Charles Laughton, Marlene Dietrich and the Prior Inconsistent Statement

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INTRODUCTION

In the movie, *Witness for the Prosecution*, Charles Laughton plays a defense barrister in a murder case.[1] On cross-examination, he confronts Marlene Dietrich, a key prosecution witness, with her own letters contradicting her direct testimony. The letters destroy her credibility. The confrontation is the denouement of the trial, but not of the movie. We learn after the trial that Dietrich contrived the letters herself, enabling Laughton to destroy her in front of the jury, thereby gaining an acquittal for the defendant, Tyrone Power, her lover. In a climactic twist, Dietrich kills Power when she discovers that he no longer loves her—before ultimately being represented by Laughton in her own murder trial.

There comes a point in a trial when advocacy skill, knowledge of the law, and professional responsibility uniquely come together. This is also the time when the adversarial nature of our system is clearest. This point occurs when a witness is impeached with a prior inconsistent statement, as portrayed dramatically in the Laughton-Dietrich confrontation.[2] This essay supports the assertion that witness impeachment is an indispensable part of the common law justice system, returning from time to time to the movie, *Witness for the Prosecution*.

I. THE FEDERAL RULES OF EVIDENCE

As every law student learns, cross-examination is the "greatest engine ever invented for the discovery of truth."[3] Traditional rules limit cross-

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1. WITNESS FOR THE PROSECUTION (United Artists 1957).

2. *Id*.

3. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourn rev. vol. 1974) ("The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross examination . . . has found increasing strength

examination to the subject matter of direct examination, and to matters affecting credibility.[4] "Matters affecting credibility" refers to the permissible grounds of impeachment as laid out by the Federal Rules of Evidence.[5] Typically, there are six ways to impeach a witness: (1) bias; (2) prior bad acts; (3) character; (4) prior conviction; (5) contradiction; and (6) prior inconsistent statements.[6] Impeachment of a witness outside of these categories is inadmissible. Further, a witness may be impeached during cross-examination, as well as outside of cross-examination. When a party offers evidence of impeachment in his own case, he is offering "extrinsic evidence" of impeachment, defined as evidence external to cross-examination.[7]

The admissibility of some extrinsic impeachment evidence is governed by per se rules.[8] For example, parties can always offer extrinsic impeachment evidence of bias. Extrinsic evidence of bad acts is never permitted, however.[9] Extrinsic evidence of "bad character for truthfulness," in the form of reputation or opinion, is always permissible.[10] Evidence of "prior convictions" is governed by its own set of rules.[11]

Extrinsic evidence of contradiction and of prior inconsistent statement is decided, however, according to the "collateral evidence" rule. Collateral in this context means "unimportant."[12] The gauge is to

in lengthening experience").

4. FED. R. EVID. 611(b).

5. *Id. See generally* Advisory Committee's Note to FED. R. EVID. 611(b), 46 F.R.D. 161, 304 (1969) (explaining the traditional rule); House Comm. on Judiciary, FED. R. EVID., H.R. REP. NO. 650 (1973) (explaining the revision in Rule 611(b) to limit cross-examination impeachment to those methods already listed in the Federal Rules of evidence, that is, matters affecting credibility).

6. FED. R. EVID. 608(a) (instructing that evidence of opinion or reputation may be introduced to attack the truthfulness of the witness); FED. R. EVID. 608(b) (instructing that specific instances of conduct can be probative of character); FED. R. EVID. 609 (delineating when evidence of a prior conviction may be introduced for impeachment purposes); FED. R. EVID. 613 (explaining when a prior inconsistent statement may be used for impeachment).

7. *The 'Lectric Law Library's Lexicon on Extrinsic Evidence, at* http://www.lectlaw.com/def/e078.htm (last visited Jan. 6, 2005), (defining extrinsic evidence as "[e]xternal evidence or evidence that is inadmissible or not properly before the court, jury, or other determining body").

8. *Id*.

9. FED. R. EVID. 608(b).

10. FED. R. EVID. 608(a)(1).

11. *See generally* FED. R. EVID. 609 (providing that evidence of a prior conviction be admitted if the crime was punishable by death, greater than one year's imprisonment, or involved dishonesty or false statement).

