

EVIDENCE OUTLINE

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I. BURDENS OF PROOF: PRODUCTION, PERSUASION AND PRESUMPTIONS

A. EVIDENCE LAW MODEL

1. Rule of law system

a. Basic structure – **All of law is chains of syllogisms:**

- i. Major premise: Rule of law – pre-exists dispute – command from hierarchically superior actor.
- ii. Minor premise: Facts – pre-exists dispute – objective, real facts in world.
- iii. Legal conclusion: Follows inexorably from major and minor premise.

b. **Major premise** → determined by substantive law

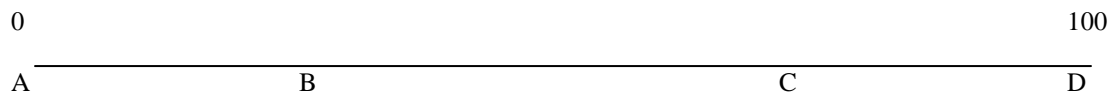
- i. Imposed on fact-finder; out there to be discovered.
- ii. Determined by substantive law.
- iii. Rule of law presupposes objectively knowable nature of law. (Set aside criticisms.)
- iv. No uncertainty acknowledged, once pronounced.

c. **Minor premise** → governed by evidence law

- i. Imposed on fact-finder; objective reality out there to be discovered.
- ii. Presupposes two philosophical assumptions:
 - i. That an objective reality does exist; AND
 - ii. It is knowable, i.e., possible for human beings to perceive this objective reality
- ii. Domain of evidence law: figuring out the minor premise to slip in, to close the syllogism.
- iii. Types of facts: This course focuses only on “adjudicative facts.”
 - (1) “Constitutional Fact” – e.g., Roe’s finding regarding beginning of life, or Miranda’s finding of inherent compulsion;
 - (2) “Legislative Fact” – e.g., how Guantanamo should look.
 - (3) “Adjudicative Fact” – garden variety findings in lawsuits, e.g., how fast the car was going.
- iv. Law acknowledges inherent uncertainty at level of facts. But law requires unequivocal answer. Cannot close the syllogism and reach the conclusion without the factual premise.
- v. Therefore, need burdens of proof, to manage this uncertainty and deflect error.

B. BURDENS OF PROOF

Framework:



X = Contested Fact → Fact-finder must determine probability that it occurred

- A = 0 % that X occurred
- D = 100% that X occurred
- B = Point at which reasonable people *could* find that X exists
 - → if don’t reach B, then directed verdict (DV) for the non-moving party (e.g., D)
- C = Point at which reasonable people CANNOT disagree that X exists
 - → if get to C, then DV for moving party (e.g., P)
 - Note: C does not exist in criminal trial; 6A jury right prohibits directed verdict.

Institutional allocations:

- AB range: patrolled by judge
- CD range: patrolled by judge
- BC range: patrolled by jury (where reasonable people could differ)

First questions:

1. Who bears production burden?

- 2. How high is it?
- 3. Who bears persuasion burden?
- 4. How high is it?

Remember:

- Burdens of proof are the chief procedural device for resolving doubt to reach absolute premise.
- “Burden” more accurately described as “bearing risk of the negative.”
- Production burden is always dependent on persuasion burden.
- In criminal cases, production and persuasion burden is on prosecution. *Taylor*.
 - But production burden can be shifted w/o constitutional problems.
 - Though puts tension on D’s 5A rights to remain silent.
- Once have initial framework, can mess around (e.g., burden shift).
 - E.g., if think a particular fact is hard for P to know, then might want to put persuasion burden on D if P meets production burden.
 - E.g., Title VII cases. If one party reaches B, then other party has persuasion burden to prove X does not exist. I.e., fact finder must find X, unless disproved.
- Must make this graph for every single element that must be proved!

Fed. R. Evid.

Rule 301. Presumptions in General Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

C. PRODUCTION BURDEN

- a) B = Point at which reasonable people could differ about whether X exists, i.e., reasonable people could think the persuasion burden was satisfied.
 - i) Production burden = bearing risk of nonproduction of evidence.
 - ii) Evidence to satisfy production burden can be adduced by *either* side.
 - iii) Only substantive evidence counts toward production burden (i.e., evidence offered for the truth).
 - iv) To *satisfy* Production Burden: Adduce enough evidence to get to BC range.
 - v) To *shift* Production Burden: Adduce enough evidence to get to CD range.
 - (1) Once shift, unless other side comes forward with evidence, entitled to DV.
 - vi) Purpose of production burden: To get the ball moving.
 - (1) Can shift back and forth throughout trial.
- b) Production Burden represents tension between judge and jury.
 - (1) The more space between B and C, the more power to the jury.
 - (2) Argument: B and C are disrespectful of jury. If so damn sure no reasonable jury would do it, then give it to jury and prove it.
 - (3) This is really a debate between trusting judges (elite of profession) and jury (the masses). How much do you want to trust 12 random people off the street?
 - (4) J. Black though production burden violated 7A (jury right) – dissented from every single directed verdict review. But historically, jury trials were always controlled by judges.
- c) Civil vs. Criminal

