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RELEVANCE

RULES 104–106; 401–403; 411

Relevance is *relational*; has meaning only in context

- There is no test for relevance; depends on logic, common sense, and experience. (49)

Kinds of Evidence

- Direct
- Circumstantial

Basic Scheme

- **Rule 104:** initial matters of weight, admissibility, & credibility.
- **Rule 401, 402:** liberal definition of “relevance.”
 - Evidence is relevant if relevant to *a fact of consequence*; fact need not be disputed. *Old Chief*.
- **Rule 403:** limits 401—evidence barred if unfairly prejudicial, confusing, waste of time, cumulative.
 - **Burden is on the objecting party to show that risk of prejudice, etc. *substantially outweighs probative value.***
 - Weigh alternative evidence; try to find evidence that has more or equivalent probative value with less prejudice
 - Two pieces of evidence on same point not mutually exclusive
 - Lack of alternatives enhances probative value¹
- **Rule 601(a):** further control by court to avoid waste of time, harassment or undue embarrassment of witnesses, tangential matters getting away from “ascertainment of truth”

Four-part test (judge decides)

- (1) Evidence offered for a proper purpose?
- (2) Evidence relevant for that purpose?
- (3) Probative value substantially outweighs risk of unfair prejudice?
- (4) Limiting instruction possible?

¹ No alternatives at all makes a strong case for necessity of certain kinds of evidence

***Old Chief v. United States*, 419 U.S. 172 (1997)**

- Defendant charged with being a felon in possession of a firearm; prior felony was for assault causing serious bodily injury. Defense sought to stipulate to the prior felony to keep evidence of title of offense and its detail from the jury. (52)
- Court: Admitting evidence of the name and title of the prior conviction would be unduly prejudicial; jury needed to know there was a prior felony conviction but did not need to know the prior felony conviction was for assault.
 - Availability of alternative proofs (including stipulation) does not affect relevance. **Under FRE, evidence is relevant if it tends to prove a fact of consequence—need not be disputed.** (53)
 - **Prosecutor’s need for “evidentiary depth” does not apply to establishing the defendant’s status.** (55)
- Balancing test under 403 (72)
 - Here, risk of unfair prejudice = entering name of prior felony conviction would show that Old Chief had previously been convicted of the same kind of crime as charged here; could lead jurors to conclude that he had done the same thing again, despite irrelevance of past behavior to the matter at hand

Background information is relevant

- Evidence that is “essentially background in nature” is usually admitted “as an aid to the understanding.” *ACN, Rule 401*.
- Can show “circumstances surrounding the events.” *U.S. v. Daily*, 842 F.2d 1380 (2d Cir. 1988).

Family history is not relevant

- *U.S. v. Solomon*, 686 F.2d 863 (11th Cir. 1982)

Info on consequences of verdict is not relevant

- See *Shannon v. U.S.*, 512 U.S. 573 (1994)

ESTABLISHING RELEVANCE

The evidential hypothesis

- Proponent should be able to offer a “general premise”—some statement about the “ways of the world or human nature.” (57)
- Evidential hypothesis links evidence to the case through the general premise
 - Differences in interpretations of the evidence affect *weight of evidence* or *credibility of the witness*, not admissibility.
 - Weight & credibility → jury
 - Matters about the merits, “everyday facts about the world,” common-sense matters → jury.
 - Questions of law → judge.
- How strong need the tendency to prove or disprove be?
 - **The Rules are designed to get evidence in.**
 - S.Ct. endorses, & the FRE contain, a broad definition of relevance.
 - If the evidence “tends to support” a permissible inference, jury/court may consider the point.²
 - **Evidence does not need to be conclusive.** Only needs to make the point for which it is being offered more or less likely.
 - Just because evidence misleads doesn’t make it irrelevant.

Judge decides relevance to determine admissibility, not weight, under 104(a).

- Judge just needs to find some kind of “logical nexus” between the evidence and the proposition to be proven.
 - Judges can consider even inadmissible evidence in deciding what will go to the jury
- Conditional matters of fact submitted to jury under 104(b)—judge provides only “screening function” when different answers are reasonable (85)

State v. Chapple, 660 P.2d 1208 (Ariz. 1983)

- **“Visceral” color photographs have high prejudicial value³**
 - *Photos of any sort usually come with Rule 105 limiting instructions*
- Here, photos were of murder victim showing charred body & skull; showed close-up of skull with a “large bone flap” cut away to show location of bullet in brain. Photos were relevant, but not very probative because they did not bear on contested issues. (69)

² Gagnon: “If the judge says, ‘yeah, I see your point,’ the evidence is going in.”

³ Better to introduce gruesome photos in B/W because they’re more clinical; provides “moral high ground” by showing prosecutor’s “compassion” for the higher emotional impact of color photos.

“Completeness” doctrine: Rules 611, 106, 401–403

- “Shortness of life”—avoidance of duplicative, needless, cumulative evidence
- Rule 106: opposing party can require offering party to introduce add'l parts of a writing if necessary to prove context (even if otherwise inadmissible hearsay)

Rule 105: Limiting Admissibility

- Judge can issue limiting instructions, telling the jury to consider evidence only for certain purposes
 - Presumption that jurors will follow instructions in civil cases
 - In criminal cases, presumption favoring exclusion(?)
- E.g., someone yells “fire” in a crowded theater
 - Couldn't be used to prove that there was a fire
 - But could be used to explain reaction of crowd (effect on listener)
 - limitation could require Rule 105 instruction

PROBABILISTIC EVIDENCE

Probabilistic evidence = evidence that purports to show the mathematical likelihood that a particular proposition is true

***People v. Collins*, 438 P.2d 33 (Cal. 1968)**

- **General bar against probabilistic evidence**
 - Prejudicial and confusing, subject to misuse; barred under 403; pseudoscience can't substitute for jury's own evaluation.
- Court's general concerns
 - Math was all wrong
 - Prosecutor assigned made-up probabilities to the six characteristics, assumed they were independent, and then multiplied them
 - Nobody knew what the factors were for the actual perpetrators because no one knew what they actually were
 - Control issues
 - Many judges, lawyers, and judges unlikely to understand
 - Judges unsure whether they can control the influence of probabilistic evidence

Policy concerns

- Creates opportunities for laziness, e.g., introducing general statistical evidence rather than particularized evidence
- Highlights the inexact nature of the whole venture—in a civil case, a 52% probability of correctness would have to support a favorable verdict
 - . . . so naturally courts are unwilling to accept evidence that shows it's little more than a toss-up

AUTHENTICATION

RULE 901: AUTHENTICATION REQUIREMENT**Must establish a foundation**

- Rule 901(a): foundation requires “evidence sufficient to support a finding that the matter in question is what its proponent claims”
 - Purpose of introducing evidence affects the foundation needed
- For both tangible & intangible evidence
- For experts (experts must be qualified)
- For hearsay (facts that demonstrate that a hearsay exception applies)
- For conversations (one of the speakers must be involved in/important to the case)

Hypo: A gun is being offered as the murder weapon. What foundation?

- Show where the gun was
- Create link between bullets recovered from the scene of the crime and the gun fired—forensic evidence
 - Testimony re: test bullets fired once the gun was in custody
 - Comparison between bullets recovered and test bullets

Standard for sufficiency of foundation

- Evidence sufficient for a reasonable person to believe that the evidence is what it's claimed to be
 - Must make prima facie case
- If foundation requires more than one witness, exhibit inadmissible until foundation complete—i.e., all witnesses have testified
 - Keep in mind the need to authenticate without publication to the jury
 - Reveal as little as possible to establish predicate for admission
 - See Keeton's example (862)

901(b) list is not exhaustive

- Can authenticate by analogy to the ten examples provided

Steps for authentication

- (1) Give the exhibit a name, e.g., “Plaintiff’s 1 for purposes of identification”
 - is not Plaintiff’s *Exhibit* 1 until it has been admitted
- (2) Authenticate by testimony of a witness with knowledge
 - unless self-authenticating under Rule 902
- (3) Offer exhibit into evidence at the end of authentication
 - “At this time we move the admission of . . .”
- (4) Opposing counsel can conduct *voir dire* & basically cross-examine the exhibit
 - Rarely done because such questions usually complete the foundation—easier to object that it’s an inadequate foundation
 - Opposing counsel can register other objections
- (5) Make sure there is a definitive ruling by the court on admission
 - Needs a number for exhibit
- (6) Present to the witness
- (7) Ask permission to publish to jury
 - Some disclosure may be unavoidable, as when an exhibit needs to be presented to a witness

AUTHENTICATING OBJECTS**Categorical certainty is not required of an authenticating witness.**

- ***United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980) (857)**
 - Categorical certainty is not required of an authenticating witness.
 - Authenticity ≠ believability
 - Admissibility based on preponderance standard
 - Reviewed for abuse of discretion
 - All it takes to get evidence in is someone who says “I was there, I saw what took place, I (think I, am pretty sure I) recognize this object, this was the one.”
 - Satisfies Rule 901(b)(1)

Perfect chain of custody not required

- ***United States v. Howard Arias*, 669 F.2d 363 (9th Cir. 1982)**
 - **Perfect chain of custody not required**
 - “Precision in developing the ‘chain of custody’ is not an iron-clad requirement, and . . . a ‘missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material respect.” (860)
 - Gaps in the chain make evidence less believable to the jury
 - Prosecutor should be meticulous about establishing chain

AUTHENTICATING WRITINGS

Circumstantial evidence usable for authentication

- *United States v. Bagaric*, 706 F.2d 42 (2d Cir. 1983) (860)
 - Circumstantial evidence usable for authentication
 - Here: Rule 901(b)(4); letter from third party used to show conspiracy
 - letter addressed to Δ_1 ; postmarked in place another Δ_2 lived
 - letter signed by alias otherwise established to be used by Δ_2
 - letter directed Δ_1 to contact a party with alias otherwise shown used by Δ_3
 - Evidence did show that the letter was from Δ_2 to Δ_1 based on its distinctive characteristics.

Spelling errors may authenticate writings

- *U.S. v. Larson*, 596 F.2d 759 (8th Cir. 1979) (861)

Letterheads may authenticate writings

- *U.S. v. Gordon*, 634 F.2d 639 (1st Cir. 1980) (862)

AUTHENTICATING EMAILS

New to courts; courts not sure how to deal with them

Header info—IP address, date, email addresses—equivalent to letterhead

- Sufficient to establish that the email is what the IP address says it is
- Courts assume that if there's a hacking issue, the lawyer will address it; presumption of legitimate IP information

AUTHENTICATING RECORDINGS

Concerns with tape recordings

- Is the recording a good copy?
- Was the equipment functioning properly?
 - Was the recording apparatus capable of making a true recording?
- Was the person conducting the recording properly trained?
 - (*Were you trained in this?—Yes. Were you following your training?—Yes.*)
- Was the recording properly preserved?
- Were the speakers identified?
- *Concerns largely mitigated by the advent of high-quality audio recording technology*

Use of transcripts in lieu of tape frowned upon

- Reading transcript doesn't convey the same info (inflection) as listening to a person speak

Translations

- Frequently allowable, but "tough"
- May require experts
- Cf. "underworld figures"—talking in "code"—need to translate their secret terms

***Turnage v. State*, 708 N.W.2d 535 (2006)**

- Provides list of the seven traditional foundational requirements for admissibility of a tape recording (866)
- Provides example of the foundational requirements being met

HEARSAY

Hearsay is an out-of-court statement used to prove the truth of the matter asserted. *Rule 801(c)*

- Use to prove truth need not be direct
- Witnesses need to say what they *saw*, not what they *said at the time*. The witness may have said X at the time yet now believe ~X; testifying to saying X would only be misleading
- No sincerity risk → not hearsay

PROBLEMS WITH HEARSAY**Reasons for Exclusion**

- **Can't cross-examine the original speaker** (106)
 - Cross-examination is the key to determining whether testimony is truthful
- No "demeanor evidence"
 - Jury can't judge credibility
- No oath
 - No incentive for truth or sanction for falsehood
- *Prevents any method of judging the truth of a statement other than the words themselves. Jury can't do its job.*

Hearsay Risks

- Misperception (107)
 - Needs to be probed through cross-examination.
 - What if the crucial issue is whether the car was green or blue, and the late-day light was dim and cool? What if the declarant had trouble telling the difference between green and blue?
- Faulty memory
 - Includes conflation of memories
- Misstatement
 - What was said wasn't what was meant
- **Risk of insincerity**, distortion, lack of candor (108)
 - Can be intentional or inadvertent

ASSERTIVE CONDUCT**Assertive conduct is hearsay**

- Acts that have communicative intent
 - e.g., nodding of the head in response to a question; lanterns hanging to warn of British coming
 - “standard nonverbal cues”

NONASSERTIVE CONDUCT**Nonassertive conduct is not hearsay**

- Acts that imply belief in a statement even if the purpose of the conduct was not to convey that belief (110)
 - “[I]ncludes the visible psychological, physical, and emotional reaction of a person” (134)
 - Rape victim sees perpetrator during lineup and begins crying → nonassertive conduct. *People v. Gwinn*, 314 N.W.2d 562, 572 (Mich. App. 1981)
 - Bank teller became pale and was shaking during bank robbery → nonassertive conduct showing robbers used intimidation. *Cole v. U.S.*, 327 F.2d 360 (9th Cir. 1964)
- Can be things like screaming “ouch!”
 - not intended to communicate
 - reflexive
 - not the product of ratiocination

Unless the actor intends to communicate, there is no risk of insincerity

- → statement is admissible
- Under Rule 801(a), conduct is *not* a statement if it is not intended as an assertion, which means it's not hearsay.

***Wright v. Doe d. Tatham*, 112 Eng. Rep. 488 (1837)**

- **Broadest interpretation of “assertive conduct”—not followed under FRE**
 - If evidence of conduct is sought to be admitted to prove the truth of the implied statements inherent in the conduct, it is hearsay. (110)
 - Here, three people wrote business letters in which they treated one Marsden as competent: *Wright* court treated these letters as assertions (authors had *acted* on their belief that Marsden was competent)
 - As long as it's an implication, it's an assertion, thus hearsay
- Treating something as an *act* rather than a *statement* changes the analysis

“A man does not lie to himself”

- “If in doing what he does a man has no intention of asserting the existence or nonexistence of a fact, it would appear that the trustworthiness of evidence of this conduct is the same whether he is an egregious liar or a paragon of veracity.”
Falknor, *The “Hear-Say” Rule as a “See-Do” Rule: Evidence of Conduct*, 33 Rocky Mtn. L. Rev. 133, 136–37 (1961) (116)

Evidence of noncomplaint

- ***Cain v. George*, 411 F.2d 572 (5th Cir. 1969) (117)**
 - Plaintiff said heater in motel room was faulty. Defendants offered evidence that past occupants had not complained about the heater.
 - Not hearsay
 - **When you *don't* report something, it's unlikely that the lack of reporting is meant to communicate something.**
 - Evidence is of *inaction*, not an assertion, even though the evidence supports the inference that everything is fine.

Indirect hearsay

- E.g. stating your name for the record (118)
 - People don't actually have recollections of their being named, or their date or place of birth, or their parents' hometowns
 - Technically hearsay, but see also Rule 803(19)—exception for “[r]eputation” among family members about “personal or family history”

- *United States v. Check*, 582 F.2d 668 (1978) (119)
 - Prosecutor asked: “Without telling us what Mr. Cali told you, what did you say to him?”
 - Court: “Nothing more than a dodge to avoid the hearsay rule”
 - creates inferences about others’ conduct and statements that are not subject to further inquiry; implies other declarants’ statements
 - **Can’t elicit a witness’s half of a conversation as testimony if the interlocutor’s statements would have been hearsay**

Machines and animals

- Information from “simple” machines (e.g., a watch) usually admissible; from nonsimple machines (e.g., a computer screen, stock quotes) usually not (122)
 - distinguishing factor: the need for human action to produce the info
 - a watch passively, constantly tells time
 - stock statements must be authored—written, *cf.* a letter—& retrieved
- Canine tracking and ID info usually admissible (123)

NONHEARSAY USES OF STATEMENTS

Testimony offered for any of the following purposes:

Impeachment

- Witness 1 testifies that the light was green for the red car. Opposing counsel calls Witness 2, who testifies that after the accident, Witness 1 had said that the light was green for the blue car.⁴
 - For impeachment purposes, the “matter asserted” is unimportant except insofar as Witness 1’s first statement was *inconsistent*.
 - In impeachment cases, despite risk of misleading jury, probative value usually trumps because of the need to establish/challenge credibility

Verbal acts (or parts of acts) (“operative language”)

- In the middle of a rubdown, masseuse asks undercover agent if he was “interested in a good time.”⁵
 - Masseuse’s words are not hearsay because the words themselves were the crime—they constituted the solicitation.
 - Whether she intended to carry out her offer doesn’t matter.
- Offer and acceptance are verbal acts; they change the relationships between people and between people and objects
 - The words themselves *are* the thing.

⁴ From Problem 3-C (124)

⁵ From Problem 3-D (124)

- Verbal offer of making payment on a contract is not hearsay⁶
 - Words have **independent legal significance**
- A claim of ownership is not an action⁷
 - Doesn't change any relationships; no independent legal significance; claim of ownership does nothing but make the claim itself; can't be used to prove anything but the truth of the statement itself → hearsay
- Fun hypo: Man and wife in car crash. Both die. Question of wills turns on who died first. Bystander hears woman say: "I'm still alive." Hearsay?
 - Hearsay use: to prove that she was alive based on the content of her words.
 - Nonhearsay use: to use the statement to show that she was capable of speech and so must have been alive.

Effect on the listener or reader

- Victim injured in explosion when employee of gas company lights cigarette near leaking propane tank after victim led him there. Victim sues company owning tank, saying company was negligent. Company argues contributory negligence, saying victim shouldn't have been so close to the tank. Victim offers employee's statement that he was from the gas company.⁸
 - Using to show effect on listener—explaining why victim was near the tank (employee had said he was from the gas co & asked to be shown the tank) → not hearsay
 - Using to prove that employee was an employee of the gas co. → hearsay
- Someone says "please don't step on the ketchup." What are they doing?
 - Using to prove that there was ketchup → hearsay
 - Using to prove that the listener was warned → not hearsay
- Mechanic says "your brake are bad. Get them fixed."
 - Using to prove that brakers were bad → hearsay
 - Using to prove that the listener was warned → not hearsay

Verbal objects

- **Identifying characteristics** are not hearsay⁹
 - Used only as an identifier or marker
 - E.g., Hit & run with truck marked "Apogee Inc."
 - X could say "Person A has a truck marked 'Apogee Inc.'"
 - Y could say "The truck I saw was marked 'Apogee Inc.'"

⁶ From Problem 3-E (125)

⁷ *Id.*

⁸ From Problem 3-F (126)

⁹ See problem 3-G (126) (use of matchbook w/ insignia to connect defendant to scene not hearsay).

- Witness points out a man to undercover agent at scene; agent later testifies that the witness had pointed to the defendant → not hearsay.