12. *See* MCCORMICK ON EVIDENCE § 36 (John W. Strong ed., 5th ed. 1999) ("[T]o impeach by extrinsic proof of prior inconsistent statements, the statements must have as their subject facts relevant to the issues on the historical merits in the case.").

ask whether extrinsic evidence of this contradictory fact or inconsistent statement is worth the time it takes to admit it.

A mere recitation of these impeachment rules shows that the advocate needs detailed knowledge of the rules of evidence before she even thinks about impeachment techniques, whether on cross-examination itself, or through extrinsic evidence.

II. THE BEAUTY OF IMPEACHMENT

Extrinsic evidence is helpful to a party, because it is proof: something you can point to in closing argument. Impeachment during cross-examination itself, however, is more damaging—and more fun. The fun part implicates advocacy skill. Traditional advocacy prescribes a three-step approach to impeachment with a prior inconsistent statement. First, the attorney must commit the witness to the fact he intends to contradict; second, he builds up the circumstances or context of the making of the contradictory statement; third, he confronts the witness with having made the statement. Commit, build up, confront—an easy enough prescription to remember, but the devil is in the details of execution.

Before discussing this technique in detail, I make three preliminary points. First, the rationale for the three-step approach is that jurors are limited in the ways they can learn the facts of the case. Typically jurors learn by listening, which is one-dimensional and is made more difficult by their general inability to ask questions. They must therefore listen and hear correctly the first time that the words are spoken, which emphasizes the obvious importance of repetition, diagrams, and photographs. When the examiner impeaches with a prior statement, she expects the jurors to understand an abstraction, or "inconsistency," between the two statements. If the contradiction is "yes" versus "no," or "red" versus "green," it is relatively easy for the jurors to "see" the contradiction. In the world of real trials, however, the contradiction is embedded in phrases and paragraphs and is difficult to "see" just by listening. Thus, the three-step prescription of commit, build up, and confront addresses this problem by building up to and setting off the contradiction.

Second, the approach creates the opportunity for dramatics. Specifically, when the cross examiner confronts the witness with the prior inconsistent statement, she has the chance to "ring the changes" for emphasis. She can raise her voice; she can lower her voice to a stage whisper. The examiner can also slow down the delivery and labor over each word of contradiction (as Charles Laughton does inimitably

in confronting Marlene Dietrich), or can pause for dramatic effect. Here then is the high drama of a real trial: making the witness agree to the examiner's damning words.

Third, a skillful examiner will then emphatically confront the witness, because once the witness answers, the impeachment is complete. There is no room for follow-up along the lines of "[w]ere you lying then or are you lying now?" Such a question only gives the witness a chance to explain the inconsistency, thereby taking the clear edge off of the effect of the inconsistent statements.

A. Committing the Witness

Now, let's look at some practical aspects of this three-step technique, starting with the committing stage. There are a couple of ways to commit the witness to the facts to be impeached. The examiner can assert what the witness has already said on direct: "You have told us the light was green," or by contrast, the examiner can assert the contradictory proposition: "The light was red, wasn't it?" Each approach works as an effective set-up, but each has its drawbacks.

Asserting what the witness has already said on direct repeats that version. There is the danger that this repetition emphasizes that version for the jury, so the examiner has to be sure not to repeat the direct testimony at length and also be sure to ask the question in a skeptical tone of voice, and in a skeptical form: "Now, you have just told this jury . . . ."

Asserting the contradictory proposition at first bumps up against the substantive evidence versus impeachment evidence distinction that I develop below.[13] If the prior inconsistent statement is admissible only to impeach, and not substantively, the examiner cannot imply through her questions (and in her closing argument) that the statement is true. If the examiner starts this impeachment by asserting the contradictory fact ("the light was red"), the implication arises that the inconsistent statement that asserts this very thing ("the light was red") should be understood as proving the light was red—especially if the examiner's theory is that the light was indeed red. This will lead to an objection on hearsay grounds when the examiner confronts the witness, which interrupts the flow of questions and diminishes the impact of the impeachment.[14]

13. At this point, it is sufficient to say that a prior statement is generally hearsay, but is admissible to impeach if it is inconsistent with a statement on the stand. The prior statement is only admitted to show contradiction, and not as a true statement. FED. R. EVID. 801(d)(1)(A).