- (a) Civil: 7th Amendment: C exists. Can give DV to P.
- (b) Criminal: 6th Amendment: C doesn't exist. No directed verdict for P in criminal. CD range is the realm of jury nullification. I.e., no reasonable juror could fail to find X, but jury just refuses.
- d) **B is function of persuasion standard.**
 - i) United States v. Taylor (2nd Cir. 1972), p. 1117
 - ii) In criminal cases, B shifts forward to B', b/c persuasion is BRD.
 - (1) Whether it's B or B' affects not so much the trial itself, but greatly affects the plea negotiations.
 - (2) **This is very important if you represent an unlikeable defendant**—need to protect him from getting before jury. Need to argue the shift from B to B', and emphasize B' is bigger hurdle.
 - (3) Sometimes, prosecution will give away the death sentence, to move B' backward in order to get it to a jury.
 - iii) Arguments in favor (J. Friendly)
 - (1) There is a significant difference b/w enough evidence such that reasonable juror could find X is true by preponderance, than beyond reasonable doubt.
 - (2) Production burden must be function of persuasion burden.
 - iv) Counter-argument: Learned Hand argument:
 - (1) In day-to-day use, it's just too thin of a difference.
 - (2) Plus, only harm is that every so often criminal case goes before a jury when it wouldn't have—but jury will acquit. (Note: empirically false).
- e) **Never talk about the production burden to the jury**—can ONLY confuse them.
 - i) Production burden is only in-house work; determines when jury hears the evidence. Jury should never hear the word production burden.
- f) Burden shifting factors
 - i) Weak factors:
 - (1) Logic – Need not prove a negative
 - (2) Grammar – defense rests on exception or proviso divorced from definition of crime
 - ii) Real principle:
 - (1) Balance – D ought not be required to defend until some solid substance is presented to support the accusation. But beyond this, there is a point where narrowing issues, coupled w/ relative accessibility of evidence to D, warrants calling upon him to present his defensive claim.
 - (2) E.g., self defense: intentional homicide is so grave, and basis of self-defense is so w/in cognizance of D, fair to call on him to offer evidence.
 - iii) In criminal case, if shift production burden to D on Winship fact, D need only adduce enough evidence to cast doubt (i.e., inverse of B').
- g) Remember: Thayer presumption is really just a shift of production burden!
 - i) Except requires only scintilla to rebut (i.e., pop), instead of whatever B is.
- h) Three points at trial at which parties can ask judge whether production burden met:
 - (1) After P presents case in chief, upon motion by D.
 - (2) After D rests, P or D can move for directed verdict (only D in criminal).
 - (3) After jury verdict, can move for judgment n.o.v. (in civil).
- i) Civil trial Procedure:
 - (1) Assume burden of X rests on P.
 - (a) Party seeking to alter status quo bears burden.
 - (b) In civil, default standard is preponderance.
 - (2) Production burden is function of persuasion burden.
 - (a) Production burden is pretty low if persuasion is preponderance.
 - (b) Pressures settlement: Gets P to jury, and if D is nasty corporation, will win!
 - (3) ALWAYS at end of P's case, D routinely moves to dismiss at this point.
 - (a) Even if you think it has no hope. Sometimes just say, "Judge, for the record,..." just to preserve the objection for the record.
 - (4) This forces the judge to determine whether production burden has been satisfied.
 - (a) Judge will grant the motion if finds does NOT reach B.
 - (b) Judge denies motion if DOES reach B.
 - (5) At close of all the evidence, either side can move for directed verdict (e.g., to dismiss).

- (a) Will grant if evidence is in AB, or in CD.
- (b) Sometimes judge will defer ruling (take under advisement)—wait and see what the jury says.
 - (i) If jury rules in favor of the movant, no problem.
 - (ii) If jury rules against the movant, then judge might enter judgment n.o.v. (notwithstanding the verdict).
- (6) If DON'T make motion for directed verdict, can't move for judgment n.o.v.
- (7) Therefore, three times during case that judge can evaluate where the evidence falls (AB, BC, or CD range).
- j) In assessing production burden:
 - (1) Give benefit of doubt to the moving party.
 - (2) Judge is not supposed to pass on credibility judgments.
 - (3) Not supposed to pass on probative value.
 - (4) Requires judge detach, take his hands off – even if judge himself is SURE it's wrong.

D. PERSUASION BURDEN

- a) Burden of persuasion = bearing the risk of non-persuasion. Fact-finder assumes the opposite unless reach persuasion standard. Gives guidance to factfinder about how certain he should be.
- b) Only the jury can determine if persuasion burden satisfied.
- c) Burden allocation can be outcome determinative.
- d) Possible burdens of persuasion (can be in 6 different places):
 - (1) More likely than not (preponderance) → 51% (not deflecting error at all)
 - (2) Clear and convincing → 75% (deflecting some error)
 - (3) Beyond a reasonable doubt → 95% (deflecting huge amount of error)
 - (4) Unofficial 4th category possible for death penalty cases, moral certainty → 99%
 - (5) Inverse of all of the above, i.e., requiring D to *disprove* by the same standard.
- e) What does it mean to shift persuasion burden on particular fact to D?
 - (1) Instruct jury to ignore evidence of X entirely unless believe it to the requisite level.
- f) Contexts: Consider whether *Mullaney* can apply in civil context. I.e., if losing lawsuit creates significant punishment and stigma beyond money damages, DP requires higher burden?
 - (1) Civil commitment: C&C
 - (a) Making a prediction about future; can't know BRD.
 - (b) But depriving of liberty, so need more than preponderance.
 - (2) Bail: C&C → *United States v. Salerno* (1131)(SC 1987)
 - (a) Imprisoning someone even for definite period of time (until trial) still loss of liberty and should have higher standard
 - (3) Parental termination: Preponderance or C&C.
 - (a) Arg: If 51% chance that kid is being abused, then should be taken away
 - (b) Counter-arg: Taking away kid could be harmful as well
 - (4) Preliminary factual determinations → Preponderance
 - (a) *Lego v. Twomey* (1125) (SC 1972)). Holding: Voluntariness of confessions need not be determined BRD b/c not concerned w/ reliability, innocence
 - (b) Rule: preliminary determinations in criminal case can be by preponderance and found by judge.
 - (c) Basically all prelim determinations (besides bail) are preponderance.
 - (5) Reputation:
 - (a) If D's reputation will be seriously affected (there will be a substantial opprobrium) does that make us ratchet burden of persuasion up?
 - (b) If we ratchet up persuasion burden are also shifting up production burden (harder for P's to get to jury).
 - (6) Deportation
 - (a) More than just monetary harms involved, so should get higher.