Circumstantial evidence of state of mind

- Lady dies in bus accident; widower sues bus company for value of future financial benefit. To rebut this claim, bus company offers her will, written just a few weeks before, saying things like “[Husband has treated me with] utter cruelty, disrespect, and indifference,” “[Husband has] wasted [our] resources . . . upon selfish and trivial pursuits,” etc. (from Problem 3-H, 128)
 - Being used to show state of mind → not hearsay
 - Doesn’t matter if her claims are true
 - Wills are public; that she said such hurtful things publicly shows her state of mind re: the marriage, regardless of the truth of her assertions
 - Gravity of the communication also probative
 - **Communication is serious → implies reliability**
- Statement like “I am Napoleon” would show deranged state of mind regardless of truth of the statement (148)

STATEMENTS WITH PERFORMATIVE ASPECTS

Statements more performative than assertive treated as nonassertive conduct

***United States v. Singer*, 687 F.2d 1135 (8th Cir. 1983)**

- Address on envelope admitted as evidence of Δ ’s residence (136)
 - Letter was addressed as it was because of the belief that Δ lived there
 - “Serious performative aspect”—the letter was initiating the eviction process
 - Getting the letter to Δ was important to the landlord (author)
 - Landlord had no “duplicitous” motive in sending letter
- Address on letter was more performative (getting the letter to Δ) than assertive (claiming that Δ lived at the stated address)

Betting rings, drug operations, & phone calls

- Law enforcement agents busting betting rings & drug operations routinely take incoming phonecalls
 - Officers can testify to taking incoming phone calls as proof that people on the premises normally take bets or sell drugs. *Headley v. Tilghman* (2d Cir. 1995); *U.S. v. Long* (D.C. Cir. 1990)

- Why are these phone calls not hearsay?
 - **Two-step inference**
 - Action (of calling) tells you what the people believe (that it's a betting parlor).
 - Because the people acted on their belief (and their action was not itself intended to communicate something), it can tell us something about the real world (that the premises are in fact a betting parlor).
 - → the phone calls are performative.
 - Not trying to communicate; trying to place a bet.
 - Placing the bet is comparable to altering legal relationships, giving independent significance to the phone call: although the bet wouldn't be enforceable in court, mean-looking dudes with baseball bats will show up at your place if you don't pay betting debts

DECLARATIVE SENTENCES

Questions: syntax nondeterminative

- Questions can be assertions (138)
 - Error to admit Δ 's question to arresting officers: "How did you find us so fast?", as it "contained an inculpatory assertion." *U.S. v. Summers*, 414 F.3d 1287 (10th Cir. 2005)
 - "Could it be a little more quiet in here?" may convey "the speaker's opinion that the stereo is too loud," Callen, *Hearsay and Informal Reasoning*, 47 Vand. L. Rev. 43, 89 (1994)
- Some courts disagree
 - In drug case, testimony about a phone call asking whether the "apples" had arrived was not hearsay, *U.S. v. Oguns*, 921 F.2d 442, 448–49 (2d Cir. 1990)
 - Assertions implicit in questions do not make them hearsay, *U.S. v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990)

Lying

- Wife tells federal officer “My husband in Denver” when he isn’t.¹⁰ (139)
- Why is this admissible?
 - Wife was trying to mislead police; that she was trying to cover for him implies that she thought he was guilty about something.
 - Statement offered not to prove that Δ was or wasn’t in Denver, but to prove that the wife was trying to protect Δ
 - Lying to a federal officer is a federal crime; that she was willing to expose herself to the risk of prosecution implies her perceived need to cover up for Δ
- Characterize the statement as an action intended to throw police off the trail
- **Lies are not hearsay.** *Anderson v. U.S.*, 417 U.S. 211, 219–22 (1975)

Voluntary Disclosure

- Dudes landed on rural airstrip as part of drug trafficking operations.¹¹
- Owner of airstrip prosecuted; disclaims involvement in trafficking; offers testimony from a witness that the owner had told six people that he had this plane on his airstrip.
 - Supports owner’s claim of innocence because he probably would not have advertised criminal behavior
 - Risk of insincerity very slight
- **Voluntary disclosure → not likely guilty because a rational and guilty person would not have disclosed.**
 - Focus on risk of insincerity
 - What makes this statement nonhearsay is that it can be characterized as nonassertive verbal conduct

Using statements to prove matters assumed

- ***United States v. Pacelli*, 491 F.2d 1108, cert denied (1974) (142)**
 - “This is a case where you could justify any result”
 - Prosecutor offers proof of what accused & co. did
 - Conversations about bungling of the murder clearly implied knowledge and belief that Δ was the murderer
 - here deemed error to admit; conviction reversed
 - (Gagnon: the four arguments on p. 144 aren’t entirely persuasive—“it’s just too tough to call”)

¹⁰ From Problem 3-J (139)

¹¹ From Problem 3-K (141)

- **A statement is hearsay when offered to prove something assumed by the speaker.**
Krulewitch v. U.S., 336 U.S. 440, 441–43 (1949) (145)
 - See also *U.S. v. Reynolds*, 715 F.2d 99, 103 (3d Cir. 1983) (“[S]tatements containing express assertions may also contain implied assertions qualifying as hearsay and susceptible to hearsay objections.”)

HEARSAY EXCEPTIONS: STATUTORILY DEFINED NONHEARSAY

Basic Scheme

- **801(d)**
 - **801(d)(1):** statements by declarants who testify
 - **(A):** inconsistent prior statements given under oath
 - **(B):** consistent & offered to rebut a charge of improper motive, etc.
 - **(C):** identifying a person
 - **801(d)(2):** admissions
- **803:** unrestricted exceptions
- **804:** statements by unavailable declarants
- **807:** “catchall”

Crawford doctrine: constitutional constraints

- Constitutional constraints in the 6th Amdt trump the FRE (154)
 - Confrontation clause implicated any time a prosecutor uses hearsay against a Δ
- **Was the statement designed to be testimonial?**
What was the “primary purpose” of the statement?
 - **If testimonial, needs cross-examination to be admissible**
- **If statement was to deal with an “ongoing emergency”** (e.g., 911 call)
→ **not testimonial**, *Davis v. Washington*
 - If police have arrived & are taking statements → testimonial

Prior inconsistent statements (801(d)(1)(A))

- Can be used substantively (under the FRE; states generally go the other way)
- Witness must be cross-examinable.

- Defining “other proceeding”
 - ***State v. Smith*, 651 P.2d 207 (Wash. 1982) (157)**
 - Affidavit given to police officers at station
 - Process of securing affidavit considered an “other proceeding” under 801(d)(1)(A)
 - *Prosecutor introduced the affidavit (1) to impeach a different ID of the perpetrator that the witness gave at trial, and (2) to serve as independent substantive evidence of what it asserted. Court admitted affidavit on both grounds; this approach not followed by most courts.*
 - **Major issue = reliability**¹²
 - Affidavit considered reliable
 - Sworn testimony, in front of notary, subject to penalty of perjury . . . (160)
 - “Other proceeding” includes grand juries in the 9th Circuit
- Immigration proceedings are other proceedings. *U.S. v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976) (161)
- Preliminary hearings are proceedings. (161)
- **Inconsistency is established if the current testimony contains a detail not previously reported**¹³
 - Anything that is different—present or not present—makes it inconsistent
- **Memory loss and cross-examinability** (163)
 - Witness claims lack of memory → focus on prior statement & acts
 - Indulging witnesses’ feigned memory loss would allow them control over the rules of evidence & whether they testify—this is not okay
 - but if there’s *really* no memory of what was said, there’s nothing to cross-examine.
 - California & federal courts: feigned lack of memory is inconsistent (164)
 - Prior ID under 801(d)(1)(C) can be satisfied even if the witness forgets the events so long as the witness remembers the making of the statement; witness still cross-examinable. *U.S. v. Owens*, 484 U.S. 554 (1988).
 - Consistent with confrontation clause

¹² Gagnon says that although the affidavit was admitted as both impeaching & substantive evidence, the affidavit was lacking important indicia of reliability usually required for admission of evidence

¹³ From Problem 4-A (162)

Prior consistent statements (801(d)(1)(B))

- Three conditions for use as substantive evidence
 - 1. Witness must be cross-examinable at trial
 - 2. Must be consistent with present testimony
 - 3. Offered to rebut charge of recent fabrication or improper influence or motive
- **Purpose is not to impeach but to rehabilitate**
 - 801(d)(1)(B) only applicable if there has been an attack on a witness's credibility, alleging recent fabrication or improper influence or motive
 - Attack must precede rehabilitation.
- Prior attacks may be express or implied
 - "You just made this up!" (express)
 - "Aren't you married to the defendant?" (implied)
 - "Didn't you have a meeting with defendant's counsel yesterday?" (implied)
- ***Tome v. United States*, 513 U.S. 150 (1995) (167)**
 - **Court read CL "pre motive" temporal requirement into 801(d)(1)(B)**
 - Prior consistent statement admissible only if the "statement had been made before the alleged fabrication, motive, or influence came into being" (168)
 - Facts
 - Custody case; mother claimed father sexually abused child; child offered such testimony at trial
 - Defense suggested that the testimony was motivated by a desire to live with mother (**attack!!**)
 - Six witnesses testified to prior statements made by child ("He 'gets drunk and thinks I'm his wife'")
 - offered to rehabilitate the child as witness
 - Issue
 - Whether the prior statements *rebutted* the alleged link between the testimony and the child's desire to be with her mother (rehabilitative purpose(?))—*not* whether they suggested the child's testimony was true (substantive purpose(?))
 - Holding
 - Statements didn't rebut the attack so had no relevance
→ not admitted
 - Prosecutor had wanted to introduce the evidence:
 - Rehabilitatively (kid's been consistent in saying . . .)
 - Believing consistency doesn't require believing substance of consistent statement
 - Consistency only affects credibility → nonhearsay use
 - Substantively (dad did in fact . . .)
 - Goes to the truth of the statement offered
 - (Rule 801(d)(1)(B) meant to control this use of evidence)

- **Ways of reading 801(d)(1)(B) in light of *Tome***
 - Meeting *Tome* requirements for admission of prior statement as rehabilitative → can use substantively
 - **More favored**
 - Whenever you offer to rebut (pre motive required), can use substantively
 - (2) Meeting *Tome* only means that you can use the prior statement rehabilitatively

Prior statements of identification (801(d)(1)(C))

- More trustworthy & persuasive than in-court IDs (176)
 - Strict procedural requirements re: lineups in crim (*Wade-Gilbert* doctrine)
 - per se rule blocking use of prior ID statements if
 - (1) Δ denied counsel at postindictment lineups *or*
 - (2) circumstances of ID overly suggestive
- Conditions for admissibility under 801(d)(1)(C)
 - 1. Declarant testifies at trial
 - 2. Declarant is present & subject to cross
 - 3. Statement is one of ID of the person after perceiving the person
 - perception includes hearing & other senses
 - ID based on voice recording admissible. *See U.S. v. Ramirez*, 45 F.3d 1096, 1101 (7th Cir. 1995) (180)
- ***State v. Motta*, 659 P.2d 745 (Haw. 1983) (176)**
 - **A composite sketch is not hearsay**
 - Declarant (person making ID) must be available
 - Sketch artist doesn't need to be (but it's better if they are—avoid “logical disconnect” in jurors' minds)
 - No attack needed before such evidence can be admitted
 - *How is a composite sketch the statement of the declarant, not the artist?*
 - Declarant adopts the sketch
 - *Cf.* transcript of a verbal statement that the declarant verifies as accurate
- Some jurisdictions require that declarant must actually see the subject “for a second time”—not just recognize and then, e.g., comment to a friend. *State v. Shaw*, 705 N.W.2d 620 (N.D. 2005). *Contra U.S. v. Lopez*, 271 F.3d 472, 484–85 (3d Cir. 2001).
- Prior ID under 801(d)(1)(C) can be satisfied even if the witness forgets the events so long as the witness remembers the making of the statement; witness still cross-examinable. *U.S. v. Owens*, 484 U.S. 554 (1988) (180)
 - Consistent with confrontation clause

ADMISSIONS BY PARTY OPPONENT UNDER 801(D)(2)

Generally

- Admissions can be used to prove the truth of the matter they assert, which the Rules of Evidence typically disallow; 801(d)(2) *exempts* admissions from the general bar against hearsay
 - Justifications (181)
 - “[E]ach party is responsible for making or breaking, winning or losing, his own lawsuit—by his conduct both in and out of court.”
 - Hearsay doctrine largely to protect right of cross-examination, but a party can’t “complain that he didn’t have a chance to cross-examine himself”
 - Admissions are a kind of conduct, amounting to behavior by a party that provides circumstantial evidence of what they assert (182)
 - Admissions give rise to estoppel notions and should be usable against a party for similar reasons
 - Fairness suggests that one shouldn’t be allowed to complain that his words are proven (and used) against him
- Admissions are usually not “binding”—a party can still take a conflicting position at trial
- **No coerced admissions.** See *Mincey v. Arizona*, 437 U.S. 385 (1978); *Colorado v. Connelly*, 479 U.S. 157 (1986) (185)

The party’s own statement (801(d)(2)(A))

- No personal knowledge requirement¹⁴ (182)
 - *Mahlandt v. Wild Canid Survival & Research Center*, 588 F.2d 626 (1978) (203)
- No “against interest” requirement (*cf.* 804(b)(3), when declarant unavailable)
- May be opinion or conclusion
 - Lay testimony usually has to be factual; here the jury is being told the conclusion on which they are being asked to deliberate, but this is okay
- Admissions under the influence not excluded (184)
- Sleep-talking not excluded in civil cases, but usually excluded in criminal
- Admissions from severely incapacitated Δ s inadmissible.
 - *Mincey v. Arizona*, 437 U.S. 385 (1978) (Δ was severely injured); *Beecher v. Alabama*, 389 U.S. 35 (1967) (Δ was loaded on morphine).
- Minority does not always render admissions inadmissible.
 - *De Souza v. Barber*, 263 F.2d 470 (9th Cir. 1959) (statement made when declarant was 19 admissible). *Contra Fontaine v. Devonis*, 336 A.2d 847, 852 (R.I. 1975) (3½-year-old’s statement inadmissible).

¹⁴ From Problem 4-B (183)

- Admissions in criminal court or traffic court do not form basis for collateral estoppel in civil suits, but the admissions are admissible (186–87)
- ***Bruton v. United States*, 391 U.S. 123 (1968)** (187)
 - “spillover confession” problem
 - **Two Δs in one trial, one admission → admission should be excluded; trials should be severed**
 - Limiting instructions inadequate
 - Can’t do cross on the admission because it came from a co-Δ: violates *Crawford* doctrine & 6th Amdt right to confront hostile witnesses
 - Regarding the argument that joint trials are efficient:
 - **Concern for efficiency does not trump the need for justice**
 - → separate trials
 - **“Interlocking” confessions** of several co-Δs
 - Δ₁ can raise a *Bruton* objection if he is named (or his activities described) in a confession by another offered in evidence against Δ₁. *Cruz v. New York*, 481 U.S. 186 (1987) (192)
 - **Inferential “linkage,”** if needed to construe a confession by X as implicating Y—e.g., X does not mention Y by name but describes joint activities, and later evidence shows that Y participated in those activities—probably not barred by *Bruton*. *Richardson v. Marsh*, 481 U.S. 200 (1987)
 - **Redaction**
 - Leaving obvious blanks leads jury to assume the worst; exacerbates more than solves the problem
 - **Hypo.** Napton, employee of Ace Building as truck driver, negligently runs over coworker O’Brien. A month later, Napton loses his job for unrelated reasons. Six months later, Napton tells O’Brien: “The brakes on the truck just failed” and “I was speeding.” O’Brien sues Napton and Ace for his injuries. (*Problem 4-D, 190*)
 - Re: Napton
 - Failure of the brakes = admission, but irrelevant to the case against him (Napton not responsible for maintaining brakes on his employer’s car)
 - Speeding = Napton’s own admission → relevant to the case against him
 - Gagnon says: in a properly run trial, this admission shouldn’t be admitted anyway

- Re: Ace
 - Failure of the brakes: employer is responsible for maintaining (bad brakes = employer negligence); would be admissible against Ace *if* Napton were still in Ace's employ when admission made.
 - Speeding: irrelevant.

Adoptive admissions (801(d)(2)(B))

- Failure to contest a statement that implies guilt (193)
 - E.g. out-of-court question: "You were speeding, weren't you?"—with a failure on your part to protest → tacit adoption
 - **If a reasonable and innocent person would have responded in protest, the admission is assumed adopted**
- ***United States v. Hoosier*, 542 F.2d 687 (6th Cir. 1976) (193)**
 - Defendant's girlfriend says some incriminating stuff to a third party about "sacks of money" & "That ain't nothing, you should have seen the money we had in the hotel room"
 - Defendant didn't protest
 - Third party testifies to these statements at trial
 - Not excluded
 - "[P]robable human behavior would have been for appellant promptly to deny his girlfriend's statement if it had not been true"
 - Esp. since Δ had already told the third party that he planned to rob a bank
 - "[M]ore is needed to justify admission of this statement than the mere presence and silence of the appellant," but "there was more in the record." (194)
- See also Note p. 194 (elements & limits of tacit-admissions doctrine)
- Questions to ask the defendant: (194)
 - Did you hear the statement? Was it spoken? Did you deny it?
- ***Doyle v. Ohio*, 426 U.S. 610 (1976) (195)**
 - **Once *Miranda* warning given, *Hoosier*-type adoptive admissions are excluded**
 - admitting post-*Miranda* would violate due process
 - Prosecutor wanted to use post-arrest silence to impeach the theory that Δ gave at trial, on the theory that if this story of innocence were true, he would have offered it post-arrest instead of being quiet. *Court said no way!!*
- *Doyle* does not apply to pre-arrest silence. *Jenkins v. Anderson*, 447 U.S. 231 (1980). (198)

- Post-arrest silence has been held admissible when police neither question nor Mirandize. *Fletcher v. Weir*, 4554 U.S. 603 (1982).
- No *Miranda* violation when Δ was Mirandized, declined to talk, requested a lawyer, and then spoke to his wife and made incriminating statements while officer was in the room recording the conversation. *Arizona v. Mauro*, 481 U.S. 520 (1987). (199)
- **Hypo.** Ivers is charged with armed bank robbery. Prosecutor offers testimony from Jessup that the following conversation took place:¹⁵
 - *Kerwin*: Are you the one who stuck up the bank the other day?
 - *Ivers*: Will you please leave me alone?
 - Judge must decide (1) if the pair of statements is a tacit admission and (2) if the pair is suitable for the jury to evaluate.
 - Judge need not screen first
 - *Judge will probably say the jury can handle this and submit with instructions*
- version 2:
 - *Kerwin*: You're the one who stuck up the bank, aren't you? It just so happens that I was in the bank when the fellow came in, and it was you, wasn't it?
 - *Ivers*: Will you please leave me alone?
 - Risk of jury misuse goes up
 - Judge should screen it first (i.e., go through the process of deciding—"could a jury decide that . . .")—104(b)

Authorized statements (801(d)(2)(C))

- When a person is authorized to speak for another, the principal is bound by the one authorized to speak
- In such cases, the speaking agent's words aren't considered hearsay; directly attributed to the principal

Statements by employees, etc. in scope of employment (801(d)(2)(D))

- **No need to be authorized to speak about matters in scope of employment**
 - Doesn't mean only while employees are *on duty*; as long as the employee is employed and speaking about employment, employee can bind employer
- E.g., truck drivers—statements at accident scene would be inadmissible if employees couldn't speak about matters within the scope of their employment

¹⁵ From Problem 4-E (199)

- ***Mahlandt v. Wild Canid Survival & Research Center, 588 F.2d 626 (1978) (203)***
 - Personal knowledge not needed for admissions!
 - “In-house” statements considered admissions
 - Executive sessions—you can’t invade them to make them tell you, but if they disclose . . . it’s on, baby
- **“Layered” hearsay**
 - Hearsay within hearsay
 - One employee speaks, tells it to another, who tells it to a third . . .
 - All of the statements fit the rule
 - Talk among agents/employees doesn’t incur further levels of hearsay
 - Rule 805: multiple layers of hearsay OK if each layer fits an exception
- **Independent contractors**
 - Not considered statements of their employers unless adopted

Coconspirator statements (801(d)(2)(E))

- Three requirements for admissibility
 - “Coventurer” requirement: declarant and Δ conspired
 - “Pendency” requirement: during the course of the venture
 - “Furtherance” requirement: statement made in furtherance of conspiracy
- Why admit this stuff?
 - Evidence of conspiracy is almost always circumstantial
 - Coconspirator statements are essential to proving most conspiracies
- ***Bourjaily v. United States, 483 U.S. 171 (1987) (213)***
 - **Under Rule 104, no need for independent evidence**
 - **Standard for admissibility under 104: *preponderance***
 - Statements can be used to prove themselves, as long as there’s some other evidence as well (at least in context of coconspirator stmts)
 - “Bootstrapping” rule is dead
 - Judge can consider the contents of the statement in determining admissibility, such as for whether it meets some part of 801(d)(2)
 - But still need some more evidence for the statement to meet 801(d)(2)(C), (D), or (E)
 - Could the phone call between Lonardo and Greathouse be used against Bourjaily?
 - Only if it preponderantly fit the coconspirator exception
 - Statement being used to prove itself . . . that’s fine as long as there’s some other evidence as well

- Statements during “concealment” phase do not meet “pendency” requirement. *Krulewitch v. U.S.*, 336 U.S. 440 (1949) (220)
- If co-conspirator requirements are met, statement comes in, regardless of reliability concerns.