14. A limiting instruction is the usual remedy for this problem. The judge instructs the jury

B. Confronting the Witness

After committing the witness to the fact to be contradicted, the examiner builds up and then confronts. When confronted, the witness will say, "yes," "no," or "I don't remember." A "yes" or "no" effectively ends the impeachment. If the witness says "no," denying the impeaching statement, the examiner moves on and offers extrinsic evidence of the statement in his own case, but only if the statement is important or non-collateral.

What if the witness responds, "I don't remember"? Such a response is, in actuality, a common response, because it is natural. The witness does not wish to be trapped in a contradiction. Moreover, he certainly does not want to put himself in jeopardy of perjury. "I don't remember," gives the witness some room to maneuver. But in responding this way the witness has only shifted the ground of attack for the examiner. Now the examiner is in the "refreshing recollection" mode. She can now use exhibits of all kinds in an effort to induce the witness to recall making the previous statement. This includes using writings made by others, which otherwise would be inadmissible to impeach the witness directly because they are not his statements. Refreshing recollection broadens the range of questions that the examiner can ask, which in turn further focuses the jury's attention on the contradiction.

C. "Building Up" the Impeachment

Look at the role that written statements play. If the witness's previous statement was written, the examiner has an easy option. Certainly the examiner wants to somehow incorporate the writing because jurors give extra weight to writings, even though, in actuality, writings do not have any greater probative weight than testimony. Writings do, however, carry an extra, imaginary weight because they are tactile: the jurors can touch, hold, and manipulate a writing. Therefore, writings create an added dimension to the jurors' learning.

The tactical option which arises for the cross examiner when the previous statement is written is either to immediately use the statement, or to wait and spring the statement on the witness if the witness denies the statement. If the examiner initially uses the impeaching statement,[15] he serves the objective of letting the jurors immediately see that the

that the statement is admissible only for the bearing it has on the witness's credibility, and is not to be taken as proof of what the statement asserts.

15. Such a statement would have to be marked for identification, and be authenticated by the witness.

examiner has this tactile, concrete object, this "objective correlative"[16] for the witness's lack of credibility.

In addition, the examiner shows the witness that she "has the goods" on the witness, which provides a powerful element of control in carrying out the commit, buildup, and confront phases of impeachment. In using the writing at the outset, the examiner loses, however, a small element of surprise, and the opportunity to utilize twice the impeachment.

If the examiner were to withhold the writing however, and embark on the three steps of committing, building up, and confronting first, she may prompt the witness to deny having made the statement. When the witness denies making the statement, the examiner can immediately mark the writing for identification, show it to the witness and conduct the impeachment a second time. A second impeachment not only emphasizes the contradiction, but also adds an extra measure of discredit, as the witness has been caught initially denying a statement he must now admit having made.

There is a drawback to this option in that if the witness immediately admits to having made the prior statement, and the examiner has not used the writing itself, there will be no opportunity to mark and show the writing. The impeachment would be completed by the witness's concession, and the examiner would have to move on; as such, the writing would be "cumulative," and likely inadmissible.

III. IMPEACHMENT AND *THE WITNESS FOR THE PROSECUTION*

Charles Laughton's use of Marlene Dietrich's contrived letters is a delightful and realistic practice in staging. Laughton asks Dietrich questions about letters he alleges she wrote to a certain "Max." As he asks these questions, he holds a piece of paper, apparently the letter to which he refers. This paper in fact has nothing to do with the letter, but instead is a mere piece of scrap paper that he had retrieved from his briefcase. The real letters that Laughton intended to use to impeach were placed underneath a book on his desk. Dietrich's answers become shrill denials of his assertions. As he waves the paper in front of her, she blurts out, "[w]hy that is not even my stationery. Mine is light blue with my initials on it." At this point, Laughton pauses and slowly lifts from the pages of his book the actual letters, in blue with initials on

16. *See* T.S. ELIOT, *Hamlet and His Problems*, *in* THE SACRED WOOD 95, 100 (Methuen 1969) (using the phrase to describe a literary technique whereby "a set of objects, a situation, a chain of events which shall be the formula of [a] *particular* emotion; such that when the external facts . . . are given, the emotion is immediately evoked").

them. He then asked sonorously, laboriously, "[l]ike. . .this?"