- (7) Political Asylum
 - (a) In many cases if send back are sentencing to deprivation of liberty or death → shouldn't the burden be much higher (at least CaC if not BRD)?
- g) **Burden of Production vs. Persuasion when Judge is also the fact-finder:**
 - (1) Judge needs to be precise on whether he is ruling on burden of production or burden of persuasion → makes big difference on appeal.
 - (a) Make sure to make him state it on the record!
 - (b) Will often just allow evidence if a close call—but must be clear whether allowing as substantive evidence to satisfy production burden.
 - (2) If ruling on burden of production (A-B, C-D) → judgments as a matter of law
 - (a) Appeal standard is de novo.
 - (b) More likely that appeals ct is going to overturn.
 - (3) If ruling on burden of persuasion (B-C) → factual determination
 - (a) Trial judge is entitled to significant deference on appeal.
 - (b) Can't overturn trial fact determination unless judgment not substantiated by significant evidence.
 - (c) Much harder case to make in appellate ct.

E. DUE PROCESS REQUIREMENTS

1. In re Winship (p. 1123) (SC 1970)

- i. **HOLDING: Constitutional Due Process requires P prove every element of crime BRD.**
 - a. Even for juveniles, if charged with act that would be a crime for adult.
- ii. Why?
 - a. Balance of evils. Wrongly acquitting is lesser evil than wrongly convicting.
 - b. "Far worse to convict an innocent man than to let a guilty man go free.
- iv. Counter-arguments:
 - a. Letting guilty go free is worse → recidivism!
 - b. Persuasion burden should float depending on seriousness (e.g., pickpocket need less certainty).
- iv. Winship locks into place highly favorable structure for Ds.
 - a. Shifts B to the right on probability line.
 - b. Enlarges AB range → more opportunity for directed verdict for D. (Often D's only hope is knocking case out before getting to B (b/c jury will hate him)).
 - c. Sometimes burden so high simply can't be satisfied b/c of nature of facts.
 - d. Together w/ rule against directed verdicts against Ds, big thumb on scale for Ds.
- v. Theoretical defense of Winship:
 - a. About fundamental relationship b/w individual and state.
 - b. BRD is prophylaxis to prevent state from using prosecution power improperly. Enhances freedom in society. Prevents prosecution just to harass people.
 - c. Free society assumes best about individual, and worst about government.
 - i. If give government a power, assume it will be taken to its logical conclusion. Assume abuse of power will occur at some point.
 - ii. By contrast, assume individual is always born anew.
 - d. Totalitarian societies reverse the presumptions.
 - i. Presumptively trust the government as benevolent.
 - ii. Suspicious of individual – assume he will do something bad if left to his own devices.
- vi. Prosecutors hate Winship. Try to make holes in it.

2. Aftermath of Winship

- Winship rule: (1) P must prove every element BRD; (2) must be found by jury.
 - **Persuasion burden ALWAYS remains with State** -- even if have to prove a negative (e.g., absence of heat of passion).
 - **But production burden is flexible.** Can put it on D. But note: puts tension on 5A. And only has to adduce enough evidence to create shadow of “doubt.” This saves the State from having to prove a negative all the time and allows for narrowing of issues. If make D satisfy production burden, then issue not before jury unless D produces evidence. Some judges will not allow D to sum up on issue if didn’t produce any evidence.
- But not everything is a “Winship” fact!
- **Three piles of facts:**
 - **Winship facts**
 - **Affirmative defense facts**
 - **Sentencing facts**
- Remember: Production burden can ALWAYS be shifted (even of Winship fact).

3. AFFIRMATIVE DEFENSES

- 1) For some facts, State is free to put persuasion burden where it wants, and can be found by judge.
 - Facts that are:
 - Sufficiently removed from the act; or
 - Too hard to prove (e.g., mental state); or
 - Peculiarly within province of D (e.g., mental state); or
 - Only relevant to degree of crime, not guilt vs. innocence; or
 - Indicate effort by State to create supple criminal law that makes fine-grained culpability determinations to allow for mitigating facts.
 - Examples
 - Extreme emotional distress – shifting OK (*Patterson*)
 - Self-defense – shifting OK (*Martin*)
 - Duress – shifting OK (*Dixon*)
 - Insanity – shifting OK (*Aragon*)
 - Economic deprivation defense
 - Not allowed:
 - Malice aforethought – no shifting (*Mullaney*)
 - Alibi – no shifting (Hypo)
- 2) How to determine if fact is Winship or Affirmative Defense:
 - Functionalism vs. Formalism:
 - Formalism (White):
 - Defer to legislature’s labels. E.g., *Patterson*.
 - Possible limit: Maybe some things so essential, state can’t just erase and re-write under affirmative defense. E.g., malice aforethought (*Mullaney*).
 - Functionalism (Powell):
 - If element significantly impacts sentence or stigma, and/or has historical importance, must be considered Winship fact. E.g., *Mullaney*.
 - Possible limit: Some minor gradations would be just too hard for State to prove, e.g., economic deprivation defense.
 - Collateral vs. Collision Defenses
 - **Train wreck:** No shifting
 - If affirmative defense literally negates element of crime, can’t shift, even if legislature wants to.