UNRESTRICTED EXCEPTIONS TO HEARSAY: RULE 803

Declarant’s availability is generally irrelevant

- *Cf.* Rule 804 (exceptions only apply if declarant is unavailable)
- Exceptions
 - 803(5): Present recollection—declarant must be available
 - 803(18): Learned treatises—expert must be available for cross re: authoritativeness of text

All hearsay exceptions require foundation

PRESENT SENSE IMPRESSIONS (RULE 803(1))

Usually considered in tandem with excited utterances

Primary requirement: immediacy

- but not excitement
 - short time interval prevents opportunity for witness to be disingenuous or to falsify
 - immediacy = considered to obviate risk of insincerity
- Someone is describing what they perceive as they perceive it—what they hear, feel, see
 - what about media other than speech, e.g., text messages?
 - may involve too much thought—opportunity for insincerity—but case law seems to indicate admissibility
 - **writing leaves open the chance for insincerity**—if it entails a cognitive process, it loses reliability & becomes suspect
- Applicability of present-sense-impression exception is a matter of law for the judge under 104(a)

Nuttall v. Reading Co., 235 F.2d 546 (1956)

- Widow sues employer of deceased husband; basis of claim: employer forced husband to work despite his claim of being ill. Wife offered three statements as evidence: (221)

- (1) two affidavits
 - both given too long after the fact to qualify as present sense impression
- (2) wife's testimonial account of Nuttall's phone conv with his boss (222)
 - Nuttall's statements during and after the phone conv fit the exception: were in immediate response to his boss's comments
 - competent to prove that Nuttall's boss was forcing Nutall to work (*had been excluded at trial*)
- (3) fireman's testimony of Nuttall's remarks at work (reporting that Nuttall said "he was not feeling well, that he had requested to be off that day but was refused permission")
 - fit excited-utterance exception (Nuttall was under stress of being forced to work) (*had been excluded entirely at trial*)
 - competent only to prove that Nuttall was being compelled
 - not competent to prove who was doing the compelling
- Court overturned the trial court's directed verdict; remanded for new trial; the excluded evidence "[went] to the very heart of the plaintiff's case"

911 calls usually admissible

- *Crawford* issue arises, but *Davis* "emergency" doctrine usually cures the problem (purpose of 911 call is not so much testimonial as for getting help) (225 n.6)

No corroboration requirement

- Usually, the testifying witness can corroborate for present-sense impressions (e.g., in *Nuttall*, Mrs. Nuttall could corroborate that phone call happened)
- FRE do *not* require corroboration (225 n.9)
 - but some states (e.g., NY) do

EXCITED UTTERANCES (RULE 803(2))

Three-element test for “excitement”

- *U.S. v. Arnold*, 486 F.3d 177 (2007) (226)
 - (1) Startling event
 - (2) Timing: statement made before opp’ty to contrive/misrepresent
 - Linked to stress element—must be “within the traumatic range”—*Arnold* 228
 - Statement cannot be the product of reflection
 - Timing is important, but not central; does not require immediacy.
 - within several hours is often OK (228 para. 1)
 - *but* error to admit statement three hours later, when declarant a teenager, *U.S. v. Marrowbone*, 211 F.3d 452 (8th Cir. 2000) (harmless error) (231–32).
 - (3) Stress/influence: statement must be made while under stress of event
 - stress may be “rekindled,” *U.S. v. Napier*, 518 U.S. 316 (9th Cir. 1975) (233)
- Applicability of excited-utterance exception is a matter of law for the judge under 104(a)

United States v. Arnold, 486 F.3d 177 (2007)

- Charge = felon in possession of firearm (Δ was convicted murderer) (226)
 - Since *Arnold* was a convicted murderer, events involving him create more stress than if there were no prior conviction
- Three statements at issue (all held admissible)
 - (1) 911 call (227)
 - (1) *Startling event*
 - declarant threatened by convicted murderer
 - (2) *Timing*
 - trial court found that the call took place “slightly more than immediately” after the threat
 - other cases found timing met when statement made within two, three, four hours
 - (3) *Still under stress*
 - 911 operator told declarant to “calm down” and “stop yelling”—indicates stress/anxiety

- (2) Statement when officers arrived: said Arnold threatened her with gun
 - (1) *Startling event* . . .
 - (2) *Timing*
 - delay of 5–21 minutes within acceptable timeframe
 - not “sufficient time to misrepresent what had happened”
 - (3) *Still under stress*
 - officers said declarant was “crying,” “hysterical,” “visibly shaken and upset”
- (3) Statement when Arnold returned (he had left before officers arrived, but came back)—“That’s him, that’s the guy who pulled a gun on me” (229)
 - (1) *Startling event*
 - Initial threat + Arnold’s return
 - (2) *Timing*
 - 30 seconds to 5 minutes after officers’ return
 - (3) *Still under stress*
 - declarant started crying when she saw Arnold come back

Corroboration requirement—?

- *Needed to prove that stressful event really occurred?*
- Corroborating evidence discussed in *Arnold* (228 para. 3)
 - discussion largely in response to dissent?
- Issue whether uncorroborated statements can establish the existence of an exciting event usually doesn’t come up

Factors under Rule 104

- The event itself
- Content of the statement
 - what does the statement say about the event?
 - does the statement indicate that the event was startling?
- Psychological condition of the declarant
- Experience of the declarant
 - e.g., off-duty officer at scene of bank robbery vs. a bank teller
- Reason for utterance
 - spontaneous vs. response to inquiry
 - spontaneously → event impelled statement
 - inquiry → question, not event, impelled statement
 - declarant must consider questions before responding: increases risk of insincerity
- **Any risk of insincerity?**
 - Had the declarant returned to a reflective state by the time of the declaration?

Three broad areas of general admissibility

- Accidents; bystander describes what happened shortly afterwards (232 n.3(a))
- Violent-crime cases: victim or bystander describes what happened (232 n.3(b))
- Child-abuse cases; children tell parents/caretakers about “terrible acts” (232 n.3(c))
 - possible *Crawford* problem if social-service personnel or police involved
 - *Davis* doesn’t usually apply
 - Age of child an issue

Criticisms of excited-utterance exception

- Stress may not increase sincerity
- Stress may distort perception
- *However, the purpose of trial is resolution; juries need evidence to achieve resolution. If reliability concerns were primary, little evidence would come in, nothing would get litigated, and the system could not function.*

Problem 4-I: “I felt this sudden pain”

- Sanders was not experiencing pain when statement was made (233–34)
- How to show that the statement was made while under stress
 - Wife can testify to husband’s unusual behavior (coming home from work early indicates that an unusual event happened)

THEN-EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION (RULE 803(3))**State of mind must be at issue in the case (except under *Hillmon*)****Four distinct uses**

- **(1) Then-existing physical condition, or pain (236)**
 - *Declarant’s own statement likely the best source of information*
 - People overhearing the declarant saying “Oh, God, I hurt”
 - Statement on the condition that exists at the time the statement was made
→ no risk of misperception
 - Temporal proximity to onset of injury/ailment unimportant (237)
 - but declarant must be speaking about how he feels as he talks
- **(2) Then-existing mental or emotional condition (237)**
 - *Declarant’s own statement likely the best source of information*
 - People overhearing the declarant saying “Gee, I’m confused”
 - (if confusion/mental state were at issue)

- Case-law examples
 - *U.S. v. Parry*, 649 F.2d 292 (5th Cir. 1981) (Δ claimed he thought he was leading undercover agents to drug sources; reversible error to exclude testimony by Δ 's mother that he said the person phoning him was an agent with whom he was working—treated as nonhearsay circumstantial evidence of state of mind)
 - *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979) (in suit to enjoin affirmative-action program, testimony describing reasons stated by former police supervisors for past discrimination was admissible in support of challenged program)
- Mental state of nonparties may be at issue (238)
 - e.g., valuing the goodwill of a business
- **(3) Proving subsequent conduct (241)**
 - Statements of intent can be used as (some) evidence that the intended act(s) took place
- **(4) Facts about a will (253)**
 - *Declarant's own statement likely the best source of information*
 - may also be the only evidence on point about the testator's intent

Rationale for 803(3)

- A person knows his own mind
- Almost no risk of faulty memory
- Reliable because of spontaneity (feelings/thoughts being reported as they occur)
- Not *entirely* reliable, but declarant's report of his own state is often most probative
- **Problem:** almost any statement of fact can be portrayed as a statement of memory

Blame-avoiding statements usually inadmissible

- Blame-avoiding statements are self-serving
- If there's a risk of insincerity, courts sometimes exclude (237)

Courts disinclined to infer continuity

- Sometimes a statement of present status could be interpreted to apply before or after the statement was made
 - e.g., "I'll only part with this deed for money!"—probably a statement of continuous sentiment
 - but that's a dangerous inference (238 *para. 3*)

Relevance in extortion and murder cases

- Extortion: relevant because causing fear in victim is an element of the crime¹⁶
 - threats are relevant
- Murder: fear is irrelevant; whether victim was afraid has nothing to do with whether Δ is guilty
 - but victim's threats/fear become relevant if Δ claims self-defense (241 n.4)

Fact-laden statements of mind

- *Shepard v. United States*, 290 U.S. 96 (1933) (241)
 - **Rule 803(3) can reach factual circumstances**
 - fact-laden statements of mind can be admitted
 - Statements can still be excluded based on unfair risk of prejudice

Subsequent Conduct

- *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892) (242)
 - **Statements of intent can be used as evidence that the intended act(s) did actually occur**
 - Facts
 - Widow sued on three life-insurance policies, claiming that her husband (Hillmon) had been accidentally shot at a campsite in CO
 - Coadventurer of husband (Brown) claimed to have accidentally shot
 - Ins. companies said that another guy, Walters, had died, not Hillmon, and that Hillmon actually shot him
 - Said that wife/widow, Hillmon, & Brown had conspired to kill Walters
 - Ins. companies introduced letters from Walters saying that he'd been planning to go to CO with Hillmon
 - Accepted as exception to hearsay rule
 - Letters "made it more probable . . . that [Walters] did go and that he went with Hillmon" (244)
 - **Evidence of Walters' intent can thereby be used as evidence of others' acts** (see also Hunter, quoted in Hillmon)
 - Letters used as evidence:
 - that Walters went
 - that Hillmon did it
 - even though statement of intention to go with Hillmon was predicated on Walters' memory of a meeting during which such plans were made

¹⁶ From Problem 4J (239)

- ***United States v. Pheaster, 554 F.2d 353 (9th Cir. 1976) (245)***
 - Victim had made statement of intent to do something; statement of intent included reference to a third party
 - Statement used as evidence of what the third party did
 - *Pheaster should not be viewed as clarifying the reach of Hillmon under the FRE.*
 - State law only?
- ***Problem 4-K. Fright Points the Finger (251)***
 - (1) Statement of fear; relevant if Δ claims self-defense
 - supports showing of fear, but also that Δ did something to make her fearful (i.e., some remembered fact)
 - turn to Rule 403: probative value vs. risk of unfair prejudice
 - probably would be admitted if Δ claimed self-defense
 - possibly with limiting instructions
 - (2) Intention to leave, only likely to be relevant & admissible if Δ claims self-defense, because it shows fear
 - (3) Going to a women's shelter isn't even hearsay; it's an action

STATEMENTS FOR MEDICAL DIAGNOSIS OR TREATMENT (RULE 803(4))

Includes statements to all health-care providers

- 803(4) expands CL rule from just treatment to diagnosis as well

Rationale

- People want good health care
- Telling truth to physicians makes good health care much more likely
 - Lying → crappy health care
- In peoples' self-interest to tell the truth to physicians

Renville test for foundational adequacy

- ***Blake v. State, 933 P.2d 474 (Wyo. 1997) (253)***
 - ***Renville* test (254)**
 - (1) **Declarant's statement must be consistent with the purposes of promoting treatment or diagnosis**
 - (2) **Must be reasonably relied upon by a physician**
 - Facts
 - Child-abuse case; 16-yo victim; statements to doctor implicated stepfather; victim never put on stand; prosecution relied on other evidence, including doctor's testimony

- Doctor asked questions during and for treatment; doctor said it was important to know the perpetrator to be able to treat properly → declarant's statement fit the exception
- **Most injuries are physical, but in abuse cases, injuries are emotional and psychological → full treatment can only be provided if all circumstances known**
 - argument that ID of perpetrator is irrelevant (258)
 - *Crawford* objections often not successful (259 n.3)

Statements of fault excluded

- *Roberts v. Hollocher*, 664 F.2d 200 (8th Cir. 1981) (excluding physician's diagnosis, in police-brutality suit, that injuries were "consistent with excessive force")

PAST RECOLLECTION RECORDED (RULE 803(5))

Elements

- (1) **Witness lacks present recollection** (261)
- (2) **Witness made or adopted the statement**
- (3) **Statement made while matter was "fresh" in mind**
- (4) **Statement accurately reflects knowledge once had**

Ohio v. Scott, 285 N.E.2d 344 (Ohio 1972)

- Witness Tackett had conversation with Δ shortly after crime; Δ told Tackett he'd just "wrecked a car and shot a guy"; Tackett made a handwritten, signed statement to the police the next day (261)
- Why her testimony fit the exception
 - (1) Not so clear that witness entirely lacked present recollection, but the court said it fit (262–63)
 - There was never an effort to refresh the witness
 - *But see* Rule 803(5): record admissible if witness "now has insufficient recollection to enable the witness to testify **fully or accurately**"
 - witness need not have completely forgotten for the exception to operate
 - ***But attempt at refreshing would be a better first step***
 - (2) Tackett wrote and signed the statement
 - (3) Statement made the day after the event/conversation
 - (4) Tackett had personal knowledge

- **Recorded statement can only be read into evidence**
 - Can't be received as exhibit unless offered by an adverse party
- *Cf. U.S. v. Owens*, 484 U.S. 554 (1988) (Prior ID under 801(d)(1)(C) can be satisfied even if the witness forgets the events so long as the witness remembers the making of the statement; witness still cross-examinable). (394)
 - Gagnon says “remember this case”
 - *Crawford* doesn't mean that there has to be “effective” cross-examination; witness doesn't need to be destroyed. Just need to suggest that there are other motivations and that the testimony may not be reliable.

Proving accuracy of the recorded statement

- Some state courts have held that declarant's testimony that he would not have signed a false statement is enough (N.Y., no; Minn., yes) (265)
- Can sometimes require having the person who wrote the statement down to testify that the person accurately transcribed. *U.S. v. Booz*, 451 F.2d 719 (3d Cir. 1971) (266)

Freshness of memory

- No rule of thumb
- One court found “freshness” requirement satisfied three years after the event, *U.S. v. Senak*, 527 F.2d 129 (7th Cir. 1975) (265)

BUSINESS RECORDS (RULE 803(6))

Elements

- (1) **Regular business; regularly kept record** (267)
 - Doesn't include personal notes (“Dear diary”)
- (2) **Source of info must have personal knowledge**
 - **Person with knowledge must be under *business duty to report accurately*.** *Petrocelli v. Gallison*, 679 F.2d 286 (1st Cir. 1982) (268)
- (3) **Contemporaneity**
 - Information must be recorded close to the time of the event
 - E.g., during the same shift that an event occurred
- (4) **Foundation testimony required**
 - Either testimony of the custodian or other qualified witness *or* a “certification” by such person (affidavit)
 - What the records custodian does at trial—testifies about:
 - Protocol for creating records
 - E.g., “only created by hospital employees”

- Methodology of keeping the records
 - If methodology qualifies as regularly kept, regular business records → evidence can get in
 - Custodian need not have any knowledge of the actual facts
- Only what *should* happen
 - From rule: if “method or circumstances of preparation indicate lack of trustworthiness,” business records may be excluded

Rationale: necessity

- Would otherwise take several witnesses to document a single transaction
 - Would be impractical to call in all those witnesses
- Witness probably can't remember every business transaction; they'd probably look at the records to refresh their memory → might as well just use the records
- Records needed to make business work; everyone is under pressure to do their job properly → reliability
- Records created neither for a special purpose nor for trial; meant to be accurate and relied upon → indicia of credibility; very small risk of insincerity
- Comes up in almost every civil case
- Almost impossible to get documents in without this exception

Business duty to report

- ***Petrocelli v. Gallison*, 679 F.2d 286 (1982) (268)**
 - Plaintiff sued Dr. Gallison for medical malpractice, claiming that he had severed a nerve during a hernia operation. To support this claim, π offered in evidence a report from another doctor that referred to a nerve having been severed during the surgery that Gallison conducted. *Report excluded.*
 - Just because a statement is in the record doesn't mean it's part of the “business record”
 - Person with the knowledge must be under a business duty to report accurately
 - Court couldn't tell who the source of the statement was; seemed like it might have been the patient or his wife → patients had no business duty
 - Couldn't tell if physicians who wrote about the severed nerve in their report actually had personal knowledge
 - Plaintiffs were trying to slide in their own opinion as part of an official doctor's report, which is why they tried to use 803(6) instead of 803(4)

Internal reports offered as business records

- ***Norcon, Inc. v. Kotowski*, 971 P.2d 158 (Alaska 1999) (273)**
 - Female employee alleged sexual harrassment against her boss (Posehn) and boss's employer (Norcon). Offered into evidence a memo by Ford (investigator with company hired by Norcon to do security) to Ford's superior. Memo referred to statements (1) made to Ford by two other Norcon employees about Posehn and (2) made to Flesching (another security-co. employee) by another Norcon employee.
 - Memo admissible: statements by employees from (1) and (2) were made in the course of their duties; thus under business duty to report accurately
 - Employees were supervisors; reporting about alcohol use and harrassment were job requirements, especially in response to an employer-initiated investigation

Statements of exoneration raise issues of trustworthiness**PUBLIC RECORDS (RULE 803(8))****As compared to business records**

- Need not be regularly maintained
- Need not be generated contemporaneously
- Custodian need not testify

Document must be authentic

- Must come from place where public records are kept

Must be of a type listed in the rule

- **(A)** Activities of an office or agency (278)
 - e.g., court transcripts or orders, agency notices
- **(B)** "Matters observed pursuant to duty imposed by law" with a duty to report
 - *except, in criminal cases, matters observed by police officers/law-enforcement personnel*
 - e.g., reports by building inspectors
- **(C)** In civil cases, and against government in criminal cases, "factual findings resulting from an investigation made pursuant to authority granted by law"
 - e.g., studies on toxic-shock syndrome by the CDC
 - police "evaluative reports" admissible in civil cases, *Baker v. Elcona Homes*
 - note ACN's four factors for trustworthiness discussed in *Baker*
- *unless* there is some reason to doubt trustworthiness

- Bar in (B) and (C) against police reports and evaluative reports is an absolute bar against use of such reports against defendants; otherwise-applicable exceptions do not operate—**However, 803(5) can operate if the law-enforcement personnel are testifying in court** (291 n.2)
 - See Notes on Using Other Kinds of Public Records in Criminal Cases (292)
 - Computer-system data showing that Δ had crossed the U.S.–Mexico border twice on the night he said he was on a double date was admissible. See *U.S. v. Puente* (5th Cir. 1987); *U.S. v. Orozco* (9th Cir. 1979)
 - Not all government agents who secure public compliance with the law are included in the term “law enforcement personnel” in 803(8)(B). See *U.S. v. Hansen* (7th Cir. 1978) (city building inspector not “law enforcement personnel” despite possibility of criminal sanctions for noncompliance)
 - “Routine and nonadversarial public records” may be admissible. See *U.S. v. Valdez-Maltos*, 443 F.3d 910 (5th Cir. 2006) (warrants of deportation and documents in alien’s INS file nontestimonial; no *Crawford* problem).
 - Accused may offer a police report as defense evidence. See *U.S. v. Smith* (D.C. App. 1975) (police report admissible as proof that alleged victim made statement to investigating officer inconsistent with trial testimony).