Thus, Laughton holds back the writing, induces the vehement denial, and then proceeds to produce the writing with a vengeance. Dietrich is reduced to shrieking insults at Laughton ("Damn you!"). In reality—this technique, if not her reaction—is wholly plausible.

IV. MOVIE DRAMATICS AS APPLIED TO REAL LIFE: STRATEGY AND "GOOD FAITH"

One loose evidentiary end remains untied: does it make any difference whether the prior statement is admissible not only for impeachment, but "substantively" as well—that is, as a true statement?

Today many jurisdictions permit some kinds of prior inconsistent statements to be admitted as true statements.[17] Typically, rules which permit such a use require that the person who made the statement be on the witness stand and be subject to cross-examination on the statement, and that the statement be under oath, or be made under equivalent circumstances supporting the conclusion that it was reliable, such as tape recording.

It is up to the examiner whether she wants the jury to accept the statement as true. The statement's admissibility as a true statement does not necessarily mean that it must be used as true. Its use is determined by the examiner's theory of the case. The examiner offers the prior inconsistent statement as true only if the statement helps support her theory. Yet, even if the examiner intends the statement to be taken as true as well as to be used to impeach, she follows the same technique as she would were the statement being used solely for impeachment purposes. This technique provides the best means of emphasizing the making of the statement.[18] To effectively accomplish impeachment with a prior inconsistent statement in a dramatic fashion, the advocate must know the evidence rules related to impeachment and the procedural rules governing cross-examination and impeachment. She must also possess the advocacy skill to isolate and emphasize the contradiction.

17. FED. R. EVID. 801 (d)(1)(A); 725 ILL. COMP. STAT. 5/115-10.1 (2002).

18. It should be noted that the examiner might ask a few additional questions as part of the build up phase if the statement can be offered substantively. For example, the examiner may want to further establish for the jury the importance of the statement about to be impeached. These types of buildup questions are usually argumentative—i.e., "[y]ou want this jury to believe . . . ;" "[y]ou knew it was important to tell the police the *truth*." Although such statements generally carry little weight with a jury, the examiner asks these questions because he is not concerned with the answer. Instead, the examiner wants to emphasize for the jury what he considers to be the obvious motivation behind making the previous inconsistent statement.

So where does professional responsibility come into play? The advocate needs a good faith basis to assert a fact on cross-examination. This good faith requirement is an aspect of the general obligation that the advocate has to be honest with the court, and to not "perpetrate a fraud upon the court."[19] But what does "good faith basis" mean, concretely?

There are two versions of good faith: one strict and one relaxed. A strict view of good faith requires that the examiner have admissible evidence showing that the impeaching fact is true. Under this view, good faith would require that in order to assert to a witness, "you said before that the light was green," the examiner must have admissible evidence that the witness said the light was green. If the examiner has only some indication that the statement had been made, but has no admissible proof, the statement is not in good faith.

The second good faith view treats it as a rule of reasonableness; specifically, as long as the examiner has a reasonable basis for believing the impeaching fact is true (for example, that the previous inconsistent statement was made) he is operating in good faith. Thus, if the examiner's basis for impeachment is a hearsay report, made by someone other than the witness, and the report nevertheless seems authentic and reliable, she may assert the impeaching fact contained in the report.

Which view of good faith to apply depends upon the law of the jurisdiction. In *Witness for the Prosecution*, Laughton possesses letters that contradict Dietrich's earlier testimony. Laughton has a good faith basis to confront Dietrich with the statements, both because of the circumstances of the letters coming into his possession, as developed in the movie, and his expectation that he can authenticate them, through handwriting analysis, and introduce them, if necessary. Thus, he both acts reasonably and possesses admissible evidence. Of course it is the penultimate twist in the movie that the letters are false, created by Dietrich to enable Laughton to discredit her.