- Examples
 - Malice aforethought or not. (mens rea)
 - Alibi or not. (actus reus)
 - **Pass in the night:** Shifting OK.
 - Where the two facts can co-exist, OK to shift. These are really more like “sentencing defenses.” E.g., Patterson (intent vs. heat-of-passion); Martin (intent vs. self-defense).
 - Examples:
 - Heat of passion
 - Self-Defense
 - Duress
 - Insanity
 - Economic Deprivation
 - Problem: When defenses start to undercut mens rea (e.g., self-defense, duress, insanity), this “pass in the night” analysis is inconclusive.
 - P’s argument: Intent and duress can co-exist.
 - D’s response: Duress negates mens rea. No guilty mind if acting under duress.
 - Degree of Culpability vs. Guilt Determination
 - If fact only determines degree of guilt (not the fact of guilt), OK to shift.
 - Tension b/w liberty and the state is no longer a concern.
 - E.g., *Mullaney* – prove crime of intentional homicide; question is only whether hot-blooded or cold-blooded. (But rejected here.)
 - But *Martin* cuts against this – self-defense is complete justification – difference b/w guilt and innocence. If you shift, could convict even if equally likely she’s not guilty of a crime at all.
 - Counter-arg: Need *more* shifting in *Martin* case, b/c someone who *killed* might walk free if state can’t prove every element, and too hard to expect state to prove lack of self-defense.
 - 8th Amendment sets the limits
 - So long as constitutional to define crime how state has, OK to shift burden of mitigating “gifts” to D.
 - 8th Amendment – cruel & unusual punishment operates as only limit.
 - Problem: *Martin* possibly violates this (violates 8A to punish someone who killed in self-defense).
 - Hypo:
 - NY makes “criminal behavior” a crime. Sentence is anywhere from 0 years to 100 years. Then D must prove how bad his crime was.
 - But unconstitutional to maybe punish for life someone for spitting on sidewalk.
- 3) Hierarchy of Culpable Mental States
- Purpose = Specific Intent (intend the results)
 - Intent = Knowledge (intend to do act, knowing its probable results)
 - Reckless (e.g., don’t even check)
 - Negligent
 - Strict Liability (no negligence)
- 4) **Mullaney v. Wilbur (HANDOUT, 1975) (J. Powell) - functionalism**
- (1) **Rule: Any fact that substantially increases punishment and stigma (especially if it has historical importance), must be proved by State BRD.**

- (a) Takes Winship very seriously.
- (b) Creates functional approach. If fact increases stigma or punishment, goes in Winship pile.
- (2) Facts: Two men were in hotel room. One shot the other. P proved intentional homicide BRD.
 - (a) Defense: Heat of passion – D shot in response to homosexual advance.
- (3) Only question: Is it murder, or is it manslaughter?
 - (a) Depends on whether there is malice aforethought vs. heat-of-passion.
 - (b) Maine law *presumes* malice aforethought once P proves intentional homicide, unless D proves heat of passion by preponderance.
 - (c) Note: Maine law considers murder and manslaughter different degrees of same crime: felonious homicide.
- (4) Statute Text:
 - (a) “Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.
 - (b) “Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 20 years”
 - (c) Maine case law (which SCOTUS accepted) held they were different degrees of same crime.
- (5) Holding: Because malice aforethought is, and has historically been, the distinguishing element of murder, which increases stigma and punishment from 20 years to life → Winship fact.
 - (a) “Winship is concerned with substance rather than this kind of formalism.”
 - (b) Not unfair to require P to prove a negative.
- (6) Prosecution argument:
 - (a) Prosecution has satisfied *In re Winship*. Have proved beyond reasonable doubt intentional killing that resulted in death, w/o justification. Now state is free to presume he acted w/ malice aforethought.
 - (b) If D wants to show heat of passion, burden is on him.
- (7) Counterargument:
 - (a) State (Maine) has *chosen* to make those factors relevant. Has decided that the difference b/w 20 years and life is malice aforethought.
 - (b) Having chosen to make them relevant, State must now prove them beyond reasonable doubt. And must be found by jury beyond reasonable doubt.
- (8) Prosecution response:
 - (a) If impose Winship on everything, legislature less likely to make allowances for mitigation, b/c State will have to prove each beyond reasonable doubt. If you want supple criminal law that makes fine-grained culpability slices, make sure you don’t create a proof problem for the State.
 - (b) E.g., economic deprivation defense – knock down one culpability notch if committed crime based on economic desperation – legislature won’t pass this, b/c State will have to disprove economic deprivation in every case, and every D will have a sob story.