Rationale

- A lot of public pressure to generate records correctly and accurately
- Routine and repetitive → indicia of reliability
 - It’s just regular business; little incentive to falsify
- Necessity
 - Bringing in the public official every time something needed to be proven in court would prevent the officials from actually doing their jobs
 - And as with business records, officials would probably need to refresh their memory from the records
- See FRE 902: self-authentication
 - A lot of 902 is about how public records are self-authenticating

Difficulties

- Distinctions between (A), (B), and (C) are not “watertight”; it makes a difference into which category a statement falls (279)
- “Judicial modification” (*see following cases*)
- These use restrictions seem more like exclusionary provisions than limits on exceptions
- “Trustworthiness” clause is a “wildcard”—flexibility incurs uncertainty

“Evaluative reports” under 803(8)(C)—civil cases

- ***Baker v. Elcona Homes Corp.*, 588 F.2d 551 (1978), cert denied (1979) (279)**
 - Car crash in intersection; issue was who had the green light.
 - Defendant introduced, over objection, a police report including:
 - Statement by Slabach, Δ truck driver, re: π 's driving
 - Remark that the light appeared to be green for Δ
- Why both statements in police report were admitted
 - Slabach's statement
 - Not hearsay because prior consistent statement under 801(d)(1)(B).
 - *Could have used a limiting instruction to avoid jury's reliance on statement as factual*
 - Policeman's remark about the light color
 - Conclusion about light = factual finding—evaluative report
 - **Four factors regarding trustworthiness of 803(8)(C) factual findings**—from ACN Notes
 - **(1) Timeliness**
 - Report was right after policeman arrived on the scene
 - **(2) Experience of the official**
 - Sergeant was a 28-year veteran of the highway-patrol force
 - **(3) “Hearing” being held**
 - Not here—but this factor is nondispositive
 - **(4) Possibility of improper motive**
 - None here—sergeant was independent of both parties; no conflicting loyalty

Limitations on “reports” under 803(8)(B) & (C)—criminal cases

- ***United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) (285)**
 - Government wanted to prove that a white powder was heroin; introduced findings from a government chemist
 - Tried to use 803(6)
 - **Absolute bar against use of “police reports” in (B) and “evaluative reports” in (C) against defendants in criminal prosecutions (288–89)**
 - Rule 803(6) cannot be used to get in the chemist's findings
 - Chemist's findings were either a police or an evaluative report
 - Prevent violations of the Confrontation Clause
- Chemist was an agent of the government because hired by government; was a U.S. Customs Service chemist; as a full-time chemist of the USCS, she was “law enforcement personnel” (287)

LEARNED TREATISES (RULE 803(18))**Elements**

- Treatises can be used if:
 - (1) shown to be “reliable authority” (293)
 - (2) expert relied on it during direct or it was called to his attention during cross

Expert must be on witness stand

- Either saying that they relied on the treatise (direct)
- Or are questioned about it during cross
 - Verifying that it’s authoritative
 - And then calling attention to part of it
- Expert is there to explain!
 - Jury gets the benefit of as many different inputs as it can, with an explanation, so there’s no using it foolishly or incorrectly

Treatise is read into evidence

- Treatise itself is not admitted

MINOR EXCEPTIONS IN RULE 803

Further details on pp. 354–57

Ancient Documents (803(16))

- Show where it’s stored & that it’s > 20 years old → ancient document
- Rationale: age of document shows that it was prepared before litigation was contemplated; better evidence may be hard to find (necessity)

Market reports/commercial lists (803(17))

- Data published and relied upon by the public
 - e.g., price lists showing resale value of cars

Prior felony convictions (803(22))

- Conviction evidence is not conclusive; countervailing proofs are possible to suggest that there was a mistake in the judgment

**DECLARANT UNAVAILABLE (RESTRICTED EXCEPTIONS):
RULE 804**

UNAVAILABILITY

Proponent must demonstrate unavailability

- Unavailability is not an exception—just a prerequisite. (295)
- Unavailability means only that the *testimony* is unavailable.
- Unavailability is a matter of law for the judge under 104(a)
- Preference is to have live witnesses

Privilege claim upheld by court (804(a)(1))

- Privilege must actually be claimed and upheld, not merely expected to be available
- Claim of privilege under the Fifth Amendment need not be explicitly invoked

Actual refusal despite court order (804(a)(2))

- There must be an “effort to secure cooperation”
- May end in threat of contempt
- If refusal is based on wrongful conduct by the other side, 804(b)(6) may apply

Lack of memory (804(a)(3))

- Declarant forgets the “subject matter” of his statement
- *Di Caro* paradox (295–96)—under 801(d)(1)(A), witness is cross-examinable if he remembers making the statement, even if substance forgotten
 - So 801(d)(1)(A) → cross-examinable but 804(a)(3) → unavailable
= simultaneously cross-examinable and unavailable

Death, illness, infirmity (804(a)(4))

- Can be solved by a continuance if the illness is minor (296)
- Psychological unavailability
 - Witness can’t cope with testifying (re-traumatizing, etc.)
 - Rape and child-abuse cases

Otherwise absent (804(a)(5))

- E.g., outside subpoena power → cite appropriate statute to court
- Witness sometimes simply cannot be found
- Attendance cannot be obtained “by process or other reasonable means”
 - government must make a good-faith effort to procure (*Barber*)
 - refusal to immunize in face of 5th amdt claim can be considered abuse → declarant not unavailable.
 - judge and jury should be able to see *demeanor*
- Must try to get deposition if absence anticipated

Prosecutor must make “good faith effort” to procure witnesses

- ***Barber v. Page*, 390 U.S. 719 (1968) (299)**
 - **“Good faith effort” required**
 - *Court noted that federal statutes allow state prisoners to come to court to testify*
 - **Refusal to immunize in face of 5th Amdt claim can be considered abuse → declarant not unavailable**
 - Judge and jury should be able to see *demeanor*
- Facts
 - Barber & Woods tried for armed robbery in state court
 - Woods waived his privilege against self-incrimination and said things at a preliminary hearing that incriminated Barber
 - When Barber was tried, Woods was in federal prison 225 miles away
 - Trial court admitted transcript of Woods’ testimony over Barber’s objection
 - *Barber lost in state; went through federal system on habeas*
- Disposition here: Reversed
- Failure to cross-examine at preliminary hearing ≠ waiver of right to cross
 - waiver = “intentional relinquishment . . . of a known right”
 - Right to confrontation = trial right; preliminary hearings usually entail “a much less searching exploration into the merits”
 - Spending time attacking credibility at preliminary hearing shows judge you’re worried about the testimony and shows prosecutor your trial tactics
 - → no motivation to conduct the same kind of cross-exam at a preliminary hearing as at trial
 - plus, defense had every reason to believe that the prosecution would bring the witness to court
 - *The state didn’t even try.*
- No need to try what clearly won’t work; good-faith effort still required, but no need to waste time with useless acts. *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (301)

Problem 4-L. “The Government Let Her Go”

- Shell arrested for carrying drugs in the airport. Deposition (with court permission): Shell incriminates Masters; defense declines to cross-examine. Government gave Shell her passport & ticket to AUS back; knew that she would be leaving. Government claims unavailability at trial. (298)
 - Did government cause the unavailability?
 - Didn’t offer to keep Shell around or to pay to bring her back.
 - Made no real effort to make sure witness remained available.
- **Key element: credibility of Shell, the shell, is at issue. She says “Masters did it, not me,” so everyone will be trying to figure out whether to believe her. *Demeanor evidence crucial* → *actual presence is particularly important.***

HEARSAY EXCEPTIONS**Former testimony (804(b)(1))**

- Two elements
 - (1) Prior proceeding
 - Civil, criminal, administrative, etc.
 - (2) Cross-examination (direct, cross, redirect) must have been available
 - Civil: “Opportunity and similar motive” to develop testimony
 - Criminal: must be “predecessor in interest”
 - Same Δ must have been able to conduct cross
- Only thing missing is demeanor; closest thing to live testimony.
- ***Lloyd v. Am. Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978) (304)***
 - Lloyd testified at a Coast Guard hearing about an altercation with Alvarez on an AmEx ship. Both L & A represented by counsel. In this separate federal-court trial, Lloyd sued AmEx for negligence; AmEx wanted to use the Coast Guard-hearing transcript against Alvarez (whom AmEx had impleaded as a third-party Δ). Lloyd was definitely unavailable.
 - Did Alvarez (or a predecessor in interest) have “opportunity and similar motive”?
 - yes—“realistically generous” interpretation of “predecessor in interest” (307)
 - broad view—“basic interest advanced” in both sets of proceedings was “determining culpability”
 - reference to “community of individual and public interests”

- in prior proceeding:
 - Alvarez: “vindicate his original interest in recovering for his injuries” (306)
 - Coast Guard: “vindicate the public interest in safe and unimpeded merchant marine service”
 - same “nucleus of operative fact”
- Coast Guard’s interest in the prior proceeding—investigating & punishing wrongdoing—adequately similar to Alvarez’s interest in protecting his own rights
- *Notes on prior cross-examination requirement (310)*

Dying declarations (804(b)(2))

- Things said with knowledge that death is imminent (311)
 - “settled expectation of impending death”
- Indicia of credibility
 - “A dying person will not meet his maker with a lie on his lips”
 - No possible benefit from a lie; the person’s going to be dead and can’t gain anything from making false accusations
 - . . . but a little suspect in reality
- Mostly used in criminal cases to identify the killer
 - but FRE allow it to be used in civil cases
- Only statements regarding “cause and circumstances” of death
- Judge determines admissibility as a matter of law under 104(a)
- Some courts say: if the declarant knew of the circumstances of their speaking, they may be allowed to make a dying declaration—although speculative DDs not favored
- If you don’t actually die, probably not unavailable, so DD not admissible
- Context is important

Against-interest statements (804(b)(3))

- **Context is important!**
 - Apparently against-interest statements aren't always actually against interest (314)
 - e.g., "I owe Bob \$1000" isn't actually against interest if you owe Bob \$5000
 - not against interest in that if believed, you'd save \$4000.
- Kinds of interests: **pecuniary, property, penal** (penal is new to the FRE)
- **Rationale:** People don't make statements that could harm or compromise their personal interests unless they're true
- Standard of admissibility: **preponderance**
- **Conflicting interests**
 - may cancel each other out; one may predominate
 - court to decide
 - ***Demasi v. Whiney Trust & Savings Bank, 176 So. 703 (La. App. 1937) (315)***
 - bank-account issue
 - lady gave up claim to \$630 to gain \$70 by signing affidavit
 - not against interest because court said motivating factor was to get the \$70 she wouldn't have had otherwise
- **One-way interests (316)**
 - Statements of valuation used *in some courts* as maxima/minima of value
 - Declarant's goal to aim high: statement taken as maximum
 - e.g., property value for owner selling business
 - Goal to aim low: statement taken as minimum
 - e.g., declarant's statement of income for tax purposes
- **Circumstantially adverse facts**
 - e.g., admitting to smoking in a building some hours before it burned down
 - but declarant must have understood the implications of his statements
- **Declarant's understanding (317)**
 - declarant must understand his own interests
- **Effect of later events**
 - e.g., you say "I'm so drunk" when expecting to get driven home; but then, unexpectedly, you wind up driving & a collision results
 - some courts "insist" that this does not satisfy the against-interest requirement
 - idea that speaker "gives up something when he speaks"

- **Conclusory remarks**
 - Did speaker really understand (1) that they were making an admission and (2) what that admission legally entailed?
 - conclusions/opinions treated as suspect
 - although some courts do treat them as admissions
- **Against social interest (318)**
 - Not mentioned in rule; not favored by Congress; courts tend not to find
- **Against penal interest**
 - Now admissible under FRE
 - Genuinely self-inculpatory statements carry “particularized guarantees of trustworthiness” that satisfy Confrontation Clause (321)
 - problem: “invites Δs to offer perjured testimony describing third-party confessions that were never made, which are hard for prosecutors to investigate”
- **Bar against collateral statements (318)**
 - ***Williamson v. United States*, 512 U.S. 594 (1994)**
 - **Only self-inculpatory statements are admissible; collateral statements are inadmissible.**
 - A statement ≠ self-inculpatory just because it’s part of a larger confession; especially suspect when implicating others (320)
 - Non-self-inculpatory parts of confessions are not admissible
 - depends on narrow definition of ‘statement’
 - (1) report or narrative
 - **(2) declaration or remark** (preferred)
 - Statements mentioning others may still be admitted
 - e.g., coconspirators; accomplices
 - **Crucial question**
 - Whether the statement was sufficiently against the declarant’s penal interest “that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true” (321)
 - **“Curry favor” statements**
 - One might actually view an admission as in their interest: cooperate with the authorities to get lighter treatment
 - “a matter of cutting losses” (325)
 - See also *Lilly v. Virginia*, 527 U.S. 116 (1999), *id.*
 - Self-inculpatory statements may only be admitting what is known already

- **Balancing**
 - Does self-interest component outweigh against-interest component?
 - Often used as bar against statements proving acts by persons other than speaker (323)
- ***State v. Schiappa, 728 A.2d 466 (Conn. 1999) (326)***
 - Statements to third persons rather than law-enforcement personnel don't have the "curry favor" element (or, probably, the 'testimonial' character *Crawford* worries about)
 - Dually inculpatory OK
 - speaker & accomplice
 - Some courts take a broader view of 'statement' (and allow collateral statements)
- ***Problem 4-M. "He Had Nothing to Do With It" (327)***
 - Two dudes driving truck: Garvin & Torrens. They get pulled over; they have no logbook or bill of lading. Truck gets searched; cops find pot. Both arrested. Garvin gets charged.
 - Garvin's story to cops:
 - This was Torrens' mission; they had just delivered cheese; didn't know anything about pot.
 - Torrens' story:
 - Claimed ownership of pot; says it was his idea; Garvin didn't know anything about it.
 - **Is Torrens' statement admissible?!**
 - Probably. Torrens not trying to get special treatment; no "curry favor" element. Only talking about his own motivations—just digging a hole for himself. No reason to believe he's trying to save his buddy; no evidence of a connection between the two guys.
 - What about *Crawford*?
 - No confrontation problem
 - Torrens' statement was not accusing Garvin; defendant (Garvin) was trying to get statement in.

- **Corroboration requirement for statements offering to exonerate (but not implicate) the accused**
 - Confessions by third persons making reference to no one else “scare the heck out of prosecutors”
 - Guy calls Bill and says “I, Tim, did it”
 - Statement would have to be mentioned at trial
 - But Tim can refuse to testify further (5th amdt)
 - What if dude freshly on death row made the call?
 - → need for corroborating evidence—independent evidence tending to prove the same.
 - *Police don’t release specifics of crimes to the press so that if someone calls in and makes an admission, they can figure out quickly whether the admission is genuine: first question is, “How did you do it?”—idea being that they won’t know unless they really did it.*

Personal or family history (804(b)(4))

- A minor exception, “but when it’s in play, it’s in play big time” (330)
- No need for personal knowledge
- Statement can be oral or in writing
- Little risk of insincerity
 - Such statements usually not made with view to litigation
- Independent evidence not usually required when speaking about oneself
 - *Is* required if speaking of someone else

Forfeiture by wrongdoing (804(b)(6))

- A defendant that “procures” unavailability of a witness by wrongdoing forfeits the right to cross-examine; otherwise inadmissible out-of-court statements admitted (331)
 - → **Loses *constitutional right* (confrontation) and *evidentiary right* (to object as hearsay)**
 - Approved in *Crawford* and *Davis* (bottom 334, bottom 340)
 - Defendant subverts integrity of criminal-justice system
 - **Requires intent to procure absence, *People v. Moreno* (Colo. 2007) (333)**
 - Need some kind of wrongdoing beyond the underlying crime; some kind of positive act
 - Need not be criminal itself (can merely be coercive talk)
 - **Makes any statement ever made by the person the party has rendered unavailable *admissible against the intimidator.***
 - *U.S. v. Thevis*, 665 F.2d 616, 627–28 (6th Cir. 1982) (331)
 - **Rule is a penalty**—a consequence of the intimidator’s wrongful behavior
 - Admissibility not based on reliability of the declarant
 - Broadly construed (*cf.* coconspirator exception) (339 n.2(c))

- **Problem 4-N. “If You Want to Stay Healthy” (332)**
 - Act of intimidation being determined by a preponderance, outside of Δ 's or his lawyer's presence; outcome determines whether Δ loses a constitutional right.
 - That's okay.
 - No need to swear the declarant's lawyer because under 104(a), judge can consider any evidence, including lawyer's representation of what his client has told him
 - In-chambers meeting should still be on the record; there should be a court reporter there
 - Meeting doesn't interfere with Δ 's right to cross examine because the discussion doesn't go to the merits.

- **People v. Moreno, 160 P.3d 242 (Colo. 2007) (333)**
 - Act of abusing the child has (1) caused Δ to be charged with a crime and (2) rendered child unavailable as a witness (because, therapist testified, requiring the child to testify would 'retraumatize')
 - Trial court admitted child's videotaped statement (*reversed on appeal; appellate court affirmed by S.Ct.*)
 - Q: Does 804(b) (6) apply?
 - No— Δ had no *intent* to subvert the criminal system; no *intent* to procure unavailability.
 - Underlying crime itself not necessarily sufficient to constitute procurement. (336)
 - Act resulting in witness unavailability must have been intended to procure unavailability.

- **Giles v. People, 554 U.S. ____ (2008)**
 - Upheld *Moreno*
 - **Intent always required**
 - Act must be conduct *designed* to prevent testimony.
 - It must be the integrity of the proceedings that's been attacked
 - Confrontation means: Δ must see witness as he testifies; witness must see Δ as he testifies.
 - some exceptions when a child testifies, e.g., use of closed-circuit TV, if testifying would threaten the child's health

THE “CATCHALL” EXCEPTION: RULE 807

Does not require unavailability

Elements

- Testimony must be reliable
- Must be in the interest of justice to admit
- Must give notice to opposing counsel

“Reliability” element

- Evidence that’s demonstrably reliable doesn’t always fit an exception
- *Dallas County v. Comm’l Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961) (346)
 - Court admitted an old newspaper clip from a small town
 - “To our minds, the article published . . . on the day of the fire is more reliable, more trustworthy, more competent evidence than the testimony of a witness called to the stand fifty-eight years later.”
 - *Would be ‘ancient documents’ exception now*

State v. Weaver, 554 N.W.2d 249 (Iowa 1996)

- Kid died with babysitter. Kid had symptoms consistent with shaken-baby syndrome; injuries 7–10 days old at time of death. Babysitter charged with murder; convicted. Babysitter challenged conviction with affidavits. (347)
 - This case doesn’t mean that affidavits would be accepted at trial—just that the affidavits let the court know what the witnesses would have said. Affidavits used because the witnesses weren’t allowed to be called at trial (→ no transcript for review).
- Affidavits from five women said that baby’s mom, a waitress at a restaurant that the five women frequented, told them that the baby had hit its head on a coffee table, and that the babysitter hadn’t hurt the kid
 - Couldn’t use womens’ statements as substantive evidence without getting through the hearsay issue; otherwise could only be used to impeach mom’s testimony (which pointed to babysitter)
- **Indicia of reliability**
 - Witnesses neutral—not associates of babysitter or mom
 - Mom made the statement more than once; repetition suggests reliability
 - . . .

Catchall & Child Abuse (353)

- Area of the law still developing

CONSTITUTIONAL BAR AGAINST HEARSAY

THE CONFRONTATION CLAUSE

Defendant entitled to be present when witness testifies

- Witness and defendant must be able to see each other, *Coy v. Iowa*, 487 U.S. 1012 (1988) (399)
 - Some exceptions when a child testifies, e.g., use of closed-circuit TV, if testifying would threaten the child's health (e.g., would "retraumatize")
 - but needs a specific finding (400)

Evolution of the doctrine

- *Sir Walter Raleigh's Case* (1603) (358)
 - Cobham said some inculpatory stuff about Raleigh, possibly under pressure; Raleigh demands that Cobham be produced at trial, and that Cobham repeat his accusations or recant; court refused to produce Cobham, even though he was available
- *Mattox v. U.S.* (1895) (359)
 - Dying declarations OK; pre-existed the Sixth Amendment; Constitution not meant to eradicate hearsay exceptions
- *Kirby v. U.S.* (1899)
 - Third-party felony convictions can't be used against the accused "to prove any fact essential" to the earlier judgment (*cf.* 803(22))
- *Pointer v. Texas* (1965)
 - Confrontation as "fundamental right"
- *Douglas v. Alabama* (1965)
 - Suggested that deferred cross is OK
- *Barber v. Page* (1968)
 - Must demonstrate unavailability
- *Bruton v. U.S.* (1968) (360)
 - Limiting instructions don't cure prejudice caused by one Δ making a confession incriminating co-Δ by name
- *California v. Green* (1970)
 - Prior or deferred cross implied acceptable
- *Dutton v. Evans* (1970)
 - "Indicia of reliability" satisfy Confrontation Clause
- *Ohio v. Roberts* (1980)
 - Declarant must be called as witness; if unavailable, statement must be shown to be reliable
 - "Firmly rooted" hearsay exceptions could show reliability
 - but tons of exceptions were "firmly rooted"
 - **Overruled in federal doctrine, at least implicitly, by *Crawford***
 - Some states still follow *Roberts*

Testimonial statements and *Crawford*

- ***Crawford v. Washington*, 541 U.S. 36 (2004) (363)**
 - Major concern under CL was *ex parte* examinations being used against Δ s
 - **If a statement is testimonial, can be used only if**
 - **(1) Declarant is unavailable and**
 - **(2) Prior opportunity to cross-examine declarant (373)**
 - *Confrontation Clause* demands method of determining reliability, not a mere requirement of reliability → Roberts is out (371)
 - *Crawford* doesn't mean that there has to be "effective" cross-examination; witness doesn't need to be destroyed. Just need to suggest that there are other motivations and that the testimony may not be reliable. Cf. *Owens* (unremembering witnesses) (394)
 - **"Testimonial"**
 - Not strictly defined but *Crawford* suggests: (373)
 - includes "formal statement to government officers" (367)
 - includes "statements taken by police officers in the course of interrogations"
 - including from kids
 - Not "statements in furtherance of a conspiracy"
 - Dying declarations OK
 - Non-hearsay uses OK
 - ***See also Davis***
 - *Case law suggests: (376–79)*
 - Doesn't include private statements
 - Doesn't include kids' statements to parents/caregivers/doctors in hospitals
 - Declarant available → deferred cross OK
 - Prior testimony usable; no *Crawford* problem (391)
 - Unavailability → see *Barber* (must make good-faith procurement effort)
- State of mind of the speaker?
 - Was it the intention or belief of declarant to an official investigation?
 - *See also Davis*—addresses "primary purpose" of interrogation

“Ongoing emergencies” and *Davis*

- *Davis v. Washington*, 126 S.Ct. 2266 (2006) (379)
 - “Ongoing emergency” exception to *Crawford*
 - “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the **primary purpose** of the interrogation is to enable police assistance to meet an ongoing emergency.” (emphasis added) (382)
 - *Hammond* (companion case): statement to police did not fit exception because emergency situation was over & police were looking for a statement about *what had already happened*
 - “Testimony” = “A solemn declaration or affirmation made for the purpose of establishing or proving some fact” (383)
 - marks out not “core” but “perimeter” of the term

Deferred cross & prior inconsistent statements

- *California v. Green*, 399 U.S. 149 (1970) (391)
 - Witness tells a “different” story at trial “inconsistent” with previous
 - New story “favorable to” defendant
 - Witness “repudiates” what he said before
- Deferred cross must be “full and effective”

Minimal opportunity for cross-exam generally adequate

- “The Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985)
- Witnesses forgetting the subject matter but remembering the making of their prior statement are adequately cross-examinable.
 - “[The] opportunity [to cross-examine] is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief.” *United States v. Owens*, 484 U.S. 554, 559–60 (1988) (393–94)
 - “successful cross-examination is not the constitutional guarantee”

CHARACTER EVIDENCE

Relevance is a major consideration

GENERALLY INADMISSIBLE TO PROVE CONDUCT (RULE 404)

Character evidence is disfavored

Cannot use character evidence to show propensity

- Being honest (or violent) by nature or disposition can tend to show that a person was honest (or violent) on a particular occasion¹⁷
 - But this is a propensity use → inadmissible under 404
- Propensity is *some* evidence of a particular fact, but probative value depends on context and carries heavy risk of prejudice, bias, and misuse.
 - *Too much risk.*
 - Evidence that a person is “bad” can be a conclusive to a jury; jury says “this person is bad, so let’s punish him,” and particular consideration of the case itself stops there.

