States, 6 F.2d 364, 366 (2d Cir. 1925).

31. Ohlbaum, *supra* note 22, at 232. During the decade prior to the official codification and enactment of the Federal Rules of Evidence, an advisory committee, appointed by the Supreme Court, had drafted the rules and sent them to Congress. *Id.* at 242 n.35 (describing evolution of Federal Rules of Evidence). Accompanying each rule, the Committee included a note explaining why the rule was included and why it was worded in a particular way. *See id.*; *see also* FED. R. EVID. According to Professor Ohlbaum, "[u]nless changes were made in the Supreme Court's proposal, the [Advisory Committee] notes are generally accepted as representing the intent of Congress." Ohlbaum, *supra* note 22, at 242 n.35.

32. *See* United States v. Check, 582 F.2d 668, 680 (2d Cir. 1978).

> [T]he class of such prior statements which can potentially be so utilized as substantive evidence because of their exclusion from the definition of hearsay is carefully confined to those "(p)rior consistent statements (which) traditionally have been admissible (but only for the rehabilitative purpose of) rebut(ting) charges of recent fabrication or improper influence or motive."

Id. (alterations in original).

33. FED. R. EVID. 801(d)(1)(B).

> evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, *no sound reason is apparent why it should not be received generally*.[34]

In the general comments on Rule 801(d)(1) (pertaining to the general admission of prior statements, both consistent and inconsistent), the Committee specifically noted that there is not a hearsay problem when a witness "admits on the stand that he made the [prior consistent out-of-court] statement and that it was true."[35] Declaring that this decision "is one more of experience than of logic," the Committee implied that the expansion of the use of prior statements was motivated by policy-based concerns.[36] Specifically, the Committee stated that the prior-statement rules will "provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."[37]

The federal circuit courts first considered the new Rule's invocation in a 1978 Fifth Circuit case, *United States v. Williams*.[38] In *Williams*, the accused was charged with filing false income tax returns, and he objected to the admission into evidence of an affidavit given to the FBI by his chief assistant.[39] Determining that the defense had attempted to discredit the assistant's testimony by showing that threats of prosecution had influenced his testimony, the Fifth Circuit held that the prosecution was allowed to introduce the affidavit, in which the assistant's responses were the same as the ones that he had given at trial, for the truth of what it asserted, pursuant to Rule 801(d)(1)(B).[40] Therefore, the court ruled that the affidavit was substantively admissible by virtue of the fact that prior consistent statements are excluded from the hearsay bar.[41] Specifically, the court stated that the requisite

34. FED. R. EVID. 801(d) advisory committee's note (emphasis added).

35. FED. R. EVID. 801(d) advisory committee's note. The Committee noted that "[t]he hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth," though this scenario only occurs in the context of prior inconsistent statements. *Id.*

36. *Id.*; *see also* Commonwealth v. Daye, 469 N.E.2d 483, 491-92 (Mass. 1984) (explaining that the Federal Rules of Evidence represent political compromise relative to admission of prior inconsistent statements), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements). Much of the advisory committee notes on 801(d)(1) concern the potential hearsay-based concerns invoked when a prior inconsistent statement is used substantively. *See* FED. R. EVID. 801(d) advisory committee's note. Specifically, the Committee stated that Rule 801(d)(1)(A), regarding prior inconsistent statements, will "provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case." *Id.* (citation omitted) (internal quotation marks omitted).

37. FED. R. EVID. 801 advisory committee's notes (citation omitted) (internal quotation marks omitted).

38. 573 F.2d 284 (5th Cir. 1978).

39. *Id.* at 286.

40. *Id.* at 289.

41. *Id.*

conditions were met because the assistant "testified at the trial and was also subject to cross-examination concerning the statement."[42] Additionally, as the court wrote, "[d]efense counsel attempted to impeach [the chief assistant] through questions suggesting that [his] motive in testifying was to escape prosecution himself. The prior affidavit was therefore admissible to rebut this attack on [his] credibility."[43]

University of Illinois College of Law Professor Michael H. Graham briefly summarizes the history of the development of prior consistent statements in his article, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*.[44] According to Professor Graham, the prior consistent statement rule has previously undergone three stages of development, and is currently in its fourth.[45] First, before 1675, prior consistent statements were admissible as substantive evidence; then, with the advent of the common-law prohibition against hearsay, prior consistent statements were only admissible to boost the credibility of the declarant; third, courts became divided as to exactly what circumstances would warrant the admission of a prior consistent statement to boost credibility; and finally, the current rule, enacted in 1975, again admits prior consistent statements for the truth of what they assert.[46]

B. Massachusetts Law Pertaining to Prior Inconsistent Statements

Unlike the federal system, Massachusetts courts do not adhere to a codified list of evidentiary rules.[47] Instead, Massachusetts rules of evidence have developed as a result of judicial decisions, by both the Appeals Court and the SJC.[48] The development of prior-inconsistent-statement jurisprudence

42. *Williams*, 573 F.2d at 289.

43. *Id.*

44. *See* Michael H. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 HASTINGS L.J. 575, 577-78 (1979) (discussing complex history of admissibility of prior consistent statements).

45. *Id.* at 578.

46. *Id.*

47. *See* Commonwealth v. Gonsalves, 833 N.E.2d 549, 559 (Mass. 2005) (indicating Massachusetts has "common-law rules of evidence").

48. *See id.* Although not formally codified, in 2006 the SJC organized and published these rules in the form of a "guide." *See* MASS. G. EVID., at ii (2014). The Massachusetts Guide to Evidence mirrors the organization and format of the Federal Rules of Evidence. *Id.* Prior to publication of the Guide, the SJC considered, and rejected, "The Proposed Massachusetts Rules of Evidence." Jeremiah F. Healy III, *Ten Years After: A Reconsideration of the Codification of Evidence Law in Massachusetts*, 15 W. NEW ENG. L. REV. 1, 1 & n.1 (1993) (providing text of SJC's rejection of Proposed Rules in 1982). In the interim between the rejection of the Proposed Rules and the publication of the Guide, the SJC invited practitioners to cite to the Proposed Rules despite their being rejected. *See* Commonwealth v. Daye, 469 N.E.2d 483, 491 (Mass. 1984) (inviting citation to Proposed Rules), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements); *see also* Healy, *supra*, at 14-15. Since the publication of the Guide, the Proposed Rules are no longer available for reference. *See* Mass. Court System, *Massachusetts Guide to Evidence*,

exemplifies the process by which this occurs. In the 1984 case *Commonwealth v. Daye*,[49] the SJC adopted the reasoning of proposed rule 801(d)(1)(A),[50] which allows a declarant's sworn prior inconsistent statement to be admitted as *substantive* evidence, so long as the declarant is subject to cross-examination at trial.[51]

The defendant in *Daye* was convicted at a jury trial on indictments charging him with assault by means of a dangerous weapon and unlawfully carrying a firearm; additionally, on an indictment for assault with intent to murder, the defendant was convicted of the lesser included offense of assault with intent to kill.[52] When an identifying witness for the prosecution had said, on direct examination, that he "didn't know what he [the shooter] looks like," the prosecutor questioned this witness about his grand jury testimony, in which he had indicated otherwise.[53] Over the defendant's objection, the witness read from the section of the grand jury transcript in which he had stated to the grand jury that he had identified the defendant as the gunman.[54] Despite reading the transcript, however, this witness continued to deny having actually recognized and identified the defendant, and implied that his grand jury testimony was not truthful.[55] For these reasons, the SJC declined to consider the grand jury testimony under the "past recollection recorded" exception to the rule against hearsay.[56] Instead, the SJC held that the prior testimony should be admitted for

MASS.GOV, http://www.mass.gov/courts/case-legal-res/guidelines/mass-guide-to-evidence/ (last visited Mar. 20, 2015), *archived at* http://perma.cc/N4D3-GJRK (displaying only Massachusetts Guide to Evidence and not Proposed Rules). When referencing a specific evidentiary rule discussed in a case that cites to the Proposed Rules, this Article uses "proposed rule"; when referencing a specific rule in the currently available Guide, this Article uses "rule." When referencing a specific rule in the Federal Rules of Evidence, this Article uses "Rule."

49. 469 N.E.2d 483.

50. *See id.* at 493 (adopting reasoning of proposed rule 801(d)(1)(A)). The relevant text of the proposed rule was that a statement is not hearsay (and is therefore admissible) if it is a prior statement by a witness and "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … inconsistent with [her] testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." *Id.* at 485 n.1.

51. *See id.* at 488 (limiting non-identifying witness's testimony regarding another witness's prior positive identification to impeachment purposes). Previously, the testimony of a non-identifying witness concerning an extrajudicial identification by the identifying witness was admissible "only to corroborate the fact that [the identifying witness] did *at that time and place* make the identification, not *as proof of the truth of the identification itself*." Commonwealth v. Leaster, 287 N.E.2d 122, 125 (Mass. 1972) (emphasis added).

52. *Daye*, 469 N.E.2d at 485.

53. *Id.* at 489 (alteration in original).

54. Commonwealth v. Daye, 469 N.E.2d 483, 489 (Mass. 1984), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements).

55. *Daye*, 469 N.E.2d at 489.

56. *See id.* at 490.

> When a witness has no current recollection of a particular event, the witness may incorporate in his testimony "a writing expressive of his past knowledge," provided the witness, "having firsthand knowledge of the facts recorded in the memorandum, [is] able to testify that the memorandum written or observed by him was true at the time it was made."

its substantive value *merely because it is an inconsistent statement*, thereby adopting the reasoning of proposed rule 801(d)(1)(A).[57] On these grounds and with this rule in effect, the SJC then vacated the conviction and granted the defendant a new trial.[58]

In granting the new trial, the SJC noted that it was henceforth altering Massachusetts's common-law rule regarding the admissibility of prior inconsistent statements.[59] The SJC explained that, prior to this decision, Massachusetts adhered to the "orthodox" view that prior inconsistent statements constituted inadmissible hearsay, and were only admissible at trial for the limited purposes of impeachment.[60] The court further explained that this orthodox view had been premised on a belief that prior statements, in general, lack the requisite level of reliability to be admitted at trial.[61] The *Daye* court then put forth the modern, contrasting view, which it subsequently adopted. According to the SJC, proponents of the modern view contend that the reliability of prior inconsistent statements can be tested "notwithstanding the witness's recantation" through cross-examination at trial because cross-examination "'can probe the witness' perception and memory and can develop all the reasons why the witness made a statement which he now insists was not true.'"[62] Persuaded by this view, the SJC held that "the absence of a contemporaneous cross-examination does not in our opinion so impair the [prior inconsistent grand jury] statement's reliability as to mandate that the fact finder be deprived of the right to accept the statement for its probative worth" because "the presence of the declarant at trial creates an opportunity fully to explore the circumstances under which [the] statement was made," as well as the "veracity of its factual content."[63]

Considerations of public policy and pragmatism also had a hand in persuading the *Daye* court in reaching its decision. The SJC mentioned the

Id. (alteration in original) (citations omitted). In *Daye*, the court noted that this witness "denied at trial both first hand knowledge of the defendant's involvement in the crime and the truth of his statement to the grand jury implicating the defendant." *Id.*

57. *See id.* at 493 (acknowledging probative value of prior inconsistent statements).