5) **Patterson v. New York, 1977, U.S., p. 1096 (J. White) - formalism**

- a) **RULE:** Persuasion burden of extreme emotional disturbance can be allocated to D (by preponderance).
 - Facts: Man murders estranged wife’s boyfriend
 - New York statute: D is guilty of murder if commit intentional killing, “except . . . it is an affirmative defense that” that D acted under “extreme emotional disturbance.”
 - Hot-blooded killer less culpable than cold-blooded killer.
 - History in male-dominated criminal law of reducing culpability for “honor” killings—killing of unfaithful wife.
 - Issue: Who has burden of proving extreme emotional disturbance?
 - P prove absence of e.e.d. beyond reasonable doubt?
 - Or D prove presence of e.e.d. by preponderance?
 - D’s argument: Mullaney applies directly. E.e.d. affects punishment and stigma. Modern heat of passion.
 - P’s argument (wins):
 - Formalistic: State has defined as affirmative defense, not material element of defense.
 - Note: May be some limits....

- NY has made many fine-grained gradations in culpability. Wouldn't make all these gradations if had to prove them all BRD. Don't hamstring the legislature.
- Distinguish Mullaney:
 - Formalism: Legislature specifically defined as affirmative defense, rather than element.
 - "It is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances."
 - Collateral: E.e.d. does not negate intent.
 - E.e.d. "constitutes separate issue" and "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder."
- Any limits to formalism?
 - "The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." – FN 3.
- Note: Patterson is invitation to States to define crimes broadly; shift to D facts to distinguish among them.

6) Martin v. Ohio (U.S. 1987) p. 1104 (J. White) – self-defense

- a) **RULE:** Constitutional to make D prove self-defense by preponderance
 - i) Even though factors tend to overlap with first-degree murder determination.
 - ii) But cannot instruct jury not to consider self-defense evidence in its BRD murder determination (b/c elements that prove self-defense tend to negate premeditation).
- b) Facts: Battered woman shoots her husband. D admits she killed. But asserts self-defense.
- c) Statute: Aggravated murder = killing with "prior calculation and design." Self-defense classified as "affirmative defense."
- d) Differences from Patterson.
 - i) Self-defense is a *complete* justification. Not gradation of culpability—*absence* of culpability.
 - (1) Argument for *more* need for shifting:
 - (a) This person killed—and she's going to walk free if can't prove. It's too hard to expect State to be able to prove absence of self-defense BRD.
 - (2) Argument that shifting is impermissible:
 - (a) Switches presumption of innocence. Someone not guilty of a crime at all might go to jail if it's equally likely that she is guilty or not.
 - ii) Self-defense elements tend to negate premeditation elements (more so than e.e.d. and intent).
- e) Dissent (Powell):
 - i) This rule allows D to be convicted of crime even equally likely she acted in self-defense, i.e., no crime was committed at all.
 - ii) Jury instructions are inherently confusing – affirmative defense instruction necessarily surplusage, b/c either there remains doubt about premeditation or not. Danger jury will try to reconcile the conflicting instructions by reducing P's burden.
- f) How to reconcile Mullaney, Patterson, and Martin?
 - i) Formalism – legislature's labels trump.
 - ii) Collateral vs. Collision defenses – b/c self-defense doesn't literally negate premeditation.
 - iii) 8A as only limit? – But Martin seems to violate this.

7) Alibi Defense Hypo

- a) Could legislature pass "alibi defense" statute, requiring D to establish alibi by preponderance, or else jury does not consider at all?
 - i) Answer: NO – alibi defense is quintessential "train wreck" situation – therefore, Winship governs.
 - (1) An alibi by necessity negates the very commission of the act. If you switch the burden on an alibi, are switching the burden on whether the underlying factual events actually took place.
 - (2) Note: Shifting burden on actus reus here. But insanity/duress raise similar problems of shifting burden on mens rea.

- ii) Counter-argument: If P satisfies initial production burden, only shifting production burden to D. Then D must put on enough evidence to satisfy production burden.
 - (1) Prof says you can tell the jury: If you don't believe the alibi evidence (more likely than not), you don't have to take it into account at all. Though can't instruct them not to take it into account—too much like a directed verdict against D.
 - (2) RT: Isn't this effectively shifting persuasion burden to D? Anytime instructing jury not to consider if they don't believe to a particular standard, that's getting at the persuasion burden. Can't do this if it's a Winship fact!
 - (3) RT: If instead claim you're only having jury pass on the production burden, that's like giving a DV where there wasn't one before. Also, jury not supposed to be involved in production burden.

8) **Dixon (2006), Supp. p. 661 – duress**

- a) **RULE:** OK to shift burden on **duress** defense to D by preponderance.
 - i) Note: Duress is full justification like self-defense; not just mitigation.
- b) Facts: D did not disclose prior felony when buying gun. Willful failure to disclose is a crime.
- c) D's defense: Duress—they told me that unless I came back w/ a gun, they would kill me and my family.
- d) Statute is silent on duress—unlike in Martin, where legislature had literally moved the self-defense into the other pile.
- e) Where should the burdens be placed?
 - i) Defense Argument: This is Mullaney.
 - (1) Prosecution had burden of proving malice aforethought as element of offense—here, non-duress is also an element of the offense. Therefore, must prove beyond reasonable doubt.
 - (2) No Patterson formalistic argument to even make here, b/c legislature didn't speak.
 - ii) Prosecution Argument: This is a collateral defense, not a collision defense, i.e., passing in the night.
 - (1) Can satisfy all elements of misrepresentation regardless of duress.
 - iii) Defense Response: Duress negates mens rea. No guilty mind if acting under duress.
- f) These collateral and collision arguments are difficult b/c not clear—e.g., does duress negate mens rea?
 - i) In Dixon, court seems to treat like collateral defense, too—allows burden to shift to D by preponderance—i.e., jury can ignore entirely if don't believe it.