Kinds of character evidence

- Specific acts
 - Strictly limited under the rules (404(a)(1),(2),(3); 404(b); 405(b))
- Opinion
 - Rule 405(a)
- Reputation (“community opinion”)
 - Rule 405(a)

General scheme—defendant’s & victim’s character

- Rule 404 generally governs admissibility of character evidence.
 - *If* Rule 404 does not bar the evidence, Rule 405, etc. show particular ways of admitting.
 - **Rule 404 exceptions apply to criminal cases only.** Cannot use any of the propensity-evidence exceptions in 404 in civil cases.

¹⁷ Proof of honesty is more probative in proving truthfulness than is proof of dishonesty probative in proving deceitfulness (403)

- Defendant may offer testimony about “pertinent trait[s]” of his character. (Rule 404(a)(1))¹⁸
 - If Δ does, prosecutor can offer rebutting evidence.
 - If Δ offers character evidence of alleged victim under (a)(2), prosecutor can offer evidence of the same character trait in the defendant.
 - *Decision left to defendant whether to get into character evidence; Δ assesses risk of doing so, and presumably only does if Δ decides that on balance, the evidence will weigh in his favor.*
 - If it’s a “pertinent” trait that has something to do with the issues that need to be resolved, the defendant can offer it. (406)
 - Witness never having heard anything bad = admissible evidence of good character
 - Proof that the defendant is law abiding is usually OK (407)
- Defendant may offer testimony about the “pertinent trait[s]” of character of the alleged victim. (Rule 404(a)(2))¹⁹
 - Prosecutor can offer rebutting evidence:
 - About alleged victim’s character
 - About the same character trait in the defendant (Rule 404(a)(1))
 - Defendant may offer evidence of alleged victim’s violent acts in support of claim of fear of alleged victim (409)
- If defendant offers evidence that alleged victim was the “first aggressor,” prosecutor may offer evidence of a “character trait of peacefulness” of the alleged victim. (Rule 404(a)(2))
 - **An eyewitness who testifies to seeing the first blow being struck is *not* testifying about character.**
- *Evidence of witnesses’ character governed by Rules 607, 608, 609 (Rule 404(a)(3))*
- Specific evidence of other “crimes, wrongs, or acts” not admissible as propensity evidence, but is admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” (404(b))
 - Upon request of the accused, the prosecutor must “provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce”
 - notice may be provided during trial “if the court excuses pretrial notice on good cause shown”

¹⁸ See also Problem 5-A (600)

¹⁹ See also Problem 5-B (407)

REPUTATION, OPINION, SPECIFIC INSTANCES (RULE 405)

Foundation required

- **Reputation:**²⁰
 - Need to show that the witness is adequately familiar with the community to be familiar with reputations
- **Opinion:**
 - Need to show a relationship longstanding enough to have ability to meaningfully evaluate character
 - Duration of relationship = important

Reputation

- Reputation among coworkers OK (408 n.1)
- Reputation evidence *after* the crime is not admissible (409 n.3)
- Arguably inferior to opinion evidence(?) (409 n.4)
 - *material from my notes say "reputation testimony preferable" in the context of Problem 5-D*

Opinion

- Question to answer: is the witness's knowledge of this person extensive enough to have formed an opinion about their character?
- Expert opinions on violent/nonviolent character not admissible (409 n.5)

Cross-examination of character witnesses

- On cross, 405(b) allows questions regarding specific examples of conduct on the character trait in question²¹
 - Prosecutor need not have a good-faith basis for questions
 - "[D]efendants . . . have no valid complaint at the latitude which existing law allows to the prosecution to meet by cross-examination an issue voluntarily tendered by the defense." *Michelson v. United States*, 335 U.S. 469, 484–85 (1948) (424)
 - Can undermine the stated opinion
 - Q: Were you aware that X has seventeen bastard children?
 - Witness says yes: undermines claim that X has good character.
 - Witness says no: undermines witness's claim that he knows X well enough to form an opinion.
 - As a matter of tactics, prosecutors usually don't take this approach (makes prosecutor look like a bad guy; jury can tell when the prosecutor is treating a witness unfairly)

²⁰ See also Problem 5-C (408)

²¹ From discussion of Problem 5-D (409)

Character as an element of the charge: civil & criminal (405(b))

- Almost never happens in criminal cases (412)
- Can happen in civil cases (414)
 - defamation, negligent entrustment, child custody, wrongful death
- Denying an allegation of past criminal behavior (“I’m no thief”) doesn’t put character into evidence—but does create issue of credibility²²
 - Rule 608: can impeach with rebutting evidence (but such evidence is not to be used substantively)

OTHER CRIMES: MOTIVE, PLAN, INTENT (RULE 404(B))**List in Rule 404(b) is *exemplary***

- Can reason by analogy to listed uses
- Showing intent in a previous context can show likelihood of having similar intent in the present context
- *Can’t use character evidence if it goes through propensity.*
 - Narrower listed uses are okay.

Balancing under 403: probativity vs. prejudice

- Worry about portraying Δ as a “bad person” remains—jury may punish regardless of the merits of the present case
- **Four-part test** (judge decides)
 - (1) Evidence offered for a proper purpose?
 - (2) Evidence relevant for that purpose?
 - (3) Probative value substantially outweighs risk of unfair prejudice?
 - Prosecuting attorney’s necessity
 - What *is* the probative value? What does the evidence tend to prove?
 - Nature of prior crimes—inflammatory? likely to anger/ mislead jury?
 - Does Δ claim entrapment?—prosecution must be able to refute
 - *Motion in limine provides valuable method of answering these questions at leisure*
 - Should trial courts specify in writing their reasoning on determinations of admissibility? Should they be making specific findings on probative value vs. risk of unfair prejudice?
 - Circuit courts split (5th Cir.: findings needed if asked, but not otherwise; 1st Cir.: appellate court assumes that proper balancing done at trial)
 - (4) Limiting instruction possible?

²² See also Problem 5-E (413)

Intent: *Problem 5-F. Drug Sale or Scam?*

- Smith acts as informant; tells cops Moore is coke dealer. Sale set up with undercover officer. Moore sells some hash; when it comes to the four ounces of coke, Moore wants to inspect the cash; says it's "dusty" and refuses to sell.
- Police pick up Moore with a small amount of cocaine, but not enough to show that he's a dealer. Prosecuted as dealer anyway.
- Smith testifies that Moore has done a bunch of deals over the past 18 months, showing past intent to sell as evidence of intent to sell in the set-up deal.
 - **Admissible?**
 - Four-part test
 - (1) Purpose is to show intent on a particular occasion = OK.
 - (2) Evidence is definitely relevant; shows past intent
 - (3) Highly probative because circumstantial evidence is almost always the only evidence of intent (**necessity argument**); risk of prejudice not unfair because it does not substantially outweigh probative value.
 - Moore says he wasn't planning on selling; says he was planning on ripping off the cash and not actually transferring any drugs
 - Claims entrapment?—if so, he is saying he had no intent (propensity?) to commit the charged crime on the given occasion
 - **High potential for misuse of evidence of past intent when the past crimes are similar to the present charge**
 - But when specific intent is a necessary element of the charge at hand, probative value still outweighs risk of prejudice.

Prior acts as evidence other than of intent

- **Malice**
 - E.g., past drunken-driving convictions to show that Δ knew that driving when drunk was dangerous
- **Knowledge**
 - E.g., marijuana convictions in face of claim that Δ thought he had oregano

- **Modus operandi**²³
 - “Signature” method of committing a crime points like a fingerprint to the identity of a perpetrator
 - E.g., to show that Δ is guilty now, prosecutor shows evidence (e.g., confession or conviction) of eight other crimes done in the same particular way
 - More points of comparison → more likely to be legitimate identifiers
 - Modus operandi vs. probabilistic evidence
 - Probabilistic evidence has a “veneer of science”; expert testifies as to mathematical likelihood
 - In M.O. situations, just looking at similarities
- **Plan or propensity**
 - **Problem 5-H. The Corrupt Judge (420)**
 - Judge charged with 27 counts of accepting bribes. Charged under Hobbs Act (fed. extortion statute) and RICO (prohibits operating an “enterprise” in interstate commerce through a “pattern” (2+ events) of “racketeering” (violating state/fed laws)). (“Enterprise” = court system.)
 - Rupert (former court employee): testifies that judge has received envelopes full of cash on a monthly basis for eight years. Couldn’t link to judge’s rulings.
 - Neely (lawyer with immunity): testifies that he’d paid bribes to the judge “on dozens of occasions.” Couldn’t name any specific instances.
 - **Admissible?**
 - Both witnesses’ testimony minimally probative re: particular counts
 - But RICO charge goes to repeated acts; specifics not so important
 - Risk of prejudice: more so on specific counts of bribes than on RICO charge
 - **Limiting instruction!**
 - Tell jury to consider only for RICO!
 - In sexual-abuse cases, evidence that Δ also abused victim’s sibling sometimes offered as evidence of plan or design—but state/fed split inconclusive (421 n.4)

²³ See Problem 5-G (419)

- **“Other purposes,” e.g., absence of mistake**
 - Evidence of a series of suspicious injuries in children may be admissible to show intentional infliction of a particular injury at issue, although a “significant difficulty” arises when the testifying physician can’t link the injuries to a specific perpetrator or a specific time²⁴ (422)
- **Opportunity**
 - Showing “portable knowledge,” e.g., how to disarm a sophisticated alarm system; skill necessary to complete a complex act
- **Impeachment uses**
 - E.g., when Δ says “I’m a good person—I’ve never been in trouble with the law before”—prosecutor can introduce evidence of prior crimes (423 n.4; Contradiction, p. 576)
 - Denying an allegation of past criminal behavior (“I’m no thief”) doesn’t put character into evidence—but does create issue of credibility²⁵
 - Rule 608: can impeach with rebutting evidence (but such evidence is not to be used substantively)

Proving the prior act

- ***United States v. Huddleston*, 485 U.S. 681 (1988)** (424)
 - Judge plays “screening” role
 - No “preliminary finding” of proof required; judge makes a “threshold” decision whether the evidence is “probative of a material issue other than character”
 - (2) Relevance issues treated as matters of conditional fact for the jury under 104(b), using preponderance standard (*see Bourjaily*)
- Still need to deal with Rule 403
 - *Authors think that the judge should make the determinations all the way through the process & apply clear-and-convincing standard*
- Events underlying charges on which a Δ was acquitted may still be admitted as proof of prior acts (425 n.4)
 - Criminal standard resulting in acquittal: beyond a reasonable doubt
 - Standard for admissibility of evidence: preponderance

²⁴ See also Problem 5-I

²⁵ See also Problem 5-E (413)

“RAPE SHIELD” (RULE 412) & SEX CASES (RULES 413–415)

Evidence of alleged rape victim’s sexual history usually inadmissible

Problem 5-J. Ordeal of Leslie or Fred

- Date-rape case (427)
- Fred can introduce evidence to show that Leslie consented (412(b)(1)(B))
 - but can’t show sexual predisposition (412(a)(2))
 - or any other sexual behavior (412(a)(1))
 - unless being offered to show source of semen/bruises (412(b)(1)(A))

Due-process protection of defendant (Rule 412(b)(1)(C))

- Specifically makes constitutional rights an exception to the FRE
 - *See Doe v. United States*, 666 Fed.2d 43 (4th Cir. 1981)

Justification for rape-shield protection

- Opening up sexual history to investigation would deter many from pressing rape charges
- Recognition that sexual activity is normal for unmarried people
 - Not so probative as it might have been before (when sex out of wedlock was considered promiscuous)

Evidence of motive to falsely claim rape is admissible

- E.g., accusing a third party of rape to protect a relationship

Sexual behavior & reputation in civil cases

- Evidence of “sexual behavior or sexual predisposition” is admissible, but only if probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party (403 turned on its head, plus concern for “harm”) (412(b)(2))
 - however, still barred if tends to show propensity (can’t use just to show that someone is promiscuous, but could use to show attitude, sensitivity, likelihood of taking offense)
 - conduct in workplace vs. outside of workplace
 - courts more likely to admit the former
- Evidence of alleged victim’s reputation only admissible if reputation “has been placed in controversy by the alleged victim”²⁶ (412(b)(2))

413, 414, 415 (430–34). . .

²⁶ From Problem 5-K (428)

HABIT, ROUTINE PRACTICE, SUBSEQUENT REMEDIAL MEASURES (RULES 406 & 407)**Evidence of habit freely admitted**

- Doesn't carry moral overtones
- Greater probative value

What constitutes habit?

- **Reflexive responses to recurrent conditions**
- Specific reactions to stimuli on particular occasions
 - specificity, frequency, regularity
- Semiautomatic, semiunconscious, not entirely volitional
 - Things like going to church regularly ≠ habit
 - But brushing teeth before flossing, or going up stairs two at a time, would be habit
- *cf.* character
 - character is more general
 - carries moral overtones (“baggage”)
 - deals with more conscious, deliberate acts
- ***Problem 5-M. Death on the Highway (435)***
 - Two cars crash; everyone dies. No witnesses. Estate of driver B offers testimony that driver B was a “good, careful driver” in order to show that driver B was exercising due care.
 - Is this habit?
 - Probably not: being a “good driver” is too general
 - Habit would be: “I’ve driven with this person repeatedly; he almost always drives at or under the speed limit; he uses his turn signals; he checks his mirrors frequently . . .”
 - *Judge decides under 104(a)*
- ***Problem 5-N. The Exploding Can (436)***
 - Can of freon blows up while mechanic is warming it; mechanic injured. Mechanic sues mfr; mfr says mechanic negligently ignored warning labels on can. Mfr calls mechanic’s coworker as witness, who offers testimony:
 - Coworker says he’s seen mechanic “often . . . use an immersion coil to heat water, and thus to heat cans of freon” (which freon can says not to do)
 - Is this repeatedly enough?
 - Could be—“often” is vague
 - Is this specific enough?
 - Probably—deals with a very specific circumstance

Habit and negligence cases

- **Admitted as habit evidence:**
 - Plaintiff's "habitual disregard" of warnings to wear seatbelts, *Sharpe v. Bestop* (N.J. 1999) (436–37)
 - In trial of boyfriend of victim's mother, evidence that *she* abused child, offered to show she caused injuries, was habit (but excludable under 403), *State v. Huerta* (Mont. 1997)
 - Carrying a gun, *Ware v. State* (Md. 2000)
 - Testimony on decedent's "customary driving speed over a period of years, along the 'flat' leading southerly into the curve where the accident occurred, offered to prove that car driven by decedent crossed the center stripe there, *Barton v. Plaisted* (N.H. 1969)
 - Evidence that a pedestrian often crosses a certain street in a crosswalk was habit; showed "specific response to going to the grocery store," *Charmley v. Lewis* (Or. 1986)
 - Evidence that a pedestrian "had been in the habit of crossing Main Street in returning from church at the point east of the crosswalk" showed that she was not in the crosswalk when struck by a car, *Glatt v. Feist* (N.D. 1968)
 - 20-year-old female victim, college student and part-time waitress, always telling parents or friends when leaving on a trip, admitted in murder trial, *State v. McKnight* (Ohio 2005)
- **Not admitted:**
 - Plaintiff's "occasional disregard of warnings not to drink and drive," *Sharpe v. Bestop* (N.J. 1999)
 - Proof of Δ 's stop-sign and speeding violations—two in each of three consecutive years—did not show habit of speeding, *Hudelson v. Delta Inter. Machinery Corp.*, 127 P.3d 147 (Idaho 2005)
 - 37 reports on encounters between victim and police, five involving drunken and aggressive behavior—didn't "rise to the level of semiautomatic conduct" or show habit of becoming violent when drunk, *State v. Cotty*, 899 A.2d 482 (R.I. 2006)
 - In trial for murder, proof that π became violent when angry was not habit, *State v. Brown*, 543 S.E.2d 552 (S.C. 2001)
- **ACN counsel against admitting evidence of drug habits (alcoholism, etc.)**

Organizational custom and practice

- **Once industry practice is established, presumption is that the practice is generally followed**
- ***Problem 5-O. Was He Served?* (438)**
 - Agent testifies about procedure for issuing and serving deportation letters/warrants—but says he’s never executed such a warrant & his knowledge of procedures comes from what he’s been told
 - Is this “organizational custom and practice”?
 - Probably—although probative value may not be high, since the guy has only “read the manual” & hasn’t done it himself (could be a 602/personal knowledge problem)
- Organizational custom and contractual terms—often admissible (439)

Subsequent Remedial Measures (SRMs) (FRE 407)

- Change in protocol or method, after some injury or harm—such as disciplinary actions or firing an employee—not admissible to prove:
 - negligence
 - culpable conduct
 - a defect in a product or the product’s design
 - or need for warning or instruction
- **Policy (440)**
 - Want to encourage making things better or safer, not punish them
 - Unfair to introduce, over object, evidence that a party “behaved responsibly after the fact”
 - *Relevance issue*: future precautionary efforts don’t show past fault
 - *Confusion issue*: the accident and SRMs may be causally unconnected
- **Three major 407 issues**
 - (1) Exclusionary doctrine *does* (can) apply in products-liability cases
 - (2) *Erie*: generally doesn’t apply (*see also p. 448*)
 - FRE = procedural (although it causes substantive results)
 - (3) When can SRMs be used to show “feasibility”?
 - . . . when feasibility is “controverted,” but that needs definition

- ***Tuer v. McDonald*, 701 A.2d 1101 (Md. App. 1997) (440)**
 - Facts
 - Dude had angina for 16 years; goes to hospital. Given heparin (anticoagulant); surgery planned. Pre-surgery, dude goes off heparin per standard hospital procedure. Emergency comes up; dude's surgery delayed; stays off heparin. Dude goes into cardiac arrest & dies.
 - → hospital changes policy: stay on heparin until taken to operating room (SRM).
 - Plaintiff (widow of dead dude) wants to introduce evidence of SRM.
 - Alleged grounds for SRM:
 - (1) Δ had said that the prior protocol was correct.
 - No need to admit wrongdoing to claim that a change is remedial
 - (2) π was entitled to prove SRM was "feasible" beforehand
 - (3) to impeach testimony that restarting heparin = unsafe
- **Feasibility (442)**
 - possible definitions
 - (1) narrow: Δ says SRM would have been impossible before
 - (2) broad: Δ rationalizes not taking SRM before
 - court advocates a middle ground (444)
 - **Making a "flat assertion" that treatment would be "unsafe" would be contesting feasibility**
 - **But a "professional judgment call" does not contest feasibility**
 - no "absolute" assertion
 - ACN: feasibility \neq controverted if Δ stipulates to feasibility
- **Impeachment (444)**
 - Supposed to cast doubt on credibility of one making statement —not just contradiction
 - Interpreting 407 to allow contradiction under the impeachment exception would swallow the rule
 - Some examples of impeachment use: (445 para. 2)
 - Defense had claimed that the product was "perhaps the best combination of safety and operation yet devised"
 - Allowable impeachment = evidence of a design change after accident but before testimony, *Muzyka v. Remington Arms Co.* (5th Cir. 1985)
 - Defendant's design engineer claimed product was safe to operate in a particular manner
 - Allowable impeachment = post-accident letter from mfr to its dealers warning of "death dealing propensities" when used in that manner, *Dollar v. Long Mfg.* (5th Cir. 1977)