58. *Daye*, 469 N.E.2d at 496.

59. *See id.* at 485. The SJC only revised this rule to the extent that it applies to a witness's grand jury testimony. *Id.* at 495. The SJC "defer[red] consideration of issues relating to the probative use of other prior inconsistent statements, believing that any further change will be best accomplished through the 'incremental process of common law development' rather than a general rule." *Id.* at 493 (citations omitted). It should be noted that this holding did not affect Massachusetts rules of evidence regarding prior consistent statements.

60. Commonwealth v. Daye, 469 N.E.2d 483, 490 (Mass. 1984), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements).

61. *Daye*, 469 N.E.2d at 491. "[T]he reliability of a prior inconsistent statement 'rests on the credit of the declarant, who was not (1) under oath, (2) subject to cross-examination, or (3) in the presence of the trier, when the statement was made.'" *Id.* (citation omitted).

62. *Id.* at 492 (citation omitted).

63. *Id.* at 493.

viewpoint that not allowing the substantive admission of prior inconsistent statements "encourages witness intimidation and deprives the prosecution of evidence necessary to prove cases against criminal defendants in instances where key witnesses recant their testimony."[64] Additionally, the court mentioned the "pragmatic argument that juries cannot, and perhaps should not, be expected to discriminate between impeachment and probative use of a prior inconsistent statement," and that allowing substantive admission of such statements simply legitimizes that reality.[65] Ultimately, even though it recognized flaws in both of the above arguments, the SJC concluded that the reasoning of the modern view was sturdier than that of the "orthodox" view.[66]

The *Daye* court noted that its new rule governing the substantive admission of prior inconsistent statements within the context of grand jury testimony was subject to three criteria. First, the declarant must be subject to effective cross-examination at trial.[67] Second, the statement must clearly be that of the declarant, and not simply the declarant's "yes" or "no" responses to a questioner's interrogation.[68] Third, the statement may not constitute the only basis for conviction, and some degree of corroborative evidence is required.[69]

Daye is the first in a long line of cases that have developed the notion of substantively admitting prior inconsistent statements, when presented for impeachment or overcoming a witness's recantation at trial. Following the *Daye* decision, the Massachusetts courts of appellate jurisdiction further expanded the types of proceedings from which a prior inconsistent statement could be substantively admitted. First, in *Commonwealth v. Berrio*, the SJC held that grand jury testimony could be substantively admitted as evidence for reasons other than mere identification.[70] The grand jury testimony at issue was that of a sexual abuse victim, and concerned her testimony regarding when and with whom the sexual abuse occurred.[71] The defendant argued that *Daye* only

64. *Daye*, 469 N.E.2d at 492.

65. *Id.*

66. *See* Commonwealth v. Daye, 469 N.E.2d 483, 492 (Mass. 1984), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements). Specifically, the court recognized that prior statements may be fabricated for reasons other than intimidation, and that adopting the modern view runs the risk that defendants could be convicted based on false or erroneous prior statements. *Daye*, 469 N.E.2d at 492.

67. *Daye*, 469 N.E.2d at 494.

68. *Id.*

69. *Id.* The Appeals Court clarified in *Commonwealth v. Belmer* that corroborative evidence is necessary in order to obtain a conviction, not to simply admit the statement. *See* 935 N.E.2d 327, 331 (Mass. App. Ct. 2010) (describing criteria developed in *Daye* decision). Later, in *Commonwealth v. Noble*, the SJC held that when prior inconsistent grand jury testimony concerns an essential element of the crime, the Commonwealth must offer at least some additional evidence on that element in order to support a conclusion of guilt beyond a reasonable doubt. 629 N.E.2d 1328, 1330 (Mass. 1994). The court also explained, however, that that additional evidence need not be sufficient in itself to establish a factual basis for each element of the crime. *Id.* at 1330 n.3.

70. 551 N.E.2d 496, 500-01 (Mass. 1990).

71. *Id.* at 500. In her grand jury testimony, the victim had stated that the defendant, her father, had

applied to identification testimony and, as such, the victim's grand jury testimony should have been excluded.[72] While the *Berrio* court acknowledged that "in some ways the issue of identification has for a long time received unique treatment," it stated that "in *Daye*, we simply adopted Proposed Mass.R.Evid. 801(d)(1)(A) subject to conditions declared by us. Neither the rule nor *Daye* is limited to identification evidence."[73] By finding that the *Daye* conditions were met, the *Berrio* decision indicated that the SJC was willing to expand *Daye* to cover other prior inconsistent statements to be substantively admitted.[74]

Accordingly, the *Daye* rule's first major expansion beyond the realm of a grand jury proceeding came in the 1992 Appeals Court case of *Commonwealth v. Fort*.[75] In *Fort*, the Appeals Court held that prior inconsistent statements made at a probable-cause hearing were admissible for substantive purposes.[76] The court took an expansive reading of *Daye*, commenting that the *Daye* holding had simply "deferred the 'consideration of issues relating to the probative use of other prior inconsistent statements'" to subsequent decisions.[77] The court saw "no reason why inconsistent statements [made] at a probable-cause hearing should not be given probative value if the prerequisites of Proposed Mass.R.Evid. 801(d)(1)(A) and the conditions set forth in *Daye* are met."[78] The Appeals Court therefore held that testimony at a probable-cause hearing satisfied the three *Daye* criteria.[79] The court commented that there was an even more compelling argument for the substantive admission of testimony at probable-cause hearings than for grand jury testimony because witnesses at probable-cause hearings are subject to cross-examination.[80] With its decision in *Fort*, the Appeals Court set a

sexually abused her since she was about nine years old, and that they had had many instances of sexual intercourse since she was twelve. *Id.* at 500. At trial, however, the victim testified that the sexual abuse had never happened and that she had lied to the grand jury because she was angry with the defendant. *Id.* at 500-01. The trial judge allowed the prosecution to admit the victim's grand jury testimony for substantive purposes over the defendant's objection. *Id.* at 501.

72. *Id.* at 501 (citation omitted).

73. *Id.*

74. *See Berrio*, 551 N.E.2d at 501 (stating *Daye* factors were met).

75. 597 N.E.2d 1056, 1059 (Mass. App. Ct. 1992). After two witnesses testified on direct examination that they did not see the defendant with a gun or see the defendant shoot at a car, the judge allowed the Commonwealth to "introduce segments of their testimony at the probable-cause hearing, which were inconsistent with their testimony on direct, for their probative value." *Id.* at 1058. The defendant argued that the substantive admission of prior inconsistent statements was only allowable in the narrow circumstance of grand jury testimony. *Id.*

76. *Id.* at 1059.

77. *Id.* at 1058 (quoting Commonwealth v. Daye, 469 N.E.2d 483, 493 (Mass. 1984), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005)); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements).

78. *Fort*, 597 N.E.2d at 1059.

79. *Id.*

80. *Id.*

precedent for expanding the *Daye* decision beyond its facts to other situations in which the pertinent criteria set forth in *Daye* are met.

In 2000, the SJC expanded the definition of exactly what constitutes an inconsistent statement for the purposes of invoking the *Daye* rule in *Commonwealth v. Sineiro*.[81] In *Sineiro*, at a probable-cause hearing, both of the defendant's daughters testified about the defendant's sexual assaults upon them.[82] Subsequently, both daughters signed affidavits indicating that their allegations regarding the defendant's sexual assaults were untrue.[83] At an evidentiary hearing regarding the affidavits, one daughter testified that she did not remember the identity of the person who raped her, and the other daughter testified that she "did not have a present memory of the incidents that formed the basis of her probable cause testimony."[84] The judge presiding over the evidentiary hearing concluded that both daughters had intentionally falsified a lack of memory.[85] At the trial, one daughter testified that the defendant had raped her, and the other testified that he had not.[86] The trial judge substantively admitted the probable-cause hearing testimony of the daughter who recanted at trial.[87] The SJC held that the trial judge properly concluded that the second daughter's trial testimony was inconsistent with her testimony at the probable-cause hearing, stating that "there is good reason for a judge to find the existence of inconsistency when the judge concludes that testimony asserting an inability to remember is false."[88] The Court explained that "when a witness does not deny his probable cause testimony, nor its truth, but chooses to feign an inability to recall the testimony in an attempt to avoid giving evidence that might send another to jail, a judge should not be without recourse."[89]

In a subsequent case, *Commonwealth v. Newman*,[90] the Massachusetts Appeals Court expanded the *Sineiro* rule and allowed for the substantive admission of testimony that witnesses had made at a previous trial of an accomplice.[91] After the trial judge found that the witnesses feigned memory

81. 740 N.E.2d 602 (Mass. 2000).

82. *Id.* at 605.

83. *Id.* at 605-06. The affidavits were signed several months apart. *Id.*

84. *Id.* at 606.

85. *Sineiro*, 740 N.E.2d at 606.

86. *Id.* at 606-07. The daughter who testified as to the rape explained that she had recanted because she did not want "to go through with the case." *Id.* at 606.

87. Commonwealth v. Sineiro, 740 N.E.2d 602, 607 (Mass. 2000).

88. *Id.* at 608.

89. *Id.* at 608. The SJC held that the trial judge was correct in deciding that "the jury should hear all of [the recanting daughter's] versions of the events, observe her demeanor, and decide whether her testimony at trial or her testimony at the probable-cause hearing was the truth." *Id.* If a failure of memory is not found to have been fabricated, however, it is not deemed to be inconsistent with prior testimony, and therefore the prior testimony is not substantively admissible. *See* Commonwealth v. Martin, 629 N.E.2d 297, 303-04 (Mass. 1994) (holding true failure of memory not inconsistent with prior testimony).

90. 868 N.E.2d 946 (Mass. App. Ct. 2007).

91. *See id.* at 949. The SJC denied further appellate review to the *Newman* decision in 2007, thereby

loss while testifying at the defendant Newman's trial, he allowed the witnesses' testimony in a prior trial against Newman's alleged accomplice to be admitted for substantive purposes against Newman.[92] On appeal, the defendant argued that the admission of that prior testimony violated his rights under the confrontation clause of the Sixth Amendment.[93] The Appeals Court acknowledged that the defendant was unable to cross-examine the witnesses while they were making the statements at the previous trial, but reasoned that because the witnesses were available at his own trial and could be cross-examined there about those previous statements, the admission of those statements did not violate the defendant's Sixth Amendment rights.[94]

A final extension of the *Daye* rule, specifically to prior statements made in affidavits that lead to an abuse prevention order, occurred in the Massachusetts Appeals Court's 2010 decision in *Commonwealth v. Belmer*.[95] An affidavit that leads to an abuse prevention order is authorized by chapter 209A of the Massachusetts General Laws, and is thus referred to as a 209A affidavit.[96] In *Belmer*, a mother obtained an abuse prevention order against her husband, the defendant, after authoring a 209A affidavit.[97] In that affidavit, she described, under the pains and penalties of perjury, how the defendant had purposefully struck and injured their son.[98] The son had attempted to intervene in an argument between the mother and the defendant regarding the defendant's infidelities.[99] The mother repeated these claims under oath at a court hearing regarding the 209A affidavit.[100] At trial, the mother testified that the defendant had inadvertently struck their son during the argument as he was "talk[ing] with his hands."[101] At the defendant's trial, over the defendant's objection, the judge allowed the prosecutor to question the mother about her testimony at the

further extending the *Daye* rule regarding prior inconsistent statements to statements made at prior trials. *See* Commonwealth v. Newman, 873 N.E.2d 248 (Mass. 2007) (denying further appellate review).