9) **Insanity**

- a) **RULE:** Insanity is NOT a Winship fact – OK to shift burden to D.
 - i) Insanity is considered collateral defense – P must prove intent, but not *culpable* intent based on sanity.
 - ii) Note: Shows how collateral vs. collision is too formalistic – both duress and insanity are undercutting mens rea in a significant way.
- b) Three current versions of insanity rules:
 - i) Old federal version (still law in many states): P must establish sanity BRD (Winship bundle).
 - (1) Prior to 1895, burden of insanity defense almost exclusively on the defense.
 - (2) In 1895, S. Ct. held insanity essential element of offense (but not constitutional rule).
 - ii) Current federal version: P must establish by preponderance.
 - (1) This law was changed after acquittal of Pres. Reagan's attempted assassin based on insanity.
 - iii) Aragon version (many states): Shift production and persuasion burden to D.
 - (1) Aragon requires D to prove BRD!; other states use preponderance.
 - (2) Aragon: too easy to fake an insanity defense—juries don't really know who is insane.

4. SENTENCING FACTS

1) **RULES**

- a) **6A right to have jury find any fact that the law makes essential to punishment.** Apprendi, Blakely.
- b) “Any fact (other than prior conviction) which is necessary to support a sentence exceeding the maximum authorized by facts established by plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” Booker (citing Apprendi).
- c) 6A does not limit judicial discretion per se → only insofar as it infringes on province of jury. Blakely.

2) **PROCESS:**

a) FIND THE BASELINE!	<p>(1) Baseline = Maximum of judge's discretion based only on the jury's verdict (or D's plea).</p> <p>(2) Obviously \leq statutory maximum. But also mandatory guideline maxes (<i>Blakely</i>).</p> <p>(3) Mandating vs. permitting (formal vs. pragmatic). If judge <i>could have</i> sentenced higher w/o the fact-finding, no problem, even if personally <i>wouldn't</i> have w/o the fact-finding. <i>McMillan</i>. (a) So advisory guidelines don't violate. <i>Booker</i>.</p> <p>(4) Only consider what judge actually did, not what he hypothetically could have done. <i>Apprendi</i>.</p> <p>(5) De facto maximums that congeal into mandatory limits, e.g., through appellate review, might also violate (Scalia thinks the only way to avoid 6A problem is to have NO appellate review).</p> <p>(6) Mandatory minimums do not violate. <i>McMillan</i>. (B/c judge <i>could</i> have done it anyway.)</p>
b) DID SENTENCE BUST THE MAX?	<p>(1) If so, were all additional facts found by jury by BRD or admitted by D? If not \rightarrow violates 6A.</p>

3) **Solutions (two choices):**

- a) Increase judicial power by returning to indeterminate sentencing (pretend not Mullaney facts).
- b) Decrease judicial power by assigning all bust-maxing fact-finding to a jury (need 2 juries).

4) **Types of Sentencing Factors:**

- a) **Mandatory Minimums \rightarrow OK** (e.g., *McMillan*, *Harris*).
- b) Enhanced Maximums (e.g., *Apprendi*, *Almendarez-Torres*)
 - i) **Based on recidivism \rightarrow OK** (*Almendarez-Torres*) (already found BRD in previous trial)
 - ii) **Any other factors \rightarrow GONE** (*Apprendi*).
 - (1) Note: Some seem mixed b/w these two. E.g., NY statute: enhanced sentence based on: persistent felony offender; also finding that history and characteristics warrant increased sentence.
- c) Structured Sentencing Regimes
 - i) **Mandatory Guidelines \rightarrow GONE** (*Booker*, *Blakely*)
 - ii) **Advisory Guidelines \rightarrow OK** (*Booker*).
 - (1) But be wary: If adopt pragmatic approach to baseline, then advisory guidelines from which no one deviates could be considered functionally mandatory).

5) Case Holdings:

- a) *Apprendi*: Any fact (other than prior conviction) increasing maximum penalty, must be found by jury BRD.
- b) *AZ v. Ring*: Extends *Apprendi*. If judge has to find aggravating facts to impose death, violates 6A.
- c) *Blakely*: Baseline is whatever judge *could* have sentenced based on jury's verdict alone. (Formalistic)
- d) *Booker*: Mandatory federal guidelines violate *Apprendi*/6A. Breyer's solution: Make advisory.
- e) *McMillan*: Mandatory minimums don't trigger 6A problem. Baseline is formal, not pragmatic. \rightarrow a fortiori, mitigating factors found by judge don't trigger 6A problem either. (note: pre-*Apprendi*).
- f) *Almendarez-Torres*: (Breyer) Recidivism does not raise 6A concerns (paradigmatic sentencing factor).

6) Remaining Questions

- a) Ironies:
 - i) The more guidance State gives to judge, the more constitutionally infirm his sentence. By contrast, if grant judge unfettered discretion, no problem.
 - ii) The more transparent the judge in sentencing, the more constitutionally infirm his sentence. E.g., *Apprendi*.
- b) Why not just have a very high statutory sentence, with various mitigating factors?
 - i) YOU CAN DO THIS, under Scalia's framework. Only constraint is political process.
 - ii) No 6A problem: So long as jury authorizes max, and judge's fact-findings go downward, OK.
 - iii) No 8A problem: So long as max itself doesn't violate 8A (probably doesn't), tailored system that allows for lesser punishment based on features of offense that aren't elements is OK.
 - iv) Critique:
 - (1) Results in the unfettered discretion that led to Guidelines in first place.
 - (a) True. But this is NOT constitutional problem. Just a policy question.
 - (2) Doesn't this show that Scalia's framework is just empty formalism?
 - (a) Can defend based on *notice* to D. E.g., knows the max his guilty plea can authorize.