V. IMPEACHMENT AND JUSTICE: THE TRUE ADVERSARIAL HIGH POINT

Thus far, this essay has pointed out how impeachment with a prior inconsistent statement marks a dramatic high point of the trial: where legal knowledge, advocacy skills, and ethics come together. Next, I support the assertion that impeachment with a prior statement also marks the point when our trial process is most clearly adversarial. This turns out also to involve Marlene Dietrich and her fateful decision to

19. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2003) (prohibiting lawyers from lying to the tribunal and instituting a policy of candor toward the court).

fool Charles Laughton with the fake letters.

A. The Civil Law Inquisitorial System: A Contrast

First it is necessary to discuss some general distinctions between the common law adversarial (or accusatorial) system and the civil law inquisitorial system. The English and American systems are adversarial; in contrast, Continental European systems, like the French and Italian, are inquisitorial. These adjectives denote traditional differences, which have been somewhat blurred by recent developments in which some European countries have incorporated some adversarial features.

In an inquisitorial system, the investigation by a magistrate is of equal importance with that of the trial. The investigation leads to the creation of the dossier, which is a written summary of the evidence. This dossier is the basis for the prosecution's charge against the accused, and is itself often evidence in the case. The trial is conducted and controlled by a magistrate judge. The parties—and their lawyers—play subsidiary roles. The jury comprises both professional judges and lay jurors. The magistrate takes the lead in questioning the witnesses, including the accused. The advocates ask follow-up, supplementary questions. The accused almost always testifies because, although he cannot be compelled to do so, his failure to speak may be used to support an inference of guilt. In addition, since punishment and guilt are decided in one hearing, the accused is motivated to speak to mitigate his potential punishment. There is thus no counterpart in an inquisitorial civil law trial to the vigorous advocate's cross-examination that is characteristic of a common law trial.[20]

I make this reference to the civil law system to highlight, by contrast, the adversarial nature of our system. Cross-examination is the single most important feature of this adversarial system, and impeachment with a prior statement is the quintessence of cross-examination.

B. Cross-Examination in our Common Law Adversarial System

Cross-examination and impeachment are quintessentially adversarial, but not because cross is "cross." Demeanor has nothing to do with the nature of a cross-examination. The opponent's examination of your witness is called cross because the examiner, whatever her manner, is at cross-purposes to the witness. Her objective is to further her own case theory. This may involve getting favorable information from the

20. For example, Italy's recent reforms to its criminal procedure provide an increased role for an advocate's cross-examination.

witness. It may involve—and usually does—discrediting the witness and what he has said,[21] which is the subject matter of direct examination and matters affecting credibility. Impeachment is the form that the discrediting process takes, and in confronting a witness with his own contradictory words, the examiner is unmistakably the witness's adversary.

The Michigan case of *Ruhala v. Roby*[22] emphasizes the adversarial nature of impeachment with a prior statement, and provides the groundwork for understanding Marlene Dietrich's ploy in the movie. At issue in *Ruhala* was whether to permit a prior statement to be treated as substantive evidence, rather than simply as impeachment.[23] In the case, the plaintiff called a witness whose direct testimony damaged the plaintiff.[24] The plaintiff then sought to introduce the witness's previous, contradictory statement, hoping to rehabilitate his case.[25] The defendant objected that this prior statement could not be considered substantively, that is, as true.[26] The plaintiff responded that the defendant would be able to cross examine the witness about the statement, so there would be no prejudice. Ultimately the Michigan Supreme Court disagreed with the plaintiff, and in reaching its conclusion described what cross-examination is, and what the cross examiner's objectives are:

> The difficulty with this argument is that it does not recognize the real nature of cross-examination. Cross-examination presupposes a witness who affirms a thing being examined by a lawyer who would have him deny it, or a witness who denies a thing being examined by a lawyer who would have been affirm it. Cross-examination is in its essence an adversary proceeding. The extent to which the cross-examiner is able to shake the witness, or induce him to equivocate is the very measure of the cross-examiner's success.[27]

This view of cross-examination focuses on the examiner and her objectives and is not without its critics, who claim its focus on the examiner is too narrow and ignores the procedural purposes of cross-examination.[28] This dispute is addressed shortly, but first it is

21. The Federal Rules of Evidence limits the scope of cross-examination to the subject matter of direct and matters affecting credibility. FED. R. EVID. 611(b).