92. *Newman*, 868 N.E.2d at 948-49.

93. *Id.* at 946.

94. *Id.* at 948-49. Citing the Supreme Court, the Appeals Court reasoned that when a "declarant is present at trial to defend or explain the prior statement," then the confrontation clause does not constrain the use of the declarant's prior testimony. *Id.* at 949 (citing Crawford v. Washington, 541 U.S. 36 (2004)). Furthermore, "the confrontation clause requires only 'that the defendant have an opportunity to cross-examine the witness'; it does not 'guarantee a cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id.* (certain internal quotations omitted).

95. 935 N.E.2d 327 (Mass. App. Ct. 2010). The SJC denied further appellate review to the *Belmer* decision in 2011, thereby affirming that, in situations where a victim or witness recounts a story that directly contrasts with her prior testimony, the prior testimony is substantively admissible. *See* Commonwealth v. Belmer, 942 N.E.2d 182 (Mass. 2011) (denying further appellate review).

96. *See* MASS. GEN. LAWS ch. 209A, § 3 (2014) (describing available remedies).

97. *Belmer*, 935 N.E.2d at 328.

98. *Id.* at 328-29.

99. *Id.*

100. *Id.* at 329; *see also* MASS. GEN. LAWS ch. 209A, § 4 (2014) (providing for hearing).

101. Commonwealth v. Belmer, 935 N.E.2d 327, 329 (Mass. App. Ct. 2010).

court hearing and to admit the 209A affidavit into evidence.[102] In affirming the defendant's conviction, the court held that a 209A affidavit is admissible as substantive evidence under the *Daye* rule because it bears sufficient indicia of reliability, including being sworn under the pains and penalties of perjury, being written, and that it becomes part of a formal complaint for protection that is brought before a judge.[103] The court rejected the defendant's argument that 209A affidavits are less reliable than testimony elicited at a grand jury hearing (the type of proceeding addressed in *Daye*).[104]

When viewed in the aggregate, these holdings mandate that, when made during a certain subset of sufficiently reliable proceedings, prior inconsistent statements are admissible for the truth of what they assert.[105] Massachusetts courts' treatment of prior consistent statements, however, has taken a very different path. As I explain in Part III, this dichotomy is not sufficiently supported by the accompanying rationales.

C. Massachusetts Law Pertaining to Prior Consistent Statements

The first Massachusetts decision to address the issue of whether a witness's statement can be bolstered by a prior consistent statement was an 1846 case, *Deshon v. Merchants' Insurance Company*.[106] One of the allegations in this case was that a shipping vessel had been purposefully destroyed.[107] A witness testified that there had been a plan for the vessel's destruction, and the party eliciting that testimony fully expected the witness to be "impeached on account of bad character."[108] For this reason, during the witness's direct examination, counsel preemptively addressed the matter of consistency by asking him whether he had previously told someone else about the plan for the vessel's destruction.[109] On review, the SJC held that witnesses are not allowed to proactively testify about prior consistent statements in order to strengthen their testimony because the use of this type of evidence "would open the door to great frauds in the hands of dishonest persons."[110] Therefore, the court held that the witness's prior consistent statement was correctly rejected at trial.[111] Notably, in the final paragraph of its opinion, the *Deshon* court explicitly left open the question—"of much importance"—regarding whether an impeached

102. *Id.*
103. *Id.* at 330.
104. *See id*. The court also rejected the defendant's contention that the judge had violated his rights under the Confrontation Clause of the Sixth Amendment by limiting the scope of the mother's cross-examination. *Id.* at 331-32. In this regard, the court used the same reasoning as in *Newman*. *Id.*
105. *See* MASS. G. EVID. § 801(d)(1)(A) (2014).
106. 52 Mass. (11 Met.) 199 (1846).
107. *See id.* at 202.
108. *Id.* at 202, 209.
109. *Id.*
110. *Deshon*, 52 Mass. (11 Met.) at 209.
111. *Id.* at 209-210.

witness can be rehabilitated with prior consistent statements.[112]

Several years later, in 1854, the SJC succinctly answered this "important" question in *Commonwealth v. Wilson*.[113] At issue in that case was the defendant's mental state when he killed a fellow prisoner.[114] The prosecution called a witness to testify as to what the defendant had told him prior to the killing, and these prior statements tended to prove premeditation.[115] On cross-examination, defense counsel elicited testimony that the witness had been previously questioned about the facts that he had testified to on direct examination.[116] On rebuttal, over the defendant's objection, the witness testified that when he was previously questioned, he had repeated the same facts to which he had testified.[117] Without elaboration, the SJC concluded that the exclusion of prior consistent statements is limited to testimony elicited on direct, and that the *Deshon* rule did not apply to situations in which the "other party has sought to impeach the witness on cross examination."[118]

Regarding the question of whether prior consistent statements should be admitted substantively, the court seemed to first answer in the negative in the 1858 case of *Commonwealth v. Jenkins*.[119] In this case, the government attempted to bolster the credibility of an accomplice by submitting evidence of that accomplice's prior consistent statements to third parties.[120] The prosecution had offered these statements in order to corroborate the in-court testimony of the accomplice, who had been impeached with a different version of the events that he had given to the police.[121] The accomplice had spoken to the third parties prior to speaking with the police.[122] The SJC had strong misgivings about granting general substantive admissibility to evidence that was used to combat an issue of credibility.[123] The court explained that the evidence had "no legitimate or logical tendency to establish the corroboration for which it is offered," but rather only tended to prove that the first version of the story was more true than the second because the first version had been repeated more times.[124] The court acknowledged that, while two consistent statements might suggest that the repeated statement's veracity is more

112. Deshon v. Merchs.' Ins. Co., 52 Mass. (11 Met.) 199, 210 (1846). The court deferred decision on this issue because this situation had not arisen at trial. *Id.*

113. 67 Mass. (1 Gray) 337 (1854).

114. *Id.* at 337.

115. *Id.* at 340.

116. *Id.*

117. *Wilson*, 67 Mass. (1 Gray) at 340.

118. *See id.*

119. 76 Mass. (10 Gray) 485 (1858).

120. *Id.* at 488.

121. *Id.*

122. *Id.*

123. *See Jenkins*, 76 Mass. (10 Gray) at 488.

124. *Id.* at 488-89.

probable and worthy of credit, the corroborative effect was "altogether too slight and remote."[125] For this reason, the court explained that these kinds of statements are only admissible to rehabilitate a witness's credibility (as was the situation in *Wilson*), that they are "purely hearsay," and thus "not competent as substantive proof."[126] The SJC went on to identify two classes of cases in which prior consistent statements were admissible.[127] The first class concerns cases where admission of prior consistent statements boosts the declarant's credibility after evidence is presented that indicates that he is biased or under duress.[128] The second "similar" class concerns cases where a declarant is impeached with allegations of previously concealing the facts that he testifies to at trial, and where prior consistent statements regarding those same facts are admitted to boost the declarant's credibility.[129]

A few decades later, in 1890, the SJC upheld the substantive admission of a prior consistent statement elicited after opposing counsel sought to impeach the declarant in *Hewitt v. Corey*.[130] At issue on appeal was the substantive admission of the testimony of a rebuttal witness.[131] The purpose of the witness's testimony was to reinforce that of the plaintiff's husband, whom opposing counsel had sought to impeach on cross-examination.[132] The SJC held that a prior consistent statement that constitutes "confirmatory evidence" is substantively admissible after a witness is impeached by evidence showing he is biased or under duress, or that he formerly withheld or concealed facts to which he testified at trial.[133] The court distinguished *Jenkins*, wherein it appeared that the witness had "at other times made statements inconsistent with his testimony, and where it [was] plain that he must have been false at one time or the other."[134] In such *Jenkins*-type cases, the court stated that the witness "is discredited by reason of his contradictory statements at different times, and it is no restoration of his credit to show that at still other times he has made

125. Commonwealth v. Jenkins, 76 Mass. (10 Gray) 485, 489 (1858).

126. *Id.* at 489.

127. *See id.* at 489-90.

128. *Id.*

129. *Jenkins*, 76 Mass. (10 Gray) at 489-90.

130. 23 N.E. 223 (Mass. 1890).

131. *Id.* at 223.

132. *Id.* In this case, the plaintiff sued the defendant, a sheriff, for conversion of a horse that the defendant was alleged to have wrongfully attached as the plaintiff's husband's property. *Id.* The husband explained, on direct examination, that he never considered himself to be the horse's owner. *Id.* To discredit the husband's testimony, on cross-examination, opposing counsel elicited an admission from the husband that he had previously included the horse in a mortgage of personal property he had given to a third-party mortgagee. *Id.* The husband also testified that the inclusion of the horse as his property was inadvertent, and as soon as he found out, he told the mortgagee that the horse was not his property and should not be included in the mortgage. *Id.* In rebuttal, the plaintiff then called the mortgagee (the witness), who corroborated the husband's testimony. *Id.*

133. *Id.*

134. *Hewitt*, 23 N.E. at 223.

statements in accordance with his testimony."[135]

Clearly, the SJC in *Jenkins* conceived of two different kinds of admissibility for prior consistent statements: one that boosts the declarant's credibility after evidence is presented which indicates that he is biased; and another that pertains to situations in which a witness is alleged to be concealing certain facts, in which case evidence of a previous declaration of these facts is substantively admissible.[136] However, the SJC's more recent 1976 holding, in *Commonwealth v. Zukoski*,[137] suggests that the latter aforementioned category, namely that which includes substantively admissible prior consistent statements, has effectively been eliminated.[138] This constitutes a sharp shift from the discussion of this issue in *Hewitt*, and seems to revert back to the court's treatment of this issue in the less-recently-decided *Jenkins* case.[139]

The *Zukoski* court first stated, as a general rule, that a witness's prior consistent statement is inadmissible, even where a prior inconsistent statement of the witness has been admitted.[140] Next, the court noted that, "[a]s an exception to this general rule, however, a witness's prior consistent statement is admissible where a claim is made that the witness's in-court statement is of recent contrivance or is the product of particular inducements or bias."[141] Notably, however, the *Zukoski* court failed to acknowledge anything resembling the possibility, suggested by *Hewitt*, that "confirmatory evidence" can be substantively admitted.[142]

A footnote in a more recent Appeals Court case, *Commonwealth v. Cruz*,[143] suggests that there may still be hope for the substantive admissibility of prior consistent statements.[144] In *Cruz*, a child died of what was most likely a kick to the abdomen, and his father stood accused.[145] The defense presented a theory that blamed the mother for the murder, presenting her as an abusive parent.[146] On appeal, the Commonwealth conceded that the trial judge erred in admitting a police witness's hearsay recounting of the mother's extra-judicial statements made to the police on an earlier date, which alleged the defendant's physical abuse of the child.[147] The Commonwealth agreed that these statements were

135. *Id.*

136. *See supra* text accompanying notes 127-30.

137. 345 N.E.2d 690 (Mass. 1976).

138. *See id.* at 693.

139. *See supra* text accompanying notes 127-30 (discussing holding in *Jenkins*) & text accompanying notes 133-36 (discussing holding in *Hewitt*).

140. *Zukoski*, 345 N.E.2d at 693.

141. *Id.*

142. *See id.* (describing when prior consistent statement admissible); *see also* Hewitt v. Corey, 23 N.E. 223, 223 (Mass. 1890).

143. 759 N.E.2d 723 (Mass. App. Ct. 2001).

144. *See id.* at 732 n.10.

145. *Id.* at 726.

146. *Id.* at 729.

147. *Cruz*, 759 N.E.2d at 729.

erroneously admitted on the grounds of having been "admissions against [the mother's] penal interest" because the mother was present in court and available to testify.[148]

Having conceded this point, the Commonwealth then attempted to argue that the testimony still should have been admitted, and that whether the testimony was admitted through the wrong exception is irrelevant.[149] In this regard, the Commonwealth argued "[i]f evidence is admissible under any theory supported by the record, it is of no consequence whether the precise reasons assigned by the [trial] judge are accurate."[150] While the court agreed with the aforementioned supposition, it nevertheless held that the "Commonwealth's after-the-fact rationale [did] not survive analysis" because the statement could not have fit into any of the Massachusetts common-law exceptions to the hearsay bar.[151]

Most significantly, in *Cruz*, no equivalent fact-finding by the judge existed to provide support for the admission of otherwise inadmissible hearsay on the Commonwealth's alternative "prior consistent statement" theory because the jury was permitted to consider the evidence for its full probative value since the evidence was not subject to a limiting instruction.[152] Citing *Jenkins* and *Zukoski*, the Appeals Court explained:

> Prior consistent statements, however, when allowable under the narrow hearsay exception, have long been deemed inadmissible as substantive evidence and entitled only to a restricted admissibility (under a proper limiting instruction) for the sole purpose of rehabilitating the credibility of a witness-declarant who has been impeached on the ground that her trial testimony is of recent contrivance.[153]

In a footnote that followed, the *Cruz* court further declared that, under Proposed Rule 801(d)(1)(B), prior consistent statements of a witness were not hearsay, but rather, stand as substantive evidence when they are used to rebut a charge of fabrication and when they have been made prior to the existence of the alleged fabrication or influence or motive.[154] The court further recognized:

148. *See id*. ("[H]er statements failed to meet a foundational requirement of such an exception, that the declarant be unavailable").

149. *See* Commonwealth v. Cruz, 759 N.E.2d 723, 730 (Mass. App. Ct. 2001).

150. *Id*. (alternations in original) (citation omitted) (internal quotations marks omitted).

151. *Id.* at 730. The "officers' testimony as to [the mother's] statements . . . failed the most fundamental tests for common law hearsay exceptions: a strong necessity for evidence which the fact finder would otherwise never receive; and a guarantee of trustworthiness in the circumstances surrounding the making of the statements." *Id.* (citation omitted) (internal quotations marks omitted).

152. *See id.* at 731.

153. *Cruz*, 759 N.E.2d at 731.

154. *Id.* at 731 n.10; *see also* MASS. G. EVID. § 801(d)(1)(B) (2014).

> [E]minent scholars and judges have criticized the rule limiting the use of prior statements of a witness to the issue of credibility rather than affording them substantive effect (especially because of the asserted fiction of expecting a jury to be able to discriminate properly between these evidentiary concepts and particularly when the declarant is available for and subject to cross-examination). Until the long-established rule here applied has been expressly altered by the Supreme Judicial Court, we are bound to honor it.[155]

Cruz's dicta, articulated in this footnote, results in an unfortunate Catch-22. On the one hand, *Cruz* acknowledges that perhaps prior consistent statements should be given substantive admissibility in Massachusetts courts.[156] Simultaneously, by rejecting the argument on the grounds that the SJC is the only body that could lift the *Zukoski*-mandated prohibition on these statements' substantive admission, *Cruz* also prevented the issue from reaching the SJC.[157]

Ultimately, looking at this footnote in *Cruz*, in conjunction with the pertinent portion of the *Hewitt* opinion, it appears that there remains some hope for the future of prior consistent statements' substantive admissibility. As I explain below, the rationale underlying the *Daye* opinion—which permits substantive admissibility of only prior inconsistent statements—logically leads to the conclusion that certain prior consistent statements should also be admitted substantively.[158]

III. ARGUMENT

I now submit my proposal, which is grounded in the decisions I have just discussed.[159] Prior consistent statements, which have been made under oath at a proceeding deemed sufficient for the admission of a statement if it is *in*consistent with testimony at trial, should be admitted for their full, substantive value at trial when the following conditions are met: the statement was made under oath at a prior proceeding;[160] the statement was "made before the witness had an incentive to fabricate testimony";[161] the statement is clearly

155. Commonwealth v. Cruz, 759 N.E.2d 723, 732 n.10 (Mass. App. Ct. 2001) (citations omitted).

156. *See id*.

157. *See id*.

158. *See infra* Part III.A.

159. As my argument focuses on the general goal of advocating for the substantive admission of prior consistent statements at trial, rather than the requisite conditions for this adoption, I will not discuss in detail every individual condition for admission that I mention in my proposal below. Instead, I view the existence of these conditions as important to ensure the reliability of these statements, and to provide guidance as to the qualifications for admission of prior statements (consistent or otherwise).

160. *See supra* note 8 (listing types of proceedings). I do not suggest expanding the types of proceedings beyond those which Massachusetts courts have already deemed sufficiently reliable for prior inconsistent statements.

161. Commonwealth v. Rivera, 712 N.E.2d 1127, 1134 (Mass. 1999) (admitting murder confession for substantive purposes because there was no incentive to fabricate testimony); *see also* Commonwealth v.

that of the witness, not of the interrogator, and is free of coercion;[162] there is "an opportunity for effective cross-examination of the declarant at trial";[163] the testimony is consistent with the declarant's testimony;[164] the testimony is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;[165] and "other evidence tending to prove the issue is [also] presented."[166] Support for my proposal derives from both logic and policy rationales, and is grounded in reasoning from past Massachusetts decisions previously discussed in this Article.

Four main arguments support my proposal. First, prior consistent statements made at specific types of proceedings and under oath are at least as inherently reliable as prior inconsistent statements made at the same types of proceedings.[167] Second, many psychologists and legal scholars have doubted the validity of the premise that jurors are able to fully comprehend instructions regarding the purposes for which evidence is admitted, inevitably resulting in varying implementation of the rule limiting the use of prior consistent statements.[168] Third, when a declarant's statements made at a prior proceeding are used for their substantive value at a subsequent proceeding, there is a greater chance that that declarant will be indicted for perjury if the prior statement is untrue; this should increase the reliability of statements made at prior proceedings.[169] Fourth, allowing victim-witnesses' prior statements made at 209A restraining order hearings, and thus those witnesses' statements made in their 209A affidavits, to be substantively admitted will benefit victims of domestic violence who suffer from memory loss associated with post-traumatic stress disorder.[170]

Sullivan, 574 N.E.2d 966, 970 (Mass. 1991) (admitting statement made ten months before cooperation with government to counter claim of fabrication); Commonwealth v. Kindell, 689 N.E.2d 845, 848 (Mass. App. Ct. 1998) ("[P]rior consistent statement must have been made before the motive to fabricate or act out of bias arose.").

162. Commonwealth v. Daye, 469 N.E.2d 483, 494-96 (Mass. 1984) (discussing necessity of knowing who made statement, opportunity for cross-examination, and other evidence), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements).

163. *Daye*, 469 N.E.2d at 494-96.

164. FED. R. EVID. 801(d)(1)(B).

165. *Id*.

166. *Daye*, 469 N.E.2d at 496.

167. *See* Commonwealth v. Belmer, 935 N.E.2d 327, 330 (Mass. App. Ct. 2010) (discussing expansion of *Daye* rule to 209A affidavits because reliability equivalent to grand jury testimony); *supra* note 9 (listing types of proceedings).

168. *See* Lieberman & Arndt, *supra* note 13, at 677-78.

169. *See* Commonwealth v. Francis, 734 N.E.2d 315, 331 n.16 (Mass. 2000) (requiring affidavit signed under the pains and penalties of perjury).

170. *See* Waits, *supra* note 18, at 41 (recounting victims' sentiment: battered women struggle to "think straight" due to post-traumatic stress).

A. Inherent Level of Reliability

The Advisory Committee to the Federal Rules of Evidence explained its decision to suggest to Congress that prior consistent statements should be substantively admissible by simply stating that if a "prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, *no sound reason is apparent why it should not be received generally*[,]" so long as the statement was made prior to the existence of the alleged fabrication.[171] While the text of the Federal Rule only states that prior *in*consistent statements must be given under oath to be admissible, since its 1975 codification, Rule 801(d)(1)(B) has generally only been invoked in situations in which the prior consistent statement has been made under oath.[172] Assuming the existence of a common-law requirement in Massachusetts that the prior consistent statement in question be made under oath, as there is for the substantive admission of prior inconsistent statements, there is "no sound reason . . . why [prior consistent statements] should not be received generally" in Massachusetts courts (subject to certain conditions).[173] Support for this position can be found in Massachusetts decisions pertaining to both prior consistent and prior inconsistent statements.

Massachusetts decisions that have considered the substantive adoption of prior inconsistent statements have typically focused on these statements' inherent level of reliability. In the *Daye* decision, for example, the SJC first explained that the long-standing view against allowing prior inconsistent statements is based on the fact that the reliability of such a statement "rests on the credit of the declarant, who was not (1) under oath, (2) subject to cross-examination, or (3) in the presence of the trier, when the statement was made."[174] "[P]ersuaded that the reasoning favoring use of inconsistent grand jury statements as probative evidence is sound," the *Daye* court adopted a version of the rule that "accepts at probative value only those prior inconsistent statements given under oath in instances where a record of the statement is likely to be available."[175] In so deciding, the court indicated that its primary

171. FED. R. EVID. 801(d) advisory committee's note (emphasis added).

172. *See* United States v. Rinn, 586 F.2d 113, 120 (9th Cir. 1978); United States v. Williams, 573 F.2d 284, 289 (5th Cir. 1978). This pattern of use may be because of Rule 801(d)(1)(A)'s requirement that the statement have been made under oath, and logically, if the prior consistent statement is also going to be admitted substantively, there is no reason to strip Rule 801(d)(1)(B) of this requirement due to concerns pertaining to reliability. *See* FED. R. EVID. 801(d)(1).

173. FED. R. EVID. 801(d) advisory committee's note; *see also* Commonwealth v. Daye, 469 N.E.2d 483, 494-96 (Mass. 1984) (discussing oath requirement for substantive admission of prior inconsistent statements), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements).

174. *Daye*, 469 N.E.2d at 491 (quoting CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 251, at 601 (2d ed. 1972)).

175. *Id.* at 491, 493.

focus was on the reliability of the statement, explaining: "[t]he prior statement will have been made in an atmosphere of formality impressing upon the declarant the need for accuracy, and will be memorialized in a manner eliminating subsidiary inquiries into whether the statement was actually made that would unacceptably attenuate the statement's probative worth."[176] Lastly, the court added a handful of prerequisites for the substantive admission of prior inconsistent statements, in an effort to further ensure their reliability:

> [A] prior inconsistent statement is admissible as probative if made under oath before a grand jury, provided the witness can be effectively cross-examined as to the accuracy of the statement, the statement was not coerced and was more than a mere confirmation or denial of an allegation by the interrogator, and other evidence tending to prove the issue is presented.[177]

Perhaps even more significant for the purposes of this proposal, the decisions that followed *Daye* and extended the *Daye* rule to other kinds of prior proceedings did so on the grounds that statements made at these other types of proceedings possessed a similarly high level of inherent reliability. As seen in *Berrio*, when the defendant argued that *Daye* applied only to identification testimony, the SJC disagreed, holding that the *Daye* rule was not limited to that case's facts.[178] The *Berrio* court explained that in *Daye*, "we simply adopted Proposed Mass.R.Evid. 801(d)(1)(A) subject to conditions declared by us. Neither the [proposed] rule nor *Daye* is limited to identification evidence."[179] Indeed, this decision opened the door to a series of decisions that have expanded the uses of the *Daye* rule to different types of prior proceedings.[180]

In 1992, eight years after *Daye* and two years after *Berrio*, the Appeals Court expanded the substantive use of prior inconsistent statements in *Fort*.[181] In *Fort*, the Appeals Court accepted the substantive admissibility of prior probable cause testimony, reasoning that that testimony is even more reliable than prior grand jury testimony "because not only are the statements made in an atmosphere which impresses upon the declarant the need for accuracy, but also because they are made in a forum which allows the declarant's credibility to be tested by cross-examination."[182] In 2007, the Appeals Court expanded the *Daye* rule to include testimony given at a prior trial in *Newman*.[183] Then, in 2010, the Appeals Court decided *Belmer*, which extended the *Daye* rule to

176. *Id.* at 494.
177. *Id.* at 495-96.
178. Commonwealth v. Berrio, 551 N.E.2d 496, 501 (Mass. 1990).
179. *Id.*
180. *See supra* Part II.B.
181. *See supra* notes 75-80 and accompanying text.
182. Commonwealth v. Fort, 597 N.E.2d 1056, 1059 (Mass. App. Ct. 1992).
183. *See supra* notes 91-94 and accompanying text.

include prior inconsistent statements made at 209A hearings.[184] The *Belmer* court explained that, "[l]ike grand jury testimony, a c. 209A affidavit carriers several indicia of reliability," specifically because "it must be made under the pains and penalties of perjury"; it is in writing, and therefore one cannot contend that the statement was not actually made; and it must be "brought in court before a judge."[185] This last factor may even give the 209A affidavit more reliability than a statement made in front of civilians during grand jury proceedings as a result of the level of formality that the 209A hearing conveys.[186]

Similarly, the courts' decisions rejecting the substantive admissibility of prior consistent statements demonstrate that their primary concern has been the reliability of these statements. Doubt as to the legitimacy of the substantive use of prior consistent statements first appeared in *Deshon*.[187] In *Deshon*, the SJC expressed concern that such a practice "would open the door to great frauds in the hands of dishonest persons," or, in other words, would set a precedent of allowing evidence of potentially unreliable statements to be admitted at trial.[188]

Later, the different holdings in *Hewitt* and *Jenkins* revealed the Massachusetts courts' continuing concern about the degree to which a prior statement's reliability should determine if it is substantively admissible.[189] On the one hand, in *Jenkins*, the court explained that regardless of whether two statements are consistent, if one interim statement was made that was inconsistent with the other two, the declarant must not have been telling the truth during at least one of the statements.[190] For this reason, such a witness must be "discredited by reason of his contradictory statements at different times."[191] By contrast, in *Hewitt*, the declarant did not make an inconsistent statement between the statement at trial and the statement that gained admission.[192] Therefore, a statement that constitutes "confirmatory evidence" was substantively admissible under certain conditions because it was not made unreliable by an intermediary inconsistent statement.[193]

Daye and its progeny indicate that Massachusetts courts deem statements

184. *See supra* notes 95-103 and accompanying text.

185. Commonwealth v. Belmer, 935 N.E.2d 327, 330 (Mass. App. Ct. 2010).

186. *Id.*

187. *See supra* notes 106-13 and accompanying text.

188. Deshon v. Merchs.' Ins. Co., 52 Mass. (11 Met.) 199, 209 (1846).

189. *See supra* text accompanying notes 127-30, 133-36.

190. Commonwealth v. Jenkins, 76 Mass. (10 Gray) 485, 489 (1858).

191. Hewitt v. Corey, 23 N.E. 223, 223 (Mass. 1890) (discussing *Jenkins*).

192. *Id.* at 223.

193. *See id.* The declarant's explanation, if believed, "went to show that he did not consciously do anything which amounted to an assertion of title in himself." *Id.* The declarant's prior statement to the mortgagee, "made before the present controversy arose, would have a legitimate tendency to confirm his explanation; and, if he might himself testify to this statement, there can be no good reason why the mortgagee might not also testify to the same thing." *Id.*

made during certain kinds of prior proceedings, under oath, to be sufficiently reliable for substantive admission at trial.[194] The objective level of these statements' inherent reliability *simply does not change*, irrespective of the circumstances under which they are later admitted at trial. Because the statements have already been recorded, and thus, figuratively carved in stone, so too has their level of inherent reliability. There is no reason to deem a statement sufficiently reliable when admitted under certain circumstances at trial, but to deem that same statement unreliable when admitted under different circumstances at trial. If, for example, a prior statement made in a 209A affidavit is sufficiently reliable for substantive use at trial if it is inconsistent with the declarant's trial testimony, then it should be deemed sufficiently reliable for substantive use at trial irrespective of consistency because it is the same statement with same level of inherent reliability.

The *Jenkins* and *Deshon* opinions represent the foundation of the current prohibition on prior consistent statements being admitted for their truth. *Zukoski*'s powerful holding is based on these decisions, and it effectively prevents, at least for the time being, the substantive admission of prior consistent statements in Massachusetts courts. Significant, however, is the rationale underlying *Jenkins* and *Deshon*, in which the court refused to substantively admit prior consistent statements due to a fear that they lack inherent reliability.[195] It is this same fear that continues to form the foundation of the general prohibition on the vast majority of hearsay.[196]

However, with *Daye*, the SJC expressly acknowledged that at least some prior statements, provided that they are made under certain specified circumstances, are sufficiently reliable such that they may be substantively admitted.[197] The scenario in which the SJC reviewed this issue, however, happened to be in the context of a prior inconsistent statement. Since the SJC was evidently apprehensive about extending its holding to other situations outside the facts of the case, it is not surprising that the substantive admission of prior consistent statements was not discussed. Subsequently, the Massachusetts appellate courts have similarly held that statements made in several other types of proceedings are also sufficiently reliable to be substantively admitted at trial.[198] Constrained by the original *Daye* holding, however, these decisions have not been extended to the issue of whether prior consistent statements should be substantively admitted.

By deeming statements made under these types of circumstances to be sufficiently reliable for substantive admission at trial, these decisions

194. *See supra* text accompanying note 188 (discussing court's concerns in *Deshon*).
195. *See supra* text accompanying notes 110 & 124.
196. The Federal Rules of Evidence classify prior statements as *not* hearsay. FED. R. EVID. 801(d)(1).
197. *See supra* text accompanying notes 62-63.
198. *See supra* Part II.B.

(discussing the admissibility of prior *in*consistent statements) effectively nullified the foundation upon which the prohibition on prior consistent statements was based. Specifically, as this bar on substantive admissibility of prior consistent statements had been based on a lack of inherent reliability, the SJC's holding—that some of these statements are sufficiently reliable—should effectively invalidate that prohibition. For this reason, by abolishing the foundation upon which this *Zukoski*-articulated proscription was based, *Daye* and its progeny effectively rendered *Zukoski*, and by extension this prohibition, completely moot.

Both *Jenkins* and, for example, *Belmer*, considered the reliability of the first statement in a sequence of events where: this statement is followed by a statement made at trial that is inconsistent therewith, and that is then followed by a third statement that is consistent with the first (as a result of the introduction of evidence of the first statement).[199] As previously discussed,[200] the *Jenkins* court expressed powerful doubts about how the first of the three statements described in the preceding paragraph could ever be deemed sufficiently reliable for substantive admission in these situations.[201] By contrast, however, recent decisions pertaining to prior inconsistent statements[202] have determined that these types of statements are sufficiently reliable for substantive admission at trial.[203] Therefore, Massachusetts courts evidently no longer feel that a concern based on a lack of reliability is a sufficient justification for a ban on the substantive admission of *all* prior statements.[204] For this reason, logic dictates that prior consistent statements, made in a certain subset of proceedings already deemed sufficiently reliable by Massachusetts courts, must be admitted substantively at trial. It should also be noted that the *Deshon* court's concerns regarding reliability are irrelevant to this proposal because I do not advocate the substantive admission of statements not made under oath.[205]

Furthermore, it follows that a statement that is *more* consistent with a witness's testimony is *even more* reliable than a statement that is *less* consistent with a witness's testimony (i.e. "a prior inconsistent statement"). When a witness tells one story, that story's probability of being true would certainly be higher, when a subsequently-told story is exactly the same, than when that subsequently-told story is different. And yet, to date, Massachusetts decisions

199. *See* Commonwealth v. Belmer, 935 N.E.2d 327, 329 (Mass. App. Ct. 2010). In *Belmer*, the witness made one statement on the 209A affidavit, contradicted it at trial on direct, then acknowledged having made the first statement when it was admitted into evidence as a prior inconsistent statement. *See id.*

200. *See supra* Part II.C.

201. Commonwealth v. Jenkins, 76 Mass. (1 Gray) 485, 487-89 (1858).

202. *See supra* Part II.B.

203. *See Belmer*, 935 N.E.2d at 330-31.

204. *See id.*

205. *See supra* note 9 (listing types of proceedings).

pertaining to this issue have directly indicated otherwise. Indeed, under current law, a story that is told earlier (before trial testimony) that *completely contradicts* the declarant's trial testimony is given *far greater evidentiary worth* than is an earlier story that is told before trial testimony that *matches* the declarant's trial testimony.[206]

These decisions pertaining to prior inconsistent statements have rendered moot the reasoning that underlies the prohibition on the substantive use of prior consistent statements. Additionally, the very notion—that a contradictory statement could be more reliable than a noncontradictory statement—is completely counterintuitive. Therefore, in an effort to fulfill the goal of justice by uniformly implementing similar reasoning to similar circumstances, prior consistent statements should be admitted for their full, substantive value at trial, assuming that the requisite conditions are met.[207]

B. Jurors' Lack of Ability To Discriminate Between Evidence That Is Substantively Admissible and Evidence That Is Not

At the core of our American system of justice sits jurors' responsibility to render a verdict based on evidence, which is admitted (either substantively or otherwise) pursuant to rules of evidence. Nevertheless, many feel that jurors are cognitively unable to limit information to the purpose for which it is offered.[208]

Accordingly, in *Daye*, the SJC put forth additional arguments in favor of its decision to adopt prior inconsistent statements for their substantive value, including juries' inability to appropriately follow limiting instructions as they deliberate.[209] The court reasoned that "juries cannot, and perhaps should not, be expected to discriminate between impeachment and probative use of a prior inconsistent statement," and, furthermore, that "formally conferring probative status to such statements does no more than legitimize current practice."[210] In a subsequent case, Justice Liacos on the SJC has similarly voiced "skepticism that a jury [is] able to maintain the distinction between an extrajudicial identification introduced for the purpose of corroboration and one introduced as

206. *Compare* Commonwealth v. Belmer, 935 N.E.2d 327, 330 (Mass. App. Ct. 2010) (substantively admitting prior inconsistent statements), *and* Commonwealth v. Daye, 469 N.E.2d 483, 493 (Mass. 1984), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005), *with* Commonwealth v. Cruz, 759 N.E.2d 723, 731 (Mass. App. Ct. 2001) (declining to substantively admit prior consistent statements), *and* Commonwealth v. Zukoski, 345 N.E.2d 690, 693 (Mass. 1976).

207. *See supra* Part III (discussing proposed conditions).

208. *See* Lieberman & Arndt, *supra* note 13, at 677-78. "[A] large body of research indicates that jurors have great difficulty ignoring information once they have become aware of it." *Id.*

209. *See* Commonwealth v. Daye, 469 N.E.2d 483, 494 (Mass. 1984), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements). "Permitting probative use of an inconsistent grand jury statement also eliminates an unnecessary and unseemly legal fiction." *Daye*, 469 N.E.2d at 494.

210. *Daye*, 469 N.E.2d at 492.

probative evidence."[211] Indeed, *Daye* cited a Second Circuit case, which further elaborated upon this supposition:

> The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars and judges as pious fraud, artificial, basically misguided, mere verbal ritual, and an anachronism that still impede[s] our pursuit of the truth . . . . [T]o tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable.[212]

The *Daye* court felt similarly about using a prior inconsistent statement made in a grand jury proceeding. It explained that that "[t]oday, we do little more than harmonize the legal treatment of prior inconsistent statements with the practical effect of permitting the jury to consider such statements under the guise of impeachment."[213] Additionally, many empirical studies have shown that limiting instructions have little effect on how jurors think about the material presented.[214] For these reasons, the *Daye* court concluded "the distinction between the two types of evidence should be abolished" in circumstances considering prior-identification evidence "so as to make evidence formerly limited to corroborative purposes admissible for probative purposes 'in both practical and legal effect.'"[215]

In *Zukoski*, the SJC explained that if a party seeks the admission of a prior consistent statement after "a claim is made that the witness's in-court statement is of recent contrivance or is the product of particular inducements or bias," "such a prior consistent statement is admissible *only* to show that the witness's in-court testimony is not the product of the asserted inducement or bias or is not recently contrived as claimed."[216] By its very nature, this limited type of admission entails a jury instruction that will direct the jurors to limit their consideration of this evidence only as it pertains to the declarant's credibility, and not for the truth of what it asserts.[217]

211. Commonwealth v. Weichell, 453 N.E.2d 1038, 1052 (Mass. 1983) (Liacos, J., dissenting).

212. *Daye*, 469 N.E.2d at 494 (citation omitted) (quoting United States v. De Sisto, 329 F.2d 929, 933 (2d Cir. 1964)) (internal quotations marks omitted).

213. *Id.*

214. *See* Lieberman & Arndt, *supra* note 13, at 686 (discussing research into limiting instructions and jurors' use of those instructions).

215. Commonwealth v. Daye, 469 N.E.2d 483, 494 (Mass. 1984) (quoting Commonwealth v. Mitchell, 453 N.E.2d 1038, 1052 (Mass. 1983)), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements).

216. Commonwealth v. Zukoski, 345 N.E.2d 690, 693 (Mass. 1976) (emphasis added).

217. *See* Commonwealth v. Cruz, 759 N.E.2d 723, 734 (Mass. App. Ct. 2001). When there is no limiting

There is no reason why *Daye*'s rationale pertaining to jury behavior, which supported the court's decision to abolish a distinction between substantive admission and limited admission for prior inconsistent statements, should not also be applied to situations involving prior consistent statements. If a juror's ability to effectively differentiate evidence admitted for a limited purpose is questionable in the context of prior inconsistent statements, it logically follows that a juror's ability to differentiate evidence admitted for a limited purpose in the context of prior consistent statements is questionable, as well. If the reasoning concerning the "legal fiction" limiting instructions underlying the *Daye* decision (as well as many other decisions) is followed, then a jury instruction, which directs that certain prior-consistent-statement evidence should be used *only* for evaluating witness credibility, is also similarly ineffective.

The vast majority of scholars from both the legal and the psychological communities who have pondered the subject have come to the same conclusion regarding the effectiveness of limiting instructions.[218] Moreover, this widely held notion has been the basis for many decisions, in a variety of jurisdictions, including Massachusetts.[219] Therefore, in an effort to fulfill the goal of justice through the uniform implementation of similar rationales to similar circumstances, prior consistent statements should be admitted for their full, substantive value at trial (subject to the aforementioned conditions). To do otherwise is to risk that different jurors will use certain evidence for varying purposes in their deliberations because their ability to differentiate between evidence that is substantive and evidence that is not is, at best, unpredictable.[220]

C. Increasing the Reliability of Statements at Prior Proceedings

An additional benefit of substantively admitting prior consistent statements is that if the frequency of these statements' admission were drastically increased, the reliability of these prior statements would increase as well.

instruction to accompany evidence that is only admissible for a limited purpose, "we doubt it could be said with fair assurance that the jury did not attach substantial [probative] significance" to that evidence. *Id.*

218. *See* Lieberman & Arndt, *supra* note 13, at 677-78.

219. *See* United States v. De Sisto, 329 F.2d 929, 933 (2d Cir. 1964); *Daye*, 469 N.E.2d at 494.

220. I realize that, to some extent, my rationale in Part III.B might contradict other arguments raised in this Article, in spite of the fact that Part III.B's argument supports the same conclusion. After all, if jurors are unable to actually implement limiting instructions into their decision-making process, one might wonder why eliminating a prior-consistent-statement limiting instruction would make any practical difference. Therefore, insofar as the argument in Part III.B conflicts with the reasoning in the rest of my paper, I would ask the reader to view it as a separate, alternative argument to support my conclusion; as opposed to a pillar that fits neatly next to the others. Further, as discussed earlier in this Article, it is worth noting that the SJC used both the reliability argument, as well as the limiting-instruction-effectiveness argument, to support its ultimate decision to permit the substantive admission of prior inconsistent statements. *See Daye*, 469 N.E.2d at 495-96. Similarly, I use both arguments to support my proposal to permit the substantive admission of prior consistent statements. *See id.*

Indeed, if prior consistent statements are to be given the same probative force that is given to testimony made at trial, it follows that the examination of the veracity of those statements will also increase. For example, if a 209A affidavit petitioner is made aware of a high likelihood of his or her statement's being admitted at trial for the truth of what it asserts, that petitioner may be less likely to engage in any sort of exaggeration or untruth on the affidavit due to a heightened fear of indictment for perjury. For this reason, it is realistic to expect that declarants at prior proceedings will be more likely to adhere strictly to the truth if they know that their statements could be substantively admitted at a future proceeding.[221]

D. The Positive Effect of Substantive Admission of Prior Consistent Statements on Domestic Violence Prosecutions and, by Extension, on Domestic Violence Victims

For the reasons stated below, victims of domestic battery face significant disadvantages, both legally and emotionally, when the Commonwealth attempts to prosecute the alleged perpetrator of the violence committed against them.[222] To begin, statements in 209A affidavits are often not sufficiently inconsistent with statements made at trial such that they may be deemed substantively admissible as prior *in*consistent statements. This is problematic because a victim's testimony is typically central to the success of domestic violence prosecutions, thereby requiring that victim to be deemed credible by the jury if that victim's batterer is to be convicted. Aware of this latter fact, defense attorneys frequently focus on conducting a sharp and powerful cross-examination of the victim-witness with the intention of lessening his or her credibility in the eyes of the jury. Compounded on top of the general difficulty of undergoing cross-examination for any victim-witness is the reality that domestic abuse is viewed differently by the criminal justice system than the way in which it is experienced by the victim. The very nature of domestic abuse, characterized by some scholars as a "web of coercive tactics," results in post-traumatic stress disorder and therefore causes these victims to be relatively more susceptible to lapses in memory, likely to be highlighted for the jury when they are on the witness stand.[223] Unfortunately, however, a witness's forgetting a detail on the stand does not suffice as a prerequisite to rehabilitate the prosecution's case by substantively admitting a prior 209A affidavit through Massachusetts's current prior inconsistent statement doctrine.

Statements made in 209A affidavits are not always sufficiently inconsistent

221. *Cf. supra* note 16 and accompanying text.

222. Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOT. L. REV. 265, 292 (2001) (emphasizing necessity of victim's testimony and credibility if "[s]tate is to present a strong case").

223. JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE 9 (1999).

that they qualify for substantive admission at trial under current Massachusetts law. Technically, an inconsistent statement is one that "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."[224] To be deemed inconsistent, the prior statement must also be *truly* inconsistent with the declarant's trial testimony.[225] It is distinctly possible that witnesses' answers to questions on cross-examination might call into question the reliability of their testimony on direct examination because their two statements might subtly conflict; however, most minor conflicts do not rise to the requisite level of inconsistency as to be deemed sufficient for substantive admission of a prior statement pursuant to *Daye*.[226] For example, a witness could misremember or confuse small details and testify accordingly on cross-examination.[227] Unless these answers pertain to major details of the story, courts may not deem statements made in a 209A affidavit inconsistent enough to allow a prosecutor to offer them for their substantive value, pursuant to *Belmer*.[228]

The outcomes of trials of alleged domestic batterers often hinge on the testimony of the victim-witness. Victims of domestic violence who testify at the trials of their attackers are especially susceptible to attacks on their credibility. Attorneys are legally permitted to advocate against the presentation of evidence that is adverse to their client, even when the evidence in question is factually true.[229] In his *United States v. Wade* dissent, Justice White asserted that a defense attorney's act of "confus[ing] a witness, even a truthful one, or mak[ing] him appear at a disadvantage, unsure or indecisive" is "normal course."[230] Justice White further explained:

224. *See* Commonwealth v. West, 45 N.E.2d 260, 262 (Mass. 1942).

225. *See* Commonwealth v. Johnson, 729 N.E.2d 306, 310-11 (Mass. App. Ct. 2000) (finding admission of restraining order as prior inconsistent statement improper where affiant not cross-examined). On the stand, the prosecution witness did not recall applying for a restraining order against the defendant. *Id.* at 310. The prosecution attempted to refresh the witness's recollection with the affidavit and the witness again was unable to recall applying for the restraining order or the related events, although she did confirm that it was her signature at the bottom. *Id.* Over the objection of the defense, the prosecution admitted the affidavit into evidence. *Id.* The court held that "[w]hen the witness at trial has no recollection of the events to which the statement relates," the requirement of the opportunity for meaningful cross-examination has not been met. *Id.* at 311 (quoting Commonwealth v. Daye, 469 N.E.2d 483, 494 (Mass. 1984), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005)); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements).

226. *See Johnson*, 729 N.E.2d at 262.

227. *Cf.* Commonwealth v. Day, 444 N.E.2d 384, 387-88 (Mass. 1983) (concluding dates are typically not material elements of crimes).

228. *See* Commonwealth v. Belmer, 935 N.E.2d 327, 330 (Mass. App. Ct. 2010); *Johnson*, 729 N.E.2d at 310-11.

229. *See* John Kaplan, *Defending Guilty People*, 7 U. BRIDGEPORT L. REV. 223, 247 (1986) (defending criminal defense lawyer's right to impeach truthful witness as function of checking prosecution's proof).

230. 388 U.S. 218, 257 (1967) (White, J., dissenting).

> Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth . . . . [M]ore often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth . . . .[231]

Defense attorneys who are able to successfully pursue this type of questioning certainly impair any prosecution.[232] Many criminal cases, particularly those that involve testifying witnesses who are victims of domestic abuse or sexual assault, hinge on the fact-finder's assessment of the witnesses' credibility.[233] More often than not, the victim is the only witness testifying for the prosecution. Jerome Frank describes how juries are constantly "read[ing]" witnesses, both their body language as well as their actual spoken language, to assess credibility.[234] Using knowledge gleaned from these assessments, defense attorneys use various tactics to impeach witnesses, both verbally and nonverbally.[235]

Furthermore, the nature of the abuse that these victims have suffered contributes to their level of susceptibility to these cross-examinations.[236] Indeed, victims rarely perceive the abuse they have suffered as one individual act that occurred on a specific date. As Lenore Walker explains, domestic abuse can be more accurately characterized, and is more frequently conceptualized by the victim, as an ongoing cycle.[237] James Ptacek characterizes the nature of domestic abuse as one that is not centered on criminal assault.[238] According to Professor Ptacek, "[b]attering is characterized

231. *Id. See generally* John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission*,*"* 1 GEO. J. LEGAL ETHICS 339 (1987) (defending this practice).

232. *See* Ewing, *supra* note 18, at 106. Ewing argues that domestic violence cases are especially difficult to prosecute, due to the "degree of control batterers exert over their partners." *Id.*

233. *See, e.g.*, Commonwealth v. King, 834 N.E.2d 1175, 1197-98 (Mass. 2005) (allowing testimony of "first complaint" witness to establish victim credibility); Commonwealth v. Martin, 472 N.E.2d 276 (Mass. App. Ct. 1984) (recognizing importance of jury instructions emphasizing witness credibility); *see also* Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 867 (1994) (recognizing cases with victim as only witness and where victim refuses to testify as "extremely difficult to prove").

234. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 21 (1949). "All of us know that, in every-day life, the way a man behaves when he tells a story—his intonations, his fidgetings or composure, his yawns, the use of his eyes, his air of candor or of evasiveness—may furnish valuable clues to his reliability." *Id.*

235. *See* Michael D. Roth, Comment, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 214-16 (2000).

236. *See* Waits, *supra* note 18, at 41 ("People need to understand that battered women often do not think straight because of post-traumatic stress").

237. *See generally* LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989).

238. PTACEK, *supra* note 223, at 9.

by a web of coercive tactics that a man uses against a woman, including physical and sexual violence, threats of violence, psychological abuse, and manipulation of economic resources."[239] Although criminal prosecutions frequently center on incidents of unwanted physical force, Professor Ptacek explains that "[t]he power of battering resides not only in the physical force men use but also in the social isolation they impose on women with their threats."[240]

This reality is inapposite to how the criminal justice system approaches prosecution of the defendants. Even when a prosecutor calls a victim to the stand who is ready and willing to testify against her batterer, it is difficult for the victim's accounts of a lifetime of domestic battery—necessarily divided up at trial into a small handful of individual events on certain specific dates for the purpose of the criminal trial—to stand up to a defense attorney's best attempts at impeachment during cross-examination.[241]

Moreover, studies show that the very nature of such traumatic events affects the memory process.[242] Therefore, because of the kind of abuse they suffer prior to the criminal trial, victims of domestic violence are likely to remember details of the specific events that form the basis for the criminal charges in inconsistent ways.[243] Studies show that during a traumatic event, an individual reacts to the immediate situation in real time, and does not focus on attempting to remember the details of the event as it is happening.[244] Mental health professionals believe that this act of closing off the mind to detail is a defense mechanism—a way of coping with the extreme emotional stress of trauma.[245] As Neal Hudders explains, memory loss associated with post-traumatic stress disorder resulting from long-term domestic abuse can cause a victim to not remember, or alternatively to claim to not remember, an abusive incident when testifying at trial.[246]

239. *See id*.

240. *See id.*

241. *See* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1177-78 (2002). The article explains that sometimes prosecutors choose not to put the victim on the stand at all, due to his or her fear that the witness's credibility would be impeached during "a difficult cross-examination."

242. *See* Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235, 262 (2007).

243. *See id.*

244. *See* Bessel A. van der Kolk, *Trauma and Memory*, *in* TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 279, 291 (Bessel A. van der Kolk et al. eds., 1996). "The traumatic experience is a time for reaction, not reflection. The brain prepares for an extreme traumatic threat by releasing hormones to react defensively, or to cope with the threat." Suzuki, *supra* note 242, at 262.

245. *See* Bessel A. van der Kolk, Onno van der Hart & Charles R. Marmar, *Dissociation and Information Professing in Posttraumatic Stress Disorder*, *in* TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY, *supra* note 244, at 307.

246. *See* Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 702 (1998) (noting similarities between PTSD and "Rape Trauma

The events detailed in a 1998 Kansas case, *State v. Todd*, provides an example of the effects of post-traumatic stress disorder, resulting from an abusive relationship, on a victim-witness's ability to testify.[247] In *Todd*, a victim recounted the events that led to her injuries to several individuals, and her statements implicated the defendant.[248] At trial, however, the victim claimed that she could not remember how she had received her injuries.[249] While this chain of events exemplifies an all-too-familiar tale of the plight of domestic violence victim-witnesses on the stand in every jurisdiction, in Massachusetts, this testimony would not trigger the substantive admissibility of the victim's 209A affidavit as a prior inconsistent statement.[250]

Currently, in Massachusetts, comparable legitimate memory issues do not (yet) qualify as prior inconsistent statements,[251] unless they are found to be feigned.[252] Even if the rule regarding prior inconsistent statements were given this more expansive interpretation, that rule would still likely fail to cover all situations in which a victim-witness's credibility is called into question on cross-examination due to honest behavior resulting from a lack of memory.[253] Given the domestic violence victim's potential to experience post-traumatic stress disorder and resulting memory loss, in conjunction with our understanding of domestic abuse as an ongoing cycle rather than a series of specific events, it seems unrealistic to expect a victim to remember the specific details of all the alleged charges of abuse, especially when these details are being recounted months, if not years, later.[254]

To further illustrate this complex evidentiary problem that is detrimental to prosecutions that hinge on the testimony of victim-witnesses, and to demonstrate how my proposal to admit prior consistent statements made in a

Syndrome"); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1312-14 (1993) (identifying symptoms associated with PTSD in battered women); Neal A. Hudders, Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 DUKE L.J. 1041, 1049 (2000) (explaining domestic violence victims may suffer from post-traumatic stress disorder and associated memory loss).

247. 954 P.2d 1 (Kan. Ct. App. 1998).

248. *Id.* at 4.

249. *Id.* at 3.

250. Commonwealth v. Santos, 974 N.E.2d 1, 19 (Mass. 2012). In Massachusetts, a prior statement made under oath cannot be brought in as a consistent or an inconsistent statement if the witness legitimately does not remember making those statements at trial. *Id.*

251. *See* Commonwealth v. Martin, 629 N.E.2d 297, 303-04 (Mass. 1994) (stating true failure of memory not inconsistent with prior testimony); *accord* Commonwealth v. Johnson, 729 N.E.2d 306, 310-11 (Mass. App. Ct. 2000).

252. *See* Commonwealth v. Sineiro, 740 N.E.2d 602, 608 (Mass. 2000).

253. The prosecutor and judge certainly would not be able to cure all concerns that the jury might have with a victim-witness's credibility due to his or her lack of memory through substantive admission of prior consistent statements. *See* FRANK, *supra* note 234, at 21 (discussing how juries constantly read witness' body language to assess credibility).

254. *See* Waits, *supra* note 18, at 41 ("[P]eople need to understand that battered women often do not think straight because of post-traumatic stress.").

prior 209A restraining order hearing[255] would rectify the problem, consider the following hypothetical scenarios which operate under the current Massachusetts Guide to Evidence. In both scenarios, the victim-witnesses have previously made "true" statements under oath in the 209A affidavits that support their requests for 209A restraining orders.

Scenario One

During direct examination at trial, the victim-witness tells a factually true story that is consistent with what was recorded in the 209A affidavit; I will refer to this story as "Story A." However, during a subsequent cross-examination, the defense attorney employs tactics that confuse the witness as to what actually happened—a confusion that is, perhaps, also attributable to the memory loss associated with the post-traumatic stress disorder she has experienced.[256] Perhaps, alternatively, the victim had a change of heart about the prosecution of her abuser. As a result, the witness tells a different version of the story—one that is wholly inconsistent with the testimony from the direct examination, as well as with the 209A affidavit. I will refer to this wholly different version "Story B." As a result of her behavior on the stand, the victim-witness is now no longer credible, as her testimony has effectively been impeached, by her telling of the wholly inconsistent Story B.[257]

In this situation, the prosecution can still proceed, theoretically without detrimental effect, to argue the case against the abuser because of the already established Massachusetts case law.[258] Pursuant to *Belmer*, the Commonwealth is permitted to submit the victim's 209A affidavit, telling the "true" Story A.[259] More importantly, the jury is permitted to consider that piece of prior testimony substantively, for its *full probative value*.[260] The jurors, in other words, are allowed to consider that affidavit for as much value as they would have considered Story A, if Story B had not been told.[261] Therefore, in theory, the detrimental effect of the cross-examination (due to the witness's memory loss or as a result of coercion) has been neutralized.[262]

255. Prior inconsistent statements made at 209A hearings are already admissible for their full, probative value. *See* Commonwealth v. Belmer, 935 N.E.2d 327, 329 (Mass. App. Ct. 2010).

256. *See generally* United States v. Wade, 388 U.S. 218 (1967) (White, J., dissenting).

257. *See generally* Friedman & McCormack, *supra* note 241, at 1177-78. Sometimes prosecutors choose not to put the victim on the stand at all, due to their fear that the witness's credibility would be impeached during "a difficult cross-examination." *Id.*

258. *Cf. Belmer*, 935 N.E.2d at 329 (stating proposed Mass. R. Evid. permits admission of prior consistent statement of declarant subject to cross-examination).

259. *See id*. (extending *Daye* rule to 209A affidavits resulting in abuse protection orders).

260. *See* Commonwealth v. Belmer, 935 N.E.2d 327, 329 (Mass. App. Ct. 2010).

261. *See id.*

262. *See supra* note 246 (discussing witness memory loss). *See generally* PTACEK, supra note 223, at 9 (noting effects of abusers coercive control over victim).

Scenario Two

Instead of telling a completely different story (Story B) on cross-examination, imagine now that the victim-witness's credibility is only partially, or questionably, impeached. In this scenario, the victim-witness's story on cross-examination does not rise to the level of the inconsistency of Story B. Perhaps her credibility is justifiably questioned because she is flustered and gets confused regarding the dates she described in Story A during direct examination.[263] Perhaps she suddenly has second thoughts about assisting with the prosecution of her batterer.[264] Perhaps she misremembers one or two minor details of Story A (but her story on direct examination and her story on cross-examination remain consistent enough as to not be deemed technically inconsistent). Perhaps she answers a "yes" or a "no" during cross-examination regarding just a small detail of the story, whereas direct adherence to her Story A would have required an opposite answer.[265] Perhaps she gets nervous and has a minor panic attack, thereby bringing her credibility into question in the minds of the jurors.[266] Regardless of which one of these events actually occurs, in Scenario Two, her story during cross-examination does not deviate from Story A substantially enough to be deemed inconsistent such that the *Daye* doctrine could be invoked. Here, the inconsistency has not risen to the level of Story B.[267] However, the new story has deviated enough from the original that the credibility of the victim-witness may now be reasonably questioned.[268]

In this second scenario, because the victim has not technically made a statement that is inconsistent with Story A, the court will *not* permit the prosecutor to admit her 209A affidavit for substantive evidence of the truth of Story A.[269] Instead, the prosecutor, at best, will only be allowed to introduce

263. *See, e.g.*, Commonwealth v. Thomas, 503 N.E.2d 456, 458 (Mass. 1987); Commonwealth v. Domaingue, 493 N.E.2d 841, 848 (Mass. 1986); Commonwealth v. Bougas, 795 N.E.2d 1230, 1233 (Mass. App. Ct. 2003).

264. *See* Ewing, *supra* note 18, at 106. Domestic violence cases are especially difficult to prosecute as they often have to move ahead "without the assistance of the victims." *Id*.

265. *See id.*

266. *See* Friedman & McCormack, *supra* note 241, at 1177-78 (explaining sometimes prosecutors choose not to put the victim on the stand at all).

267. *See* Commonwealth v. Daye, 469 N.E.2d 483, 494 n.16 (Mass. 1984), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *see also supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements). To be deemed inconsistent, "it suffices that the statement, '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.'" *Daye*, 469 N.E.2d at 494 n.16 (citation omitted); *see also* Commonwealth v. Johnson, 729 N.E.2d 306, 301-11 (Mass. App. Ct. 2000) (stating lack of memory does not count as inconsistent statement).

268. *Cf.* Commonwealth v. Scott, 121 Mass. 33, 35 (1876). "[A]nything tending to impeach the credibility of the witness upon any portion of his testimony in chief must, as in other cases, affect his whole testimony." *Id.*

269. *See* Commonwealth v. Cruz, 759 N.E.2d 723, 731 (Mass. App. Ct. 2001) (explaining prior consistent statement evidence not substantively admissible).

her 209A affidavit as a "prior consistent statement" to boost her credibility, thereby resulting in the judge instructing the jury that it may not consider the statement for the truth of what it asserts.[270] Therefore, in Scenario Two, when Story A is presented on direct examination and a partial deviation from Story A is elicited on cross-examination, the 209A affidavit may *only* be introduced to suggest to the jury that the victim is more likely to be a credible witness—and *not* to assert the truth of Story A. As a result, the prosecution's ability to prove its case will certainly be impaired.[271] Additionally, an acquittal is likely because the victim-witness's direct testimony (Story A) constitutes the vast majority, if not all, of the prosecution's evidence of domestic abuse.[272]

E. The Immutable Level of Inherent Reliability of Prior Statements Made at 209A Hearings

As the hypothetical illustrations have demonstrated, under the present Massachusetts rules, if the victim-witness in Scenario Two were to deviate *only slightly* from Story A during cross-examination, the prosecution's ability to prove its case would be seriously damaged.[273] Due to the fact that the version of Story A recounted on cross-examination was not sufficiently inconsistent for the text of the 209A affidavit to qualify as a "prior *inconsistent* statement" (and therefore it could not become admissible for its full probative value),[274] the prosecutor's only choice would be to offer the victim-witness's 209A affidavit as a "prior *consistent* statement," pursuant to the judge's instruction.[275] The 209A affidavit would be admissible in this situation, *not* for the statement's full probative value, *but only* to combat the impeachment of the victim-witness's credibility.[276]

It is unclear how the jurors would view such a prosecutorial effort or what they might do with the information.[277] Because they will not be instructed to consider the text of the 209A affidavit for the "truth of what it asserts" (i.e. for its full substantive/probative value), jurors could choose to disregard the text

270. *See id*. at 723 (discussing need for proper limiting instruction).

271. *See Scott*, 121 Mass. at 35.

272. *Cf.* Chanda, *supra* note 222, at 292 (describing domestic violence victim's testimony as essential to prosecution's case).

273. *Cf. id.*

274. *See* Commonwealth v. Belmer, 935 N.E.2d 327, 330 (Mass. App. Ct. 2010).

275. *See* Commonwealth v. Cruz, 759 N.E.2d 723, 731 (Mass. Ct. App. 2001)

276. *See id.* (asserting that prior consistent statements are only admissible to rehabilitate impeached witness).

277. *See* Commonwealth v. Scott, 121 Mass. 33, 35 (1876); *see also* Commonwealth v. Daye, 469 N.E.2d 483, 492 (Mass. 1984) ("[J]uries cannot, and perhaps should not, be expected to discriminate between impeachment and probative use of a prior inconsistent statement . . . ."), *overruled on other grounds by* Commonwealth v. Le, 828 N.E.2d 501 (Mass. 2005); *supra* note 5 (explaining *Le* does not impact *Daye*'s ruling on substantive use of prior inconsistent statements).

completely.[278] A juror's decision would ultimately depend on her assessment of the victim-witness's credibility after the defense attorney's best attempts to confuse and impeach the victim-witness on the stand during cross-examination.[279] In this situation, whether a juror will consider information from the 209A affidavit is far from certain.

The objective level of reliability inherent in any 209A affidavit statement—a reliability that was affirmed in *Belmer*—does not shift depending on subsequent events at a later trial.[280] There is, therefore, no valid justification for limiting *Belmer*'s expansion of *Daye* in situations involving 209A affidavits to *only* situations where the victim tells a completely *in*consistent story on cross-examination.[281] Like grand jury testimony, a 209A affidavit carries several indicia of reliability, as demonstrated by the fact that the Massachusetts Appeals Court found each of *Daye*'s indicia of reliability requirements to be present in 209A affidavits.[282]

Why does it make sense to take these important indicia of reliability seriously in one context, when a statement made at trial is inconsistent with the prior 209A statement, but to completely disregard them in another, when the two statements are consistent?

IV. CONCLUSION

For the reasons put forth in this Article, prior consistent statements should be substantively admitted in Massachusetts courts, as long as: the statement was made under oath at a prior proceeding; the statement was "made before the witness had an incentive to fabricate testimony"; the statement is clearly that of the witness, not of the interrogator, and is free of coercion; there is "an opportunity for effective cross-examination of the declarant at trial"; the testimony is consistent with the declarant's testimony; the testimony is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; and "other evidence tending to prove the issue [must be] presented."[283] As the Federal Rules of Evidence Advisory Committee observed, "no sound reason is apparent why" prior consistent statements made under oath "should not be received generally."[284] More specifically, there is no sound reason to deem statements made at prior trials, probable-cause hearings, 209A restraining order hearings, and grand jury

278. *See Daye*, 469 N.E.2d at 492; *see also Scott*, 121 Mass. at 35.

279. *See Scott*, 121 Mass. at 35.

280. *See* Commonwealth v. Belmer, 935 N.E.2d 327, 330 (Mass. App. Ct. 2010) (affirming 209A affidavit's reliability).

281. *See id.*

282. *See supra* text accompanying note 103-05 (discussing reliability of 209A affidavits in context of *Daye*).

283. *See supra* notes 160-67 and accompanying text.

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

hearings sufficiently reliable in some situations, but not in others. Additionally, many court observers believe that jurors already do consider all evidence for the truth of what it asserts, even if and when that evidence has been admitted only for a limited purpose. Therefore, my proposal would legitimize current practice.

My proposal would also increase the reliability of statements made under oath at prior proceedings. Because prior statements made under oath would be substantively admitted whether they are inconsistent *or* consistent, it would increase the likelihood that declarants who make these statements will be indicted for perjury if their statements are false. This would motivate declarants to be truthful when making these statements. Additionally, the prosecution of alleged perpetrators of domestic violence would be strengthened by the implementation of my proposal, as domestic violence victim-witnesses are particularly susceptible to credibility impeachment when on the stand, due to memory loss and post-traumatic stress disorder associated with domestic abuse.

Therefore, logic, policy rationales, and prior Massachusetts decisions impel the adoption of a rule that allows parties to admit prior consistent statements for the truth of what they assert at trial, subject to the aforementioned conditions.