- 7) **McMillan (U.S. 1996) – mandatory minimums**
- If brandish gun while committing crime, triggers 5 yr. mandatory minimum.
 - Holding: Upholds statute. Facts triggering mandatory minimum are not Winship facts. Formalism.
 - Resurgence of formalism—new bundle: If it’s a sentencing fact, don’t need to find beyond reasonable doubt. AND judge can find it—choose w/in range.
 - Rule: To determine whether fact is element of offense or sentencing factor, defer to legislature (w/in limits). (But no clear limits.) Baseline is what judge *could* have done, not what he *would* have done – minimums are irrelevant.
 - P’s argument: Mullaney is irrelevant here. Not exceeding max, no concern.
 - D’s response: Baseline should be pragmatic (not legalistic). Need functionalist approach – jury must find any fact that increases punishment and stigma.
- 8) **Almendarez-Torres v. U.S. (1998) (J. Breyer) – recidivism**
- D pleads guilty to intending to re-enter after being deported → felony. Based on facts in indictment, should get 2 years. Admits past convictions. Judge increases sentence to 20 yrs. based on “recidivism.”
 - S. Ct. says recidivism facts are different—not the sort of facts we worry about in Winship—no dispute about his prior convictions.
 - Further: Doesn’t have to appear in the indictment—can plead to a 2-year crime, get 20 years based on sentencing facts.
 - These cases solidify foundation for sentencing guidelines – can shift burden anywhere you want.
 - Breyer says increasing *mandatory* minimum is worse for D than increasing *permissive* maximum. Turns McMillan on its head (which found mandatory minimums *less* problematic).
- 9) **Apprendi (U.S. 2000), Supp. Packet (J. Stevens) – applies Mullaney to sentencing**
- RULE: If sentencing fact (other than prior conviction) increases potential sentence beyond the statutory maximum, then it’s a Winship/Mullaney fact.**
 - Resurgence of functionalism. This case begins remarkable counterattack against encroaching formalism. One of the most important cases in last 50 years.
 - Facts:
 - NJ hate crimes statute: If convicted of an offense, and then judge finds the crime was motivated by bigotry (intimidate), can tack 10 more years onto sentence.
 - D was indicted for many offenses. Negotiated guilty plea:
 - Shooting offense A: 5-10 years
 - Shooting offense B: 5-10 years
 - Bomb offense: 3-5 years (but on condition would run concurrent)
 - Enhancement (motive of racial bias) left open (up to 10 years) → Pros must only establish by preponderance, and only by judge.
 - Judge finds by preponderance that Shooting Offense A was motivated by racial bias:
 - Allows A and B to run concurrently for 10 years.
 - Then adds 2 years for enhancement.
 - Sentence of 12 years.
 - Arguments:
 - D’s argument: NJ has created a new crime, i.e., shooting w/ racial bias. Can increase detention by 10 years, and greatly increases stigma. Classic Mullaney.
 - P’s counter: Judge was granted discretion—could have sentenced up to 20 years (if sentenced A and B consecutively)—only gave him 12 years. D got off easy!
 - Response: But judge told us why he added the 2 years.
 - Sup. Ct.—we won’t ask what you *might* have done—we only ask what you did.
 - Problem: Judge went above the max for Offense A—could only have sentenced up to 10 years w/o enhancement.
 - Note: The more transparent and intellectually honest the judge is in sentencing, the more likely to get into Mullaney trouble.
 - Analysis:**
 - Violates DP and 6A:**

- (1) Under *Lego* judge can decide on a sentence w/in range set by legislature based on preponderance of evidence. But here the 5 year add-on kicked the sentence out of the max range.
- (2) Where sentencing enhancements bust max, enhancements are de facto elements of a new crime and need to be determined BRD by a jury → otherwise violate 6A and DP
- ii) **Functionalism**: “The relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”
 - (1) Legislature’s selecting particular, factually distinct conduct as worthy of greater punishment has significant implications for both (1) D’s liberty and (2) stigma associated w/ offense.
 - (2) **Labels not determinative**. “The mere presence of this ‘enhancement’ in a sentencing statute does not define its character.”
- f) Judge breakdown (3/2/4):
 - i) Majority:
 - (1) 3 (Stevens, Souter, Ginsburg): Resurrect Mullaney.
 - (2) 2 (Thomas, Scalia): All functionalism → All shifting is unconstitutional → Strongest assertion
 - ii) Dissent: 4 (O’Connor, Rehnquist, Kennedy, Breyer): Formalism is the answer.
 - (1) Note: Liberals and conservatives are aligned. Center is the dissent. Same as the flag-burning cases.
- g) Argument re whether overrules McMillan
 - i) Scalia thinks they’ve overruled McMillan. Stevens sounds like he wants to overrule it.
 - ii) Note: Thomas wants to reconsider Almendarez-Torres (i.e., fact of prior conviction).
 - iii) **Harris (2002) – ostensibly reaffirms McMillan post-Apprendi**
 - (1) SCOTUS upholds mandatory minimums (i.e., McMillan survives Apprendi).
 - (2) Only raising max incurs on jury right. Wide discretion is a policy, not 6A, concern.
 - (3) But note: 5th vote is Breyer, who disagrees w/ Apprendi. Once accepts Apprendi by stare decisis, Harris is vulnerable. In Almendarez-Torres, Breyer says increasing *mandatory* minimum is worse for D than increasing *permissive* maximum. Turns McMillan on its head.

10) **Blakely v. Washington (2004) (J. Scalia) – state sentencing guidelines**

- a) Rule: **Baseline is the maximum authorized by jury verdict *without* any additional findings.**
- b) Note: Same 5 justices as in Apprendi agree.
- c) Facts: D kidnapped wife, put her in box, threatened her and kids’ lives. D pleads guilty.
- d) Statutory max for kidnapping: 10 years (120 months).
- e) Washington structured sentencing guidelines:
 - i) Max penalty for kidnapping: 53 months.
 - ii) Enhancement for extreme cruelty: 90 months. (Still under the statutory max of 120 months.)
- f) Issue: What is baseline? Statutory max (120) or mandatory guidelines max (53)?
- g) **Holding: “The relevant statutory maximum is ... the maximum he may impose without any additional findings.”**
 - i) “When a judge inflicts punishment that a jury’s verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.”
 - ii) Scalia says the baseline is 53. Guidelines amend the statute. 10 years is the hypothetical max; but guidelines spell out in more detail what you can get. Once you plug in guidelines, max is 53. When go up to 90, had to find additional fact—that’s a Mullaney fact, must be found by jury.
 - iii) Note: If Washington hadn’t passed these guidelines, presumably open discretion from 0-10 would have been permissible.
- h) Dissent accuses Scalia of extreme formalism.
 - i) If state creates baselines, gets punished by being subject to Mullaney.
 - ii) If eliminate baselines, total discretion, get rewarded, by being exempt from Mullaney.
 - iii) Preferred rule: Defer to legislature w/in limits.
 - iv) No notice problem here—D informed he faced a 10-yr max.
- i) What options does Washington have on remand?
 - i) Not a functional approach → not saying that the fact makes a difference to the sentence and stigma.
 - ii) Formalistic approach → difference b/w mandating and permitting something → if Washington simply hadn’t passed the guidelines, presumably no problem.

11) **United States v. Booker (2005) (J. Stevens/J. Breyer) – federal sentencing guidelines**

- a) Federal Sentencing Guidelines
 - (1) Determined by Comm'n comprised of experts appointed by President. Supposed to determine optimal punishment.
 - (2) Guidelines were *mandatory*. To deviate, judge had to give specific reason—and would often be reversed on appeal. Very minimal escape hatch.
 - (3) Sentencing hearing followed trial—determined by preponderance.
- b) Issues in case: How many drugs, and level of participation
 - (1) Both Ds plead to what they think will give them X sentence.
 - (2) Instead, turns out there were more drugs on him.
 - (3) And, in Fan-Fan, D was found to be a big boss.
 - (4) Judge increases sentences.
- c) Stevens holding: Invalidates federal guidelines w/r/t aggravating factors.
 - (1) Facts are really a part of the crime b/c largely determine sentence → busting the max (as determined by the guidelines grid) → found by judge by preponderance → violates 6A and DP.
- d) Breyer (remedial): Trying to save the guidelines.
 - (1) **Makes Guidelines only advisory, precatory.** To the extent the guidelines violate Mullaney by *forcing* you to go above the statutory max, invalid. But still useful to have these experts advising you on sentencing.
 - (2) Note: Downward departures did not raise Mullaney problem. But now all guidelines advisory.
- e) After Booker:
 - (1) **Issue: Are the precatory guidelines setting a new baseline?**
 - (a) Can a judge now do the exact same thing as before, hold the same hearing, find the same aggravating factors, and decide to go over the guidelines – not b/c the guidelines mandate it, but b/c judge chooses to?
 - (2) Argument grid does not set baseline:
 - (a) Not legally mandated—just advisory. Didn't bust any max.
 - (3) Argument that grid sets baseline:
 - (a) If baseline is what judge *would have* otherwise done, and that every other judge uses—becomes the *de facto* baseline.
 - (b) Busting the de facto baseline triggers Mullaney.
 - (c) Scalia argument: If subject to reversal, then ipso facto *some* judge findings are essential to upholding a sentence → automatic 6A problem.
 - (4) Logical conclusion of this argument:
 - (a) Guidelines will disappear.
 - (5) In Blakely, Scalia suggests NOTICE is part of the problem. Ds want their pleas back, after being sentenced beyond what they expected. Detrimental reliance.

F. PRESUMPTIONS

1. Introduction

- 1) Intro
 - i) Presumptions react to an inability to prove certain facts. Allow P to satisfy burdens w/in the model.
 - ii) Presumptions artificially push P past point B.
 - iii) Presumptions are a blunt instrument. Would be better to do it all with shifting burdens.
- 2) Whenever a fact seems unjustly hard to prove, there are four possible legislative responses (remember all of these are available! Don't automatically assume that messy presumptions are the way to go!):
 - i) Shift the production burden – require other side to come forward with evidence of contrary.
 - ii) Create a presumption of PF.
 - iii) Create a permissible inference of PF.
 - iv) Remove permission as necessary element of offense.
- 3) **Structure: Basic Fact (BF) → Presumed Fact (PF)**
 - i) **Basic fact:** Launching pad that triggers the presumption

- (1) Basic fact has to be proved the same way as any other contested fact.
 - (2) Will usually be very easy to prove.
 - (3) If established, slipped into presumption model