COMPROMISE, MEDICAL EXPENSES, PLEAS, INSURANCE (RULES 408–411)

Compromise and offers to compromise (Rule 408)

- **Policy favoring settlements**
 - Allowing evidence of settlements as proof of liability would discourage settlements
- **Threshold for 408 operation: validity or amount of claim must be *disputed***
- **408(a)(1) vs (a)(2)**
 - (a)(1) bars evidence of settlements themselves
 - including, in criminal cases, evidence of civil settlements
 - (a)(2) bars made in settlement *negotiations*—broader
 - **exception in (a)(2)** for “negotiations related to a claim by a public office or agency in the exercise of . . . authority” in a criminal case
- **408(b)—permitted uses**
 - Can use evidence of settlements to:
 - show witness’s bias or prejudice
 - negate a contention of undue delay
 - prove an effort to obstruct criminal investigation or prosecution
- ***Problem 5-P. Two Potato, One Potato (449)***
 - Farmer bought herbicide for his potato farm; lots of potatoes died
 - Farmer complained to vendor
 - Vendor said:
 - “Cheron [mfr] will back up its recommendation of its product”
 - “Don’t worry. We’ll take care of you”
 - “You just tell us the damages you’re claiming”
 - **Excludable under 408?**
 - No
 - There was no *dispute* about settlement → 408 doesn’t apply
- ***Problem 5-Q. “This is Criminal; You Can’t Exclude Civil Settlements Here” (450)***
 - Dude (Prince) does some sketchy stuff with others’ money; Prince investigated by AG
 - Negotiation w/ Sanders (AG’s agent), Prince’s atty, Prince
 - → \$250k fine & a promise
 - Later, US DOJ indicts Prince in federal court
 - Prosecutor offers in evidence a transcript of a conversation involving Prince, AG, Sanders, in which Prince makes inculpatory statements
 - Defense says “that’s settlement talk; 408 bars”
 - Prosecutor says “this is a criminal case; civil settlements nonexcludable”

- **Result**
 - **Settlement doesn't come in**—408(a)(1) (Prosecutor's argument is hogwash—civil settlements *are* excludable under (a)(1))
 - **Transcript does**—exception in 408(a)(2) (evidence of “negotiations related to a claim by a public office or agency” in criminal cases)

Plea bargaining (Rule 410)

- **Text of the rule**
 - Excluded:
 - 410(1): plea of guilty later withdrawn
 - *but not a plea of guilty not withdrawn*
 - 410(2): plea of nolo contendere
 - 410(3): statements made in discussions relating to the foregoing
 - 410(4): statements made in plea discussions *with an attorney for the prosecuting authority* which either
 - results in no plea of guilty
 - or results in a guilty plea later withdrawn
 - Exceptions to 410(4):
 - (i) when other statements introduced and context needed (cf. Rule 106)
 - (ii) perjury trials if
 - statement made by Δ under oath
 - and in the presence of counsel
- **Problem 5-R. “I Used His Stuff” (452)**
 - Plea bargaining included incriminating statements
 - Secret Service agents there, but US Atty, who scheduled meeting, didn't show; bargaining does not result in plea
 - Prosecutor seeks to use incriminating statements at trial
 - **Admissible?**
 - Easy answer: yes, because 410(4) excludes only if bargaining took place with the prosecuting attorney
 - *But that's bitch ass.* The US Atty had set up the meeting, then didn't show, and sends agents instead. Defendant was acting in good faith by continuing with the meeting. Is it fair to screw over the Δ because the US Atty was being a bitch!?
 - → **Two-tiered approach**, *U.S. v. Robertson* (9th Cir. 1984) (454)
 - (a) Did Δ “exhibit [] an actual subjective expectation to negotiate a plea”?
 - (b) Was expectation “reasonable given the totality of the objective circumstances”?
 - . . . so it's not clear here, especially because the Δ had his attorney there, and attorney should have known the rules (and informed his client of them)

- If at trial, Δ makes statements contradicting those made in inconclusive plea-bargaining discussions, can't use plea-bargaining statements to impeach (454)
- **Exclusion for impeachment under 410 is waivable**
 - Defendant plea bargained with prosecutor; prosecutor said they could only talk if Δ was "completely truthful" and only if Δ agreed that "any statements he made during the meeting could be used to impeach any contradictory testimony"—court said 410 protection waived, *U.S. v. Mezzanatto*, 513 U.S. 196, 202 (1995)

Payment of medical & similar expenses (Rule 409)

- Can't use evidence of payment of (or offer to pay) medical expenses to show liability (455)
- Policy: encourages responsible behavior
- Narrower than 408

Liability insurance (Rule 411)

- Can't offer proof that a party has insurance (456)
- Policy: avoids prejudice to a party (juries may award more \$ if they know it comes from insurance); avoid relevance concerns with insurance evidence (everyone has insurance these days; doesn't tend to show culpability)

DIRECT AND CROSS EXAMINATION

DIRECT EXAMINATION

Generally requires nonleading questions

- Giving alternatives is OK; questions with only a Y/N answer generally not allowed (487)
- Goal is to have the *witness* testify, not the lawyer

Exceptions allowing leading questions (Rule 611(c))

- At the discretion of the court
- When necessary to develop testimony
 - Witness timid, reluctant, frightened, uncomprehending, very young . . .

- Uncooperative witnesses (488)
 - When “hostile” (being difficult)
 - or “adverse” or “identified with an adverse party”
 - adverse = hostile by definition (against your client’s interests)
 - identified with = e.g., the party’s girlfriend
- Preliminary matters
 - Setting up witness for the substantive testimony
- Matters not contested
- Experts (usually)
 - Experts know what they know; not malleable or prone to suggestion on what their opinion is
- When memory exhausted → Rule 612

Present Recollection Revived (Rule 612)

- ***Baker v. State*, 371 A.2d 699 (Md. App. 1977) (489)**
 - **Any materials may be used to refresh memory under Rule 612**
 - but adverse party gets to see/smell/hear whatever
 - witness need not have personal knowledge; refreshing materials need not be “genuine”
 - Present recollection revived (612) vs. past recollection recorded (803(5))
 - Past r. recorded: witness has no memory of prior statement; statement itself admitted in evidence.
 - Present r. revived: witness’s memory triggered by stimulus; only the *testimony* is admitted in evidence; refreshing materials are not themselves evidence.
- *Refreshing material may be usable substantively under 801(d)(1)(A) if it’s the witness’s own prior inconsistent statement (493 n.2(b))*
 - But generally, Rule 612 doesn’t create a hearsay exception because the “stimulus itself is never evidence.” (*Baker*, 491)
 - And of course, there’s always impeachment (494)

CROSS-EXAMINATION

Leading questions allowed (even encouraged)

- Although in civil cases, attorney cannot use leading questions on cross of his own client
 - Most lawyers wouldn't bother with cross anyway

Cross is all about control

- *Lawyer* is the focus of cross
 - Purpose: test the case that the witness stated on direct

Cross-examining on witness preparation²⁷ material (Rule 612(2))

- ***James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982) (494)**
 - **A party is entitled to inspect any document used to refresh recollection, even if privileged.** (497)
 - Possible exception if the document contains “attorney mental impressions” (opinion work product) (497)
 - Defendant sought production of a binder that π used in preparing witnesses
 - Plaintiff claims that the binder is protected by work-product privilege
 - Defendant responds: but the binder contains only stuff that was already produced during discovery.
 - **Privilege attaches: selection/ordering of work—“selection & distillation”—is “often more critical than pure legal research” (495)**
 - Is privilege waived by using binder to prep witnesses? **(Yes)**
 - Right to cross-exam vs. privilege: privilege wins.
 - Only way to know whether attorney overprepared witness (suggested answers vs. just clarifying) is to know how the attorney did the prep
- Rule 612(2) departs from CL in allowing production of documents used to prepare a witness, rather than just documents used to refresh
 - Party has right to request; whether to grant = subject to judicial discretion
 - Getting disclosure of all witness-preparation materials may give rise to a break in the trial so that the preparation materials can be examined (498 n.2)

²⁷ Witness prep = “woodshedding” = entirely appropriate. woodshedding is about trying to understand what the witness *can* say so you can bring it out most effectively. not about *creating* a witness. helps narrow and focus the questions that need to be asked. in addition to making the witness more effective, makes use of courtroom time more efficient.

- No entitlement to a transcript of all conversations between opposing party & his attorney
- Voluntary disclosure to a third party waives attorney-client privilege, but not work-product privilege. *U.S. v. AT&T*, 642 F.2d 1285 (D.C. Cir. 1980) (499)

Cross-examination as an entitlement

- Virtually unassailable right (500)
- Witness dies & cross-examination impossible
→ strike direct or possibly declare mistrial
 - or partial strike, if there were partial cross
- Cross-examination “penetrate[s] . . . conflicting influences”
- Cross-examination is “the single most critical aspect” of making the Confrontation Clause guarantee meaningful (501)

EXCLUDING (SEQUESTERING) WITNESSES (RULE 615)

Witnesses should testify based on their *own* knowledge

- Don’t want to have witnesses hear what previously testifying witnesses
 - Risk of having subsequent witnesses tailor their testimony in response to what they’ve heard
 - Don’t want witnesses to discuss with each other
- Sequestration orders carry threat of being held in contempt

Gloss of Rule 615

- At request of party or on its own motion, court may sequester witnesses
 - And order witnesses not to confer, *see Williams v. U.S.* (D.C. 2004) (505)
- Exceptions:
 - (1) Party who is a “natural person”
 - If you’re a party, you have a right to be there and help the lawyer work the case
 - Parties need to be able to respond to changing circumstances and make decisions
 - In criminal cases, witness and Δ must be able to see each other
 - *but in criminal cases, victims are not parties*
 - *Corporations are not natural persons*
 - (2) Officer/employee of party, not a natural person, designated as representative by attorney
 - E.g., agent of corporation

- (3) Person whose presence is shown by a party to be essential to the presentation of the party's cause
 - investigative agents, *U.S. v. Parodi* (4th Cir. 1983) (505)
 - experts (usually)
- (4) Person authorized by statute to be present
- Violation of sequestration order ≠ automatic exclusion from testifying. *Gov't of Virgin Islands v. Edinborough*, 625 F.2d 472 (3d Cir. 1980), *Holder v. U.S.* (U.S. 1893) (506)

Problem 7-A. Daily Transcripts

- Plaintiff gets sequestration order for all witnesses
- Defense counsel reads daily transcripts to expert witness
 - Is this permissible?—can the expert still testify?
 - Maybe—he's an expert
 - See Rule 615(3) (excluding experts from operation of sequestration, for reasons similar to allowing leading questions)
 - But Rule 615 is not self-executing: defense would have had to object and suggest that experts should be excluded from sequestration

Judge's control of "mode and order" under Rule 611(a)

- Can solve problem about possibly tainting a witness's testimony by having the party to testify first

Crime victims are not parties

- State statutes generally authorize crime victims to be present → permissible under Rule 615(4) (506)
 - but who is a "victim"?
 - If, say, Dad was shot, he was the victim—not mom or daughter²⁸
- Gagnon, as ex-prosecutor, says prosecutors should have the right to exclude victims
 - When juries know the victim is in the room, they watch the victim's reaction to the trial; victim is outside prosecutor's control
 - Classic problems of witness testimonial tailoring arise in cases in which victims testify, especially when there are multiple victims (509)

²⁸ From Problem 7-B (507)

IMPEACHMENT

“Impeachment doesn’t mean blowing the witness up”

- If inference of untruthfulness if made & basis established, impeachment is complete
 - Can show multiple bases for impeachment, but no browbeating
 - Rule 403 still applies

METHODS OF IMPEACHMENT

Definite/nonspecific methods (3)

Attacks on credibility on definite points, but not specifically on what is said

- (1) Bias, animus, motivation, corruption (511)
 - Alignment with a party, payment from a party
- (2) Defect in sensory or mental capacity
 - Intoxication, mental illness, night blindness, poor vision or hearing
- (3) Untruthfulness by disposition
 - (a) cross-exam re: nonconviction misconduct (Rule 608(b))
 - specific prior bad acts
 - (b) cross-exam re: certain kinds of convictions (Rule 609)
 - (c) character witness testifies that the target witness is untruthful (Rule 608(a))

Specific/indefinite methods (2)

Attacks credibility on specific statements but don’t suggest cause for untruthfulness

- (1) Show prior inconsistent statement
- (2) Contradict witness

NONSPECIFIC IMPEACHMENT: BIAS AND MOTIVATION

Examples

- Prosecution witness with pending charges against him (512–13)
- Witness that is employee of a corporate party
- Defendants paying lawyer of government turncoat witness
- Experts’ hourly rates for testifying in given kinds of cases
- Defendant paying for witness’s spouse’s cost of living
- Witness’s homosexual advances rebuffed by a party

- “Bias may be induced by a witness’s likes, dislikes, [or] fear . . . or by the witness’s self interest.” *Manske* (quoting *U.S. v. Abel* (U.S. 1984)) (530)
- Witness’s fear for his personal safety or the safety of friends or family, relating to the parties or issues in the suit (*Manske*, 530)

No special foundation requirements for bias evidence

- Parties may prove any fact or event logically relevant to show bias. *U.S. v. Manske* (7th Cir. 1999) (530)

Right to show bias

- Defendant must be allowed to develop bias in prosecution witnesses during cross-exam (513)
 - Disallowing = violates confrontation rights & due process, *Olden v. Kentucky*, 488 U.S. 227 (1988)
- Court can impose limits
- ***United States v. Abel*, 469 U.S. 45 (1984)** (513)
 - Government witness Ehle says stuff; defense witness Mills testifies to impeach Ehle’s testimony
 - Ehle comes back to impeach Mills & rehabilitate his own testimony
 - Testimony allowed at trial, overturned in CA9, reinstated in S.Ct.
 - CA9 said rehabilitating testimony (re: membership in a “secret type of prison organization,” a “lying and murderous group”) prejudiced Δ “by mere association”
 - Defendant’s arguments
 - Prosecutor’s cross-exam about gang as meant to impugn veracity; not allowed under 608(b) because not probative of truthfulness
 - But evidence inadmissible for one purpose
≠ inadmissible for all purposes
 - Ehle’s rehabilitating testimony about gang was extrinsic evidence to impugn Mills’ veracity; extrinsic evidence not allowed under 608(b)
 - Evidence was admissible to show bias → it’s admissible
 - Bias is so important that it rises to constitutional proportions
 - Rule 608/FRE as a whole don’t talk about bias, but uniformly accepted at CL

Brady doctrine: exculpatory evidence

- Prosecutor must give all potentially to defendant; failure to do so = grounds for mistrial
 - Nondisclosure of plea deals for prosecution witnesses = also grounds for mistrial

Cross-examination of experts on their fees

- **Problem 8-A. The Hired Gun (520)**
 - Defendant GM calls expert witness; brings out that witness is being paid \$1600/day
 - Plaintiff, on cross-exam, wants to raise further questions about payment & witness's income from GM
 - defendant objects, saying "this is a collateral issue"
 - Can π ask questions?
 - Yes
 - Developing the relationship between witness & GM = entirely relevant to showing bias
- Cross-examining experts on their fees & relationship to hiring party is OK; goes directly to bias
 - Addresses the question of how likely it is that the witness will color his testimony to favor the party that call him?
- Witnesses in criminal cases can be paid; high fees are "suspicious" but allowable—testimony not excluded "unless there is evidence that he was promised payment contingent upon conviction." *U.S. v. Gray* (5th Cir. 1980) (521)
- Defendant can bring out whether witness is in the Witness Protection Program

NONSPECIFIC IMPEACHMENT: SENSORY AND MENTAL CAPACITY**Examples**

- Attacking party shows witness's impaired vision, intoxication (even during trial), impaired hearing, mental afflictions/illness (521)
 - Can be raised on cross ("Do you need glasses? Were you wearing them?")
 - **Can use extrinsic evidence** (e.g., call witness's optometrist)
 - *Cf.* Rule 608(b) (no extrinsic evidence of prior bad acts on cross)

Mental afflictions

- Mental illness \neq incompetent
- Psychiatric history of witness admissible under limited conditions (*top* 523)
 - *Matter of "great personal privacy"; risk of raising collateral issue; stigmatizes witness by mere fact of inquiry*
 - Nonparty witnesses never ordered to be examined

Expert testimony & eyewitness identification

- Testimony sometimes allowed to show: (523 n.4)
 - (a) exponential decay of memory (quickly losing edge & gradually fading)
 - (b) stress causes inaccuracies in perception and recall
 - (c) confusion and conflation of information acquired later
 - (d) feedback factor: later conversations reinforce conclusions about ID
 - (e) accuracy not strongly correlated with certainty
 - (f) cross-racial IDs contain more mistakes

NONSPECIFIC IMPEACHMENT: CHARACTER FOR “TRUTH AND VERACITY” (RULE 608)***Credibility is always in play***

- Rule 611: Also allows judge to protect witnesses from harassment and undue embarrassment

Specific prior bad acts (Rule 608(b))

- Judge has discretion over whether to allow questions
 - At minimum, judges require good-faith basis for asking (525)
 - Just means that you get to ask the question, not that you get to prove the prior bad act
 - **No extrinsic evidence**—cross-exam only
 - Does not apply to attacks on credibility by showing bias or other motivations to testify falsely: prior bad acts only (*Manske*; 532 n.5)

Probative value of violent threats on credibility

- ***United States v. Manske*, 186 F.3d 770 (7th Cir. 1999) (526)**
 - **Threats against potential witnesses → attempts to intimidate into changing stories or not testifying → probative of untruthfulness**
 - “[B]ehavior seeking personal advantage by taking from others in violation of their rights reflects on veracity.” (528)
 - “middle ground”
 - All violent crimes, felonies have at least some minimal probative value on credibility (although not necessarily very much)
 - District courts’ 608(b) decisions usually reviewed for abuse of discretion, but “[t]he usual deference does not apply when a district court incorrectly categorizes the nature of the evidence.” (529)
 - “[E]rror was in perceiving the threats as probative only of violence”

Probative value of theft on credibility

- Some courts require showing of element of deceitfulness or falsification in the commission of the theft in order to find probativity on credibility (534)

NONSPECIFIC IMPEACHMENT: PROVING PRIOR CONVICTIONS (RULE 609)**General points**

- Convictions are a matter of public record; easily accessible by prosecutor & defendant (535)
- Rule 609 comes up most often in criminal cases; rarely in civil
- Prior conviction of serious crimes = impactful to jury
 - felonies more significant than misdemeanors (609(a)(1))
 - problem: “bad guy” stigma

Overview of Rule 609

- **609(a):** can only use prior convictions to attach character for truthfulness
 - **609(a)(1)**
 - crimes punishable by death or imprisonment for more than one year:
 - for witnesses *other than the accused*, Rule 403 standard for admissibility
 - for *the accused*, probative value must outweigh prejudicial effect: *reverse 403 standard*. Burden on proponent to demonstrate the standard is met.
 - favors exclusion of the evidence
 - **Factors from *Gordon v. U.S. (D.C. Cir 1967)* (545)**
 - (1) nature of the conviction
 - (2) age of the conviction
 - (3) similarity to charged offense
 - “should be admitted sparingly”
 - (4) whether Δ 's record is otherwise clean
 - (5) importance of credibility issue to trial
 - (6) importance of getting Δ 's own testimony
 - (nonexhaustive)
 - Some states require trial courts to articulate the factors considered in admissibility determinations (545)
 - Spillover effect on Δ when impeaching Δ 's witnesses? (*Lipscomb, 539*)

- **609(a)(2)**
 - **crimen falsi** admissible regardless of severity of crime
 - if it can be “readily determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness”
 - **“readily determinable”**
 - look to:
 - statute
 - charging document
 - instructions to jury”
 - doesn’t have to be an *element* of the offense (but has to be “like it”)
 - *was finding of dishonesty necessary to finding of guilt?*
 - rule of per se admissibility (no balancing test)
 - includes *Alford* pleas & nolo contendere
 - high-end convictions: fraud, embezzlement; low-end: theft . . .
 - Violent crimes, theft, “crimes of stealth” not within 609(a)(2), *U.S. v. Givens* (9th Cir. 1985) (535)
 - **“action of force” vs. “articulation of deceit”**
- **609(b):** ten-year limit (notion of rehabilitation) *unless* the court finds that probative value (supported by specific facts and circumstances) substantially outweighs prejudicial effect (537)
 - two possible start dates for ten-year counter
 - time from date of final release (usually later) or date of conviction (if sentenced to time served)
 - parole ≠ count as final release (usually)
 - probation: courts split; figure out by jurisdiction
 - imprecise time limit
 - if witness will *testify* within 10 years of date of conviction → courts usually allow under 609(b).
 - alternative: date of indictment; not favored (easily determined, but easily manipulated by prosecutor)
- 609(c): rehabilitation (pardon, annulment, certification) → conviction not admissible
- 609(d): juvenile convictions can be inquired into only under special equitable circumstances (538)

Defendant testifies → opens door to Rule 609

- Defendant's taking the stand is threshold to use of Rule 609 as impeaching evidence against the defendant

Weighing prejudice under Rule 609

- ***United States v. Lipscomb, 702 F.2d 1049 (D.C. Cir. 1983) (539)***
 - All felony convictions have *some* probative value on truthfulness; the question is *how much*.
 - **Extent of information needed under 609(a) (540)**
 - Gov't minimum burden:
 - **Name of crime and date of conviction**
 - Trial court has discretion over how much additional inquiry to perform into underlying facts
 - 609(a)(1) has "no specific instructions"
 - 609(b) refers to "specific facts and circumstances," but 609 (a)(1) does not
 - 609(a)(2)
 - gov't can show specific facts to court
 - context is important to probative value
 - "Spillover effect"
 - Bringing out prior convictions of Δ's witnesses can prejudice Δ; doesn't apply to prosecutor
 - ***Problem 8-B. "Hit the Deck" (544)***
 - One day a man commits armed robbery of a bank. Dennet is charged.
 - Elmo, prosecution witness, testifies that Dennet confessed the robbery to him
 - Dennet gives alibi involving Farr.
 - Farr corroborates Dennet's story.
 - Dennet, Elmo, and Farr all have unrelated five-year-old convictions for bank robbery. Usable for impeachment?
 - Elmo's conviction: subject to 403 balancing
 - Some "residual" probative value of prior conviction; but no risk of unfair prejudice to prosecutor.
 - → evidence comes in
 - Farr's testimony: same 403 test
 - Same "residual" probative value of a "middle-of-the-road" felony
 - Some risk of prejudice because Farr is Δ's witness
 - → evidence probably still comes in

- Dennet's testimony: 609(a)(1) test: reverse 403
 - probative value: still "middle-of-the-road" felony
 - high risk of prejudice: same crime: "admit[]" sparingly"
 - big risk of "bad man" spillover effect
 - → evidence stays out

Practical, tactical considerations

- If prosecutor objects to his witness being attacked under 609, he can wind up looking like he's "talking out both sides of his mouth" if he wants to use 609 against defense witnesses
- Can "disarm an expected attack" by bringing out prior conviction of one's own witnesses on direct
- Cross-examining party:
 - Usually can't inquire beyond name of crime, time and place of conviction, and punishment imposed
- Re-direct:
 - Can possibly mitigate "bad-man" image with further questions

Crimen falsi under Rule 609(a)(2)

- **Problem 8-C. "A History of Lying" (547)**
 - Answers only:
 - (1) crimen falsi → per se admissible under 609(a)(2)
 - (2) probative felony → 609(a)(1); probably 609(a)(2) would work as well because he was trying to alter the outcome of a court proceeding
 - (3) petty theft, not readily determinable to be admissible under (a)(2); doesn't fit under (a)(1) → stays out
 - (4) forgery conviction → bears on truthfulness, so (a)(1) works; also per se admissible under (a)(2) as a "core crime" for (a)(2)
 - (5) felony obstruction of justice
 - more an "action of force" than "articulation of deceit" for purposes of (a)(2)
 - (a)(1) → risk of prejudice too great to allow in
 - (6) method of committing crime included falsehood → admissible despite (a) being misdemeanor and (b) crime did not necessarily include expression of falsehood.

Use of Rule 608 vs. 609

- Nothing in the Rules actually says that Rule 609 controls over 608 about prior acts for which the witness was convicted.²⁹
 - If a prosecutor doesn't want to use the prior bad acts as a conviction, he's free of the restrictions in Rule 609.

Preserving a claim of error for review

- *Luce v. United States*, 468 U.S. 38 (1984) (552)
 - **In order to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify.**
 - District court need not make specific findings when denying a motion in limine to exclude evidence of prior convictions under Rule 609(a)
 - But if defendant does testify, the district court's decision becomes reviewable
 - Any possible harm from in limine rulings = "speculative"
 - In limine rulings can be changed during the course of trial
 - If an adverse 609(a) ruling were presumed to keep the defendant from testifying, almost any error would result in a "windfall" to Δ of reversal

NONSPECIFIC IMPEACHMENT: CHARACTER WITNESSES (RULE 608(A))**Character witness attacks "principal" witness's tendency for truthfulness**

- See page 536

Foundation required

- Period of personal acquaintance
- Knowing witness or their reputation within the community
 - Community can be other than where someone lives (e.g., workplace; professional community)

Expert psychiatric testimony usually not admitted

- Generally considered not to be useful for anything beyond what lay testimony could provide
- Too much risk of abuse of testimony (fear that jurors will give expert testimony too much weight)
- *But expert witness testimony is sometimes admissible when it comes to eyewitness identification.*

²⁹ From Problem 8-D (550)

SPECIFIC IMPEACHMENT: PRIOR INCONSISTENT STATEMENTS (RULE 613)

“A valuable tool, and it works in almost every case”

- Prior statement need not be written, nor shown, nor its contents disclosed (Rule 613(a))
 - Can be direct about asking the impeaching question; no need to be “polite” about it (559)

Can be proven by extrinsic evidence (Rule 613(b))

- E.g., deposition transcript; another witness who controverts
- But if used, witness being impeached must be “afforded an opportunity to explain or deny”
 - Goes to direct examiner when they get back on the stand (Impeachment usually done on cross; cross-examiner need not provide “opportunity”)

General disapproval of tactical use of witness absence

- ***Problem 8-E. “He’s Trying to Sandbag Us!” (559)***
 - Plaintiff’s W1 testifies; on cross, Δ didn’t ask W1 about any prior statements
 - W1 dismissed after testifying
 - Defendant’s W2 tries to impeach W1’s testimony
 - Plaintiff objects, saying that W1 had no opportunity to respond
 - Objection sustained?—yes, in at least some courts
- Courts tend to take a “pragmatic” approach (560)
 - One party not allowed to trick the other by causing circumstances to develop where a witness might not be able to have an opportunity to respond—a party creating that risk should suffer it
 - Can’t use witness absence tactically like that
- ***United States v. Webster, 739 F.2d 1191 (7th Cir. 1984) (561)***
 - **Government may impeach its own witness with prior inconsistent statements only if there was a good-faith basis for calling the witness in the first place**
 - Rule 607 allows any party to impeach a witness
 - But the government can’t call a witness whose testimony would be unfavorable, then use prior inconsistent statements to impeach—knowing that the P.I.S.s would be inadmissible hearsay—in the hope that the jury would misuse the impeaching evidence substantively
 - If calling a witness is a “pretext” for 607 abuse → no go

Impeachment by pre-*Miranda* statements permissible

- ***Harris v. New York*, 401 U.S. 222 (1971) (565)**
 - Defendant had pre-hearing motion to suppress statements made post-arrest but pre-*Miranda* warning. Government was barred from using those statements.
 - At trial, Δ's testimony on direct exam "partially contradicted" the suppressed statements
 - Government allowed to use those statements to impeach.
- If a suspect claims his right to counsel after being Mirandized but he continues to answer police's interrogation questions, those statements are usable for impeachment. *Oregon v. Hass*, 420 U.S. 714 (1975) (569)

Impeachment by use of prearrest silence permissible

- ***Jenkins v. Anderson*, 447 U.S. 231 (1980) (571)**
 - Impeachment by use of prearrest silence does not violate the Fourteenth Amendment.
 - But under *Doyle* (p. 195; adoptive admissions), post-*Miranda* silence ≠ adoption ("insolubly ambiguous")
 - "[N]o government action [had] induced the Δ to remain silent before his arrest." *Fletcher v. Weir*, 455 U.S. 603 (1982)

SPECIFIC IMPEACHMENT: CONTRADICTION**Must contradict *and* tend to show a separate substantive point**

- Doctrine (not based on Rules, *see* 579) allows introduction of counterproof, but not on collateral or trivial points (576)
 - Collateral = not really relevant to the case
 - Usually inadmissible to show just that a witness is or may be mistaken
 - But if a witness was *lying*, contradiction may be admissible

Contradictory evidence needs independent relevance

- 608(b) is only a bar to contradicting extrinsic evidence on matters related to character for truthfulness
 - extrinsic evidence is fine for, e.g., bias

No “opening the door” for oneself on cross

- On cross-exam, a party cannot “open the door” to otherwise-excludable counterproof to contradict a denial that the party elicited (579)
- Usually, when otherwise-excludable counterproof *is* admitted, the testimony being contradicted could itself have been excluded (578)

Collateral issues

- **Problem 8-F. “That’s Just Collateral, Your Honor” (580)**
 - Crime on July 14 in Seattle; defendant claims alibi
 - Defendant calls restaurant owner, who says that Δ was in his Portland restaurant every day for weeks prior
 - State’s case-in-rebuttal
 - State calls officer to testify that Δ was in Seattle on July 27
 - **Collateral**—issue wasn’t whether Δ was in Seattle; issue was whether Δ committed the crime.
 - State calls restaurant worker, who says he never saw Δ
 - **Not collateral**; goes to the credibility of Δ ’s alibi

Contradicting statements made during cross-examination

- **United States v. Havens, 446 U.S. 620 (1980) (581)**
 - Defendant Havens charged with importing and possessing cocaine. Havens’ traveling companion, McLeroth, didn’t make it through customs; agents found cocaine in makeshift pockets sewed into McLeroth’s shirt. During interrogation, McLeroth implicated Havens, who was arrested; Havens’ luggage was searched, where they found not cocaine but a t-shirt with holes matching the pieces sewed into McLeroth’s shirt. T-shirt illegally seized.
 - On direct, Havens denied any involvement with drug smuggling. On cross, prosecutor asked whether he had any knowledge of having a t-shirt in his luggage that was missing pieces; Havens denied it. Prosecutor introduced t-shirt into evidence.
 - **A defendant’s statements made in response to proper cross-examination reasonably suggested by the direct examination are subject to impeachment even by illegally obtained evidence.**
 - *Agnello*: “a case of cross-examination having too tenuous a connection with any subject opened upon direct examination to permit impeachment by tainted evidence.” (583)

- So now, impeachment by illegally obtained evidence permissible even when the evidence does not “squarely contradict” Δ’s direct testimony, but cross-exam questions must be *reasonably suggested* by the direct exam.
 - Connection in this case explained on p. 585
- The “shield against having illegally seized evidence” used against a defendant cannot be “perverted into a license to use perjury by way of a defense.” (584)

REPAIRING CREDIBILITY

Limitations on rehabilitation

- Can only repair after the attack; and can only repair at point of the attack
- Simple contradiction or refutation doesn’t invite repair
 - Contradiction ≠ attack on credibility
- Evidence of good character invites cross-examination on the character witness...
 - Can make things worse
- Expert testimony on character for truthfulness generally disallowed (597)

A party can “out” easily anticipated impeaching facts on direct

- If the witness has some obvious vulnerability, these can be brought out on direct exam (590)
- Failing to do so can make it look like the party was hiding something

Use of evidence of good character to rehabilitate

- ***United States v. Medical Therapy Sciences*, 583 F.2d 36 (2d Cir. 1978) (593)**
 - On direct, State disclosed principal witness’s prior arrest
On cross, defense repeated disclosure and went into a further attack
 - → opened door for government to bolster principal witness’s character with further character witnesses
 - **Whether to allow further character witnesses to rehabilitate a witness whose credibility has been attacked is subject to the trial court’s discretion.**
 - Trial judge may allow the use of character evidence “when, subsequent to the revelation of a witness’ problems on direct, the opponent paints the witness with more accusatory strokes—especially where, as here, wrongdoing which implicates veracity is alleged and denied.” (595)
 - “[R]ehabilitating evidence should be allowed in the judge’s discretion if he finds the witness’ denial has not erased the jury’s doubts.” (596)

Use of prior consistent statements to rehabilitate

- When *Tome* pre motive requirement applies
 - When prior consistent statement offered to refute claims of improper motive or fabrication—*cf.* 801(d)(1)(B) (601)
- No *Tome* requirement
 - When prior consistent statements offered to refute suggestions of bias, faulty memory, confusion, or other claims than improper motive or fabrication
- ***Problem 8-H. “She Handed me the Heroin” (601)***
 - Suggestion of confusion at trial properly refuted by a tape recording made moments after the transaction in question despite the statements in the recording not meeting the pre motive requirement

Attacks based on beliefs or opinions on matters of religion disallowed (Rule 610)

BEST EVIDENCE DOCTRINE

RULES 1001–1008**Applies to proving the contents of writings**

- Precludes proof of the terms of a writing by testimony unless the original is unavailable through no fault of the party seeking to prove its content (881)
- Five traditional considerations (881–82)

Requirement of original (Rule 1002)

- Original writing, recording, or photograph required

Admissibility of duplicates (Rule 1003)

- Duplicates are admissible to the same extent as originals unless
 - (1) A genuine question is raised as to the authenticity of the original *or*
 - (2) Circumstances indicate that admitting a duplicate would be unfair
- Photocopies of carbon copies have been held to be originals, *U.S. v. Rangel* (8th Cir. 1978) (887)

Admissibility of other evidence of contents (Rule 1004)

- Original (or duplicate) not required, and other evidence admissible, if:
 - (1) Original lost or destroyed, except if proponent destroyed in bad faith
 - (2) Original unobtainable by any judicial process or procedure
 - (3) Original in possession of opponent
 - (4) The writing, recording, or photograph is not “closely related to a controlling issue”

Public records provable by copy (Rule 1005)

- If certified in accordance with Rule 902 *or*
- Copy is testified to be correct by a witness who has compared it with the original

- If reasonable diligence cannot procure a copy, other evidence of contents admissible

Summaries (Rule 1006)

- Voluminous writings, recordings or photographs can be presented in the form of a “chart, summary, or calculation”
 - if the originals cannot be “conveniently” examined in court
- Originals or duplicates must be made available for examination or copying
 - by other parties at a reasonable time and place
- Court may order that the originals or duplicates be produced in court

Testimony or written admission of party (Rule 1007)

- Contents of writings, recordings, or photographs provable by testimony, deposition, or written admission of party against whom offered
 - No need to account for nonproduction of the original

Functions of court and jury (Rule 1008)

- Judge usually decides admissibility if turns on fulfillment of condition of fact
- Goes to jury if an issue is raised about:
 - (a) whether the writing ever existed
 - (b) whether another writing, recording, or photograph produced at trial is the original
 - (c) whether other evidence of contents correctly reflects the contents

Does not apply to inscribed chattels

- *U.S. v. Duffy*, 454 F.2d 809 (5th Cir. 1972) (883)

Applicability of the Best Evidence Doctrine

- When the “content” of a writing is at issue (889)
- Best evidence, testimony, and refreshed memory based on transcripts (891)
- Production of original excused (896)

LAY AND EXPERT TESTIMONY

Facts and opinions are on a continuum from specific to general

LAY TESTIMONY (RULE 701)**Strict factual testimony preferred**

- But not always practical—e.g., sensations (606–07)
 - mental or physical condition of a person
 - character or reputation
 - emotions manifested by acts
 - size, heights, odors, flavors, color, heat
- Preference is for testimony that will put the jury at the same vantage as the witness at the time of the events described and to let the jury make its own inferences. (606)

Opinion testimony of lay witnesses

- Must be an informed opinion
 - Rationally based on perception of witness (Rule 701)
 - Must be based on personal knowledge (Rule 602)
- Must be “helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue” (Rule 701)
 - Cannot be based on scientific, technical, or other specialized knowledge dealt with by experts in Rule 702
- Lay opinion can be rejected if speculative or groundless
 - but if no objection, it comes in

- Examples of opinion testimony admitted into evidence (607–08)
 - In deciding not to promote *T*, *M* didn't base his decision on national origin
 - After accidental fall in stairwell, 10-year-old boy underwent “personality change” and his physical, behavioral, and educational performance in school declined
 - The railroad crossing was in poor condition and difficult to get across
 - Claimant was an alcoholic unable to work
 - It seemed that plaintiff had time to get out of the way

Opinions on ultimate issues

- The more central the opinion being proffered to the ultimate issue being decided, the more likely an objection, and the more likely the opinion will be stricken³⁰
- **Problem 9-B. The Watchful Neighbor** (608)
 - *see notes in book*
- Can't testify to things such as that a driver “did everything he could to avoid the accident” and that plaintiff “could have avoided it.” *Gorby v. Schneider Tank Lines*, 741 F.2d 1015 (7th Cir. 1984) (611)

Opinions on sanity

- Witness needs to have had “sufficient association” with the person in question (610 n.3)

EXPERT TESTIMONY (RULES 702, 703)

Question 1. How will the expert assist?

- Will the expert's testimony be helpful to the jury in understanding the evidence or determine a matter of fact? (Rule 702) (613, 622)

Question 2. Qualifications?

- Experts may be qualified by virtue of formal education, training, skill, or practical experience (613)
 - e.g., farmer could testify to value of crops
 - subject matter of the case must be within the expert's expertise

³⁰ See Problem 9-A (608)

- Foundation (622–23)
 - Educational background—degree and certificate or license to practice
 - Experience—employment or practice within a given area
 - Familiarity with the subject in the suit
- If one party has a really good expert with impressive qualifications, the other party may offer to stipulate to the expert’s qualifications
 - Judges are fine with that
 - Countermove: “Your honor, the expert needs to explain his qualifications so that the jury can understand the basis of the expert’s testimony”
- Since Rule 705 allows opinion without basis, suggestion is that there’s no need to go into the basis in terms of qualifications . . . but then there’s *Daubert*.
- Rule 403 in the background (613)
 - Testimony not always worthwhile even if otherwise admissible
 - If it doesn’t add anything → exclude

Bases for expert testimony (Rule 703)

- (1) Firsthand observation: facts or data
 - e.g., doctor that does his own examination of a party
- (2) facts or data learned at the hearing
 - from other testifying witnesses
 - or from hypos summing up evidence already presented
 - although this tends to be clumsy, it’s still used sometimes
- (3) “outside data”—data from other sources
 - only if “reasonably relied upon” by other experts in the field
 - basis not to be brought out by the proponent if basis is otherwise inadmissible. [‡]
 - expert can’t be used to bring before jury evidence that would otherwise be inadmissible
 - but opponent can ask for basis (Rule 703, 705)
 - but court can allow evidence of basis to come in, even if otherwise inadmissible, if probative value substantially outweighs prejudicial effect. (burden on proponent.) (Rule 703) (615)
- facts relied upon need not be in evidence
 - i.e., basis for expert opinion can be inadmissible, e.g., hearsay
 - however:
 - **The more heavily an expert relies on hearsay instead of experience, the more likely a court will exclude.** *U.S. v. Tomasian*, 784 F.2d 782 (7th Cir. 1986) (619)

- **Problem 9-C. “They Saw It the Same Way I Did” (617)**
 - Expert met with eleven colleagues and, upon proponent’s question, reports that they “all . . . share my view” and “all see it the same way”
 - Expert became conduit for the opinion of the other eleven people that can’t be cross-examined: not okay
 - (how do you challenge the consensus of the absent?)
 - as if the other eleven witnesses were sitting there in the witness box with her, “bolstering her before the attack”
 - enhancing her credibility before it’s even been challenged
 - Witness could confer, but this could not be brought out by the proponent. (See [‡] above)

FORMAL PROBLEMS: ULTIMATE ISSUES, LEGAL ELEMENTS (RULE 704)

Testimony on ultimate issues is admissible

- Causation, etc. (620)
- But no expert testimony on mental conditions that are elements of charges or defenses in criminal cases
 - “Every time you see an expert testifying in a criminal case about the law or applying the law, they’ve gone beyond what they’re allowed to do”
- Experts can state factors that need consideration and let the *jury* consider them

OPINION MAY BE GIVEN BEFORE BASIS (RULE 705)

Departure from common-law practice

- Used to need long, complicated hypotheticals
 - Problems:
 - Questions too long for anyone to remember
 - Worries about allegations of mischaracterizing the evidence
 - Winds up being the lawyer testifying more than the expert
 - (Lawyer talks a lot and expert just says “yeah”)

On cross, experts look for openings to provide basis

- Under Rule 703, if the basis of the opinion is inadmissible as evidence, proponent cannot disclose to the jury (unless probative value substantially outweighs prejudicial effect), but can be disclosed by opponent of evidence
 - When conducting cross, need to be precise about questions to avoid revealing bases for opinions

What makes opinions convincing is the *reasons* for them

- Can't rely on opposition to bring out the basis of an opinion
 - Opposition may be careful about their questioning or not do cross at all
- Need to prepare experts well to make sure that if you're bringing out the basis, the expert doesn't say anything inadmissible

Notice to opposition of basis

- FRCP 26(a)(2) requires parties to give each other the names of their experts and reports including "all opinions to be expressed" as well as the "basis and reasons" and "data or other information" used (626)
- FRCP 26(b)(4) allows deposition of experts after reports provided
- FRCP 26(b)(4)(B) allows a party to seek discovery of "facts known or opinions held" by an expert "retained or specially employed" in anticipation of litigation, when the expert is not expected to testify at trial, only upon showing of "exceptional circumstances" making it "impracticable" to obtain opinions otherwise
- Since expert opinions can be elicited by direct questioning, cross-examination is especially important in testing these opinions
 - But are lawyers really competent to discredit expert opinions? (627)
 - Meaningful opportunity to cross-examine depends on getting info about the basis of an opposing expert's opinion reasonably in advance of trial. *See Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980), cert. denied (1981)

Experts and costs

- Best way = expert does all his own research (but most expensive)
- Also good = tell expert what you expect the evidence to show before he testifies; he sits through trial and testifies on the basis of what he hears (but also expensive)
- Backup plan = hypotheticals; expert only comes in for as long as he'll actually be testifying (least expensive, but perhaps also the least compelling to the jury)

COURT-APPOINTED EXPERTS (RULE 706)

If courts think an expert is needed, the court can call one

- Hiring the expert = problematic
 - Limited federal funding for this stuff
 - Costs can be shifted to the losing party, but that doesn't always work
 - Losing party may be insolvent, etc.
- Rule rarely used
 - Ours is an adversary system; judges don't like to interfere with parties' cases

SCIENTIFIC TESTIMONY AND EVIDENCE

Overview

- Old standard: *Frye's* "reliability standard"—the "general acceptance test" (629)
 - *Frye v. U.S.*, 293 F.1013 (D.C. Cir. 1923)
- Replaced by *Daubert* (1993) for scientific expert testimony
 - *Frye* just a factor
 - Judges as "gatekeepers" of evidence
- *Daubert* extended by *Kumho Tire* (1998) to expert testimony generally
- Amendments to Rule 702 in response to *Daubert*
 - (1) Testimony must be based upon sufficient facts or data
 - "sufficient facts or data" not mentioned in *Daubert*
 - (2) Testimony must be the product of reliable principles or methods
 - consistent with *Daubert*
 - (3) Witness must have applied the principles and methods to the facts of the case
 - application of principles not mentioned in *Daubert*

***Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993)**

- Plaintiff's experts did some reanalysis of the teratogenic³¹ properties of Bendectin, a prescription anti-nausea drug
 - Trial court granted SJ for Δ based on *Frye* because reanalysis too new; wasn't based on "vast [existing] body of epidemiological data"
 - CA9 aff'd
- Here:
 - FRE occupy the field of evidence law; CL advisory only \rightarrow *Frye* \neq standard
- ***Daubert* factors (637)**
 - **Emphasis on *method***
 - Science must be valid
 - Results must be testable or replicable
 - **Requirement of "fit"**
 - Expertise/science being applied has to be helpful in resolving an issue actually presented in the case
 - *FRE in the background*
 - **403 applies:** if evidence is misleading, can be excluded
 - **703 applies:** proponent can't bring out basis if it wouldn't be admissible in evidence
 - **Peer review? Publication?**
 - Scrutiny of other professionals \rightarrow shows reliability
 - Publication by expert or others \rightarrow shows some broader interest; shows theory not propounded solely for the case
 - *But maybe no one had reason to be interested before . . .*
 - **Error rates? Standards of control?**
 - ***Frye*: degree of acceptance in relevant scientific community?**
- No factors dispositive; no strict test.
- **FN 11 p. 637:** "Firmly established" theories like thermodynamics subject to judicial notice
- *Daubert* helped resolve problem of junk science and experts testifying to the validity of their own opinions; also helped to allow newer theories and valid insights to come before the court

³¹ A teratogen is capable of causing malformations in fetuses

***Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1998)**

- Expert Carlson comes in to testify about tires and why they blow up (642)
 - District Court said Carlson’s methods didn’t satisfy *Daubert*
 - CA11 said *Daubert* only applied to scientific testimony
 - S.Ct. rev’d CA11
- ***Daubert* applies to all expert testimony.**
- ***Daubert* decisions reviewed for abuse of discretion.**
- *Daubert* factors don’t universally apply; court has to consider all factors that are applicable to resolving the reliability issue.
 - If all factors not addressed, there’s an abuse-of-discretion issue
 - failing to address all relevant matters means that the court’s discretion was not adequately informed
 - *Daubert* factors reviewed: p. 645
- **Reliability to be tested in a “*Daubert* hearing” (646)**

PRIVILEGES

OVERVIEW**Privilege rules run counter to the overarching goal of truthfinding**

- Justified by the importance of preserving the relationships in which the privileges arise

Privileges protect only the *communication*, not the underlying facts

- E.g., attorney–client privilege: court or the opposing party could call your client and ask what happened, but couldn’t ask what the client told you
 - Holder of the privilege: client, not lawyer

Compulsion to testify trumps ethical duty to client

- If called by the court to testify in a way that would violate an ethical duty to the client, compulsion excuses the breach

The Federal Rules' near-silence on privilege (Rule 501)

- The Advisory Committee had come up with a bunch of rules, but Congress dumped them all and reserved privilege-rulemaking powers to itself
 - Advisory Comm.'s proposed rules in Appendix C (*Rulebook 217*)
- Rule 501 says that privilege doctrine is to “governed by the principles of the common law as they may be interpreted by the courts . . . in the light of reason and experience”

PRIVILEGES VS. THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE**Privilege holds except against “a weighty interest of the accused”**

- *U.S. v. Scheffer*, 523 U.S. 303, 308 (1998) (764 n.3)
 - Constitutional entitlement to present a defense abridged only by evidence rules that infringe “a weighty interest of the accused” and are “‘arbitrary’ or ‘disproportionate’ to the purposes they are designed to serve.”
- Sometimes privileges must “yield to the paramount right of the defendant to cross-examine effectively the witness in a criminal case.” *U.S. v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983) (765)
- Defense confrontation right held to override psychotherapist-patient privilege, *In re John Doe*, 964 F.2d 1325 (2d Cir. 1992)

ATTORNEY-CLIENT PRIVILEGE**Policy considerations**

- Need to foster trust between attorney and client; ensure that attorney can adequately and fully represent the client's interests with the benefit of all relevant facts and information that the client might be able to provide
- Bentham: privilege hides the fact of lying and aids only the guilty; innocent people don't need the privilege
 - . . . attorney-client privilege is well established, but not without its critics.
- Most common approach: balance between:
 - the need to preserve the trusting attorney-client relationship and society's need to obtain the truth

Limited to “professional legal services”

- Attorney-client privilege attaches only to “confidential communications made for the purpose of rendering professional legal services to the client.” (765)
- Communications that “involve the subject matter of [the client’s] legal problem” are privileged (766 n.1)
- Does not include communications “nonlegal in nature” such as communications about the date of trial³² (766 n.1)
 - Some examples of things held not to be “professional legal services”:
 - accounting services
 - shipping agent
 - scrivener
 - investigator
 - business agent; negotiator
 - business partner
- When legal business is mixed with nonlegal business, most courts find privilege attaches only if the lawyer’s work is “primarily legal.” See *Sedco Int’l v. Cory*, 683 F.2d 1201 (8th Cir.) (766 n.4)

Breadth of “communications”

- Some courts are reluctant to let an attorney testify about the competence of his client (767 n.1)
- Case law suggests that readily observable aspects of a client are not privileged and the attorney can be compelled to testify about them (768 n.2)
 - *U.S. v. Kendrick* (4th Cir. 1964) (“[P]hysical characteristics of the client, such as his complexion, his demeanor, his bearing, his sobriety, and his address” are not privileged; such matters “are observable by anyone who talked with the client; there is nothing, in the usual case, to suggest that the client intends his attorney’s observations of such matters to be confidential.”) (dictum).
 - *In re Grant Jury Proceedings (Chesnoff)*, 13 F.2d 1293 (9th Cir. 1994) (no privilege for observations about client’s “expenditures” on European cruise, “income-producing activities,” or “lifestyle”).

³² See Problem 12-B (765)

- Most courts hold that the privilege attaches to:
 - client-attorney communications
 - and to attorney-client communications
 - at least to the extent that revealing the atty-cl commc'ns would reveal the lawyer's advice or opinions (768 n.3)
- Mere transfer of documents to the attorney doesn't create the privilege; it's the transfer for the purpose of obtaining legal advice
- **Problem 12-C. The Tipsy Client (767)**
 - After meeting with drunk client, client declines offer to get taxi & gets in his car; crashes into parked car and flees.
 - At trial of client, state calls lawyer. Must he testify?
 - Lawyer could testify to appearance—"observable by anyone who talked with the client"
 - But—demeanor: difficult to separate inferences/conclusions based on what was said from those based on what was directly observed → some courts don't allow testimony about demeanor
 - What about clients' verbal statements?
 - Were client's statements uttered while professional legal services were being rendered?
 - Rule 1: Anything the client says during the meeting is privileged
 - Mechanistic approach; doesn't really deal with the balancing act of "hiding perfectly good evidence" only when there's a real need for it
 - Rule 2 (preferable): Were statements made for the purpose of obtaining or furthering legal advice?
 - If not, probably no privilege.
- **People v. Meredith, 631 P.2d 46 (Cal. 1981) (768)**
 - **Altering the evidence destroys the privilege**
 - Meredith killed Wade. Meredith's cohort, Scott, told his lawyer that he had seen a wallet on the ground near where Wade had fallen. Put the wallet in a bag; took the bag home; split the \$100 cash in the wallet with Meredith. Tried to destroy the wallet by burning it, but were unsuccessful, and threw it into a barrel outside the house. Scott's lawyer hired an investigator who went and collected the wallet, which contained credit cards with Wade's name on them. Investigator gave wallet to detective. At preliminary hearing, prosecution called lawyer; court ordered lawyer to say whether his contact with Scott led to the discovery of the wallet; lawyer said yes. Investigator repeated this testimony at trial. Meredith and Scott convicted
 - Scott appeals, claiming that the location of the wallet was a privileged communication.

- **Question: Does privilege “encompass[] a case in which the defense, by removing or altering evidence, interferes with the prosecution’s opportunity to discover that evidence?”**
 - **No.**
- *Court said that it would have been too speculative to consider whether this evidence would inevitably have come out or not.*
 - *No obligation for prosecutor to show that the evidence would inevitably have come out*

Communications must have been intended to be confidential

- Privilege only protects statements intended to be confidential
- Public statements ≠ confidential
 - e.g., cell phone calls made on a bus
 - lawyers have an obligation to conduct themselves so as to avoid unintentional disclosures

Nonlawyers as “intermediaries or conduits”

- ***U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (774)**
 - Attorney-client privilege applies to a non-lawyer employed by a law firm if the non-lawyer is acting as an “intermediary or conduit,” i.e., transmitting information from client to attorney
 - Here it was an accountant
 - Same applies to a foreign-language translator
 - The client would have to make the communication to the attorney first; if attorney brings the accountant into the meeting, accountant cannot disclose—but if the client goes to the accountant and then the lawyer, communication with accountant not privileged

Joint clients and pooled defenses

- Privilege attaches if two or more clients retain or consult the same attorney regarding matters of common interest. All such parties can discuss without destroying the privilege. (776)
 - *but see U.S. v. AT&T*, 642 F.2d 1285 (D.C. Cir. 1980) (499)
- Courts generally uphold claims of privilege regarding joint defenses

Scavengers and eavesdroppers

- ***Suburban Sew 'N Sweep v. Swiss-Bernina*, 91 F.R.D. 254 (N.D. Ill. 1981) (779)**
 - Intent to protect confidentiality determined by extent of efforts to preserve confidentiality
 - **If a threat to confidentiality is “reasonably to be anticipated,” must take “reasonable steps” to protect confidentiality.**
 - Here, defendants had thrown draft letters, from company president to lawyer, into the trash; plaintiffs found these letters when searching through a dumpster and used information in them to write interrogatories. At trial, the magistrate declined to compel discovery on the basis that the letters contained privileged information.
 - Reversed on appeal; no privilege.
 - If Δs wanted privilege to attach, they should have destroyed or shredded the documents or otherwise rendered them illegible.
- **Negligent disclosure destroys the privilege**
 - leaving a confidential letter on one’s desk in a busy office, where a receptionist or some such might see it
- **Intentional disclosure does not.**

Corporate communications

- ***Upjohn Co. v. United States*, 449 U.S. 383 (1981) (783)**
 - Independent auditors discovered that a foreign subsidiary of Upjohn made payments to a foreign government in exchange for government business. Upjohn’s general counsel sends out questionnaire to the whole company, asking for information. Questionnaire says the matter is “highly confidential” and clearly identifies the legal implications of the questionnaire.
 - IRS does an investigation and demands all answers to questionnaire.
 - District Court & CA6 denied privilege based on control-group test: most of the questionnaires came from lower-level employees.
 - S.Ct. reverses.

- **Control-group test discarded; replaced with “subject matter” test**
 - Communications between employees and corporate counsel for the purpose of obtaining legal advice are probably privileged
 - *See more precise formulation of the subject-matter test, Harper & Row Publishers v. Decker, 432 F.2d 487 (7th Cir.); aff’d, 400 U.S. 348 (1970) (783)*
 - Court declined here to adopt a strict test; factors more useful.
 - *Control-group test defeats the purpose of the attorney-client privilege; interferes with corporate counsel’s ability to collect information and give sound legal advice.*
 - Privilege needs to be “predict[able] with some degree of certainty” to be meaningful (786–87)

- **Factors leading to finding of privilege: (787)**
 - Communications made at the direction of corporate superiors for the purpose of obtaining legal advice
 - Information related to matters within the scope of employees’ duties
 - Letter & questionnaire identified as being from general counsel and made legal implications clear
 - responses went directly to general counsel
 - Kept “highly confidential” within the company throughout the process

More generically, reasonable effort was made to maintain confidentiality

- Work-product doctrine applied here (to IRS summons) (788)
 - Counsel had made notes in margins of returned questionnaires
 - Attorney’s thoughts must remain his own

 - Necessity *may* be able to overcome privilege protecting work product that is based on oral statements, but the government would have to make a “far stronger” showing of necessity or unavailability (789–90)

- States have not uniformly adopted *Upjohn*; plenty stick with control-group test

Assertions, waivers, and exceptions

- **Asserting the privilege (802)**
 - **Client holds privilege** and determines whether it is waived or asserted.
 - Privilege must be timely asserted, i.e., before relevant testimony is given
 - By default, attorney can assert privilege in absence of client or instructions
- **Waivers (805)**
 - **Waiver = disclosure of any part of the communication unless the disclosure itself is privileged.**
 - Telling the barber = privilege destroyed.
 - Telling your wife = privileged, so original privilege attaches.
 - If lawyer deliberately discloses privileged information, privilege still attaches
 - But if the lawyer is negligent, privilege destroyed
 - e.g., handing over privileged documents during discovery
 - Limited waiver when client sues lawyer for incompetent counsel: waiver of privilege limited to the attorney being sued
 - When attorney is an attesting witness (testifying to witnessing execution of a document)
- **Exceptions**
 - Identity of client, fee arrangements, fact of representation, *see In re Osterhoudt*, 722 F.2d 591 (9th Cir. 1983) (792)
 - **Exception to the exception:** when identity of the client would show an acknowledgement of the client's guilty in the matter for which the attorney was employed, *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960) (*discussed in Osterhoudt*, 793)
 - *Baird*: client hired attorney for tax issue; at attorney's suggestion, client anonymously paid taxes via the attorney. Government wanted to know client's name; *Baird* court found that privilege attached.

- Communications made in furtherance of a crime or fraud
 - *United States v. Zolin*, 491 U.S. 554 (1989) (797)
 - IRS wanted some communicative tapes; attorney-client privilege implicated, but did not apply. Tapes were inculpatory.
 - Privilege didn't attach because the privilege is supposed to aid the giving of legal advice—aid the administration of justice—not criminality
 - *In camera* inspections are okay
 - Despite Rule 104 saying that the court can't look at privileged info
 - Privilege doesn't attach based on *ipse dixit*
 - Court still must inspect to determine whether it's actually privileged
 - But *in camera* is “almost as bad” as actually revealing → shouldn't happen often
 - Burden is on person claiming that the privilege does not attach on grounds of fraud or criminality (i.e., claiming that an *in camera* inspection is warranted) to show that a reasonable person would view the communications as relating to criminal activity
- Some jurisdictions refer to crime or *tort* instead of crime or fraud
- Not only does privilege not attach in this situation, but the attorney is bound to *reveal* the communication

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE***Jaffee v. Redmond*, 518 U.S. 1 (1996)**

- *Origin of the psychotherapist-patient privilege*
- General policy: “the public is entitled to every man’s evidence”
 - Privileges are in derogation of this, the search for truth
 - But here, a public good transcends this search.
- Like attorney-client and spousal privileges, this privilege “rooted in the imperative need for confidence and trust”
 - Rendering of services contingent upon confidentiality of the statements being made
 - Mental health of citizenry = important social function
- **Extends to licensed social workers & psychologists as well as psychiatrists**
 - but only to communications for the purpose of counseling
- No balancing test
 - Privilege would be meaningless if it weren’t certain
 - Creating the test *is* the balancing!
 - Only question is whether to apply it.
- **Privilege has been extended to receptionists, secretaries and other aides**
 - *State v. Miller*, 709 P.2d 225 (Or. 1985) (817)
 - Defendant called state mental hospital and asked to speak to psychiatrist; receptionist asked his problem and he confessed to murdering someone; communications to aides “reasonably necessary for the transmission of the communication” are privileged; even though no psychotherapist-patient relationship was yet established, privilege protects communications that defendant believed necessary to obtain diagnosis or treatment.

SPOUSAL PRIVILEGES

Of two kinds

- (1) Testimonial privilege
 - Blocks all adverse testimony by spouse, but only if marriage valid when testimony sought
 - *Trammel*: privilege attaches to witness–spouse; Δ can’t claim the privilege and keep spouse from testifying (fed. law only)
- (2) Spousal-confidences privilege (marital communications privilege)
 - Protects all confidential communications between spouses while they are married, regardless of when testimony sought; privilege attaches to both spouses, *U.S. v. Montgomery*

Testimonial privilege

- Rationale (819)
 - Preserve ongoing marriages—don’t pit husband against wife
 - “Seems to invade and deny human dignity” to have one spouse accuse another
- Under state law, usually claimed in criminal cases
- Under federal law, may not apply in civil cases
- ***Trammel v. United States*, 445 U.S. 40 (1980) (820)**
 - **Testimonial privilege attaches only to witness–spouse**
 - Since protecting the marriage is the rationale, if the witness–spouse is willing to talk about it (and incur all the damage to the relationship that would likely follow), the rationale disappears
 - Encourages prosecutors to grant immunity, in joint criminal ventures, to one spouse and thereby encourage the spouse to testify against Δ
 - “homewrecker”
- Marriage must be valid when privilege invoked
- Privilege doesn’t apply when crime is one spouse against another
 - administration of justice is more important
- Some jurisdictions follow the rule that a hearsay statement that the declarant could (would) not have made as testimony should not be admissible³³
 - E.g., Spouse tells X about something that would otherwise have been privileged; at trial, spouse refuses to testify, claiming privilege; X would then be barred from giving testimony about what the spouse said

³³ See Problem 12-F (827)

Spousal-confidences privilege (marital communications privilege)

- ***United States v. Montgomery*, 384 F.3d 1050 (9th Cir. 2004) (829)**
 - **Privilege attaches to both spouses**
 - Wife had written letter to husband imploring him to stop his fraudulent criminal activity. Husband kept letter. IRS found it during a later search and wanted to use it as evidence.
 - **Presumption of confidentiality**
 - Privilege applies if:
 - (1) words and acts were intended to be a communication
 - (2) marriage valid
 - (3) communication was confidential—not made in the presence of (or likely to be overheard by) third parties
 - Letter was *not* intended to be shared; wife intended the *content* of the letter to be disclosed to a third party, but not the letter itself.
 - Letter was left on kitchen counter, kids were around, but prosecution hadn't introduced any evidence that the location of the letter & the presence of children make it likely that third parties would have seen or read the letter (832)
 - Presumption of confidentiality wins
- ***United States v. Estes*, 793 F.2d 465 (2d Cir. 1986) (834)**
 - Privilege attached to husband's act of pouring a bag of stolen cash on the bed because act was a communication
 - Some courts say: if actor intended to communicate, privilege applies; if no intention of communication, no privilege.
- **What a spouse sees or perceives is not confidential; only the *communication* is protected under spousal-confidences privilege.**
 - Just because something was done solely in front of a spouse doesn't mean that the privilege applies