22. Ruhala v. Ruby, 150 N.W.2d 146 (Mich. 1967).

23. *Id.* at 152.

24. *Id.* at 149.

25. *Id*.

26. *Id*.

27. *Id*.

28. *Rules of Evidence, Hearing on H.R. 5463 Before the Comm. on the Judiciary*, 93d Cong. 50–53 (1974) (statement of Professor Edward Cleary).

instructive to illustrate how *Witness for the Prosecution* depends, for its dramatic impact, upon this cross-examiner point of view.

C. Illustration of the Adversary Uses of Cross-Examination

In her conversations before trial with Laughton, Dietrich comes to realize that were she to provide an alibi for her lover, Tyrone Power, her testimony would be of little help, as her bias would be obvious. On the other hand, if she were to testify against him, (by claiming he was not at home when he said he was) and then be discredited, the destruction of her credibility would so weaken the prosecution case that her lover would be acquitted. This she attempts by contriving the letters and getting them to Laughton (with the help of a rather cheesy disguise) under circumstances establishing their authenticity.

Her desired outcome ensues due to Laughton's skill in impeaching her, and her own feigned hysteria at being impeached. It all works gloriously, and dramatically, but only because impeachment provides such a powerful method of proof. But are we comfortable with giving impeachment this power? There is a just ending in the movie, but do we feel there is a just result in the trial? Dietrich kills Power, who was in fact a murderer, and she must thereafter face her own prosecution. Yet, but for Power's own philandering, he would have gotten through unscathed.

The question the movie poses echoes the dispute addressed in the *Ruhala* opinion.[29] What is the relationship of cross-examination and impeachment to justice? Thinking about an answer brings us back to the distinction between the civil law inquisitorial system and our accusatorial system.

D. Cross-Examination and Justice

Mirjan Damaska, the Sterling Professor at Yale Law School, is a prominent Comparative Law scholar who has compared the differences between the accusatorial and inquisitorial systems.[30] One of his focuses is on the relative degree to which each system is designed to get at the "truth of what happened":

> It is openly stated by some common law lawyers that the aim of criminal procedure is not so much the ascertainment of the real truth

29. *Ruhala*, 150 N.W.2d 146.

30. *See, e.g.*, Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973) (discussing the belief that "the rules of evidence under the common law adversary system of criminal procedure present much more formidable barriers to conviction than do corresponding rules in the non-adversary civil law system").

> as the just settlement of a dispute. . . . In talking about ends of the criminal process continental lawyers place a primary emphasis on the discovery of the truth as a prerequisite to a just decision.[31]

Accepting the distinction Damaska describes for argument sake, how does impeachment with a prior inconsistent statement quintessentially, assist a "just settlement?"

It can be argued that impeachment does so in two ways. First, impeachment balances the witness's assertions with his contradictory words, thereby giving the jurors a balanced view of what the witness has said. Ultimately, a judgment based on these balanced assessments is itself more balanced, fair, and thus a "just settlement."

Second, impeachment assists a just settlement in a criminal case by enforcing the burden of proof beyond a reasonable doubt. This strict burden is itself illustrative of Damaska's characterization of the common law system, as "not so much [concerned with] the ascertainment of the real truth."[32] The burden of proof expresses "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[33] Impeachment can itself create reasonable doubt. A judgment based solely upon a witness who has been substantially impeached is not beyond a reasonable doubt, and is not a just settlement.

VI. CONCLUSION

Impeachment is an effective tool in our adversarial system. Specifically, impeachment may be so effective as to create a reason to believe the very opposite of what the witness has asserted. This is the strategy behind Dietrich's set up of Laughton to impeach her on the stand. Although the trial outcome is a false one, we only know that because we are watching the movie. On its face, the trial outcome appears to be a "just settlement."

31. *Id.* at 581.

32. *Id*.

33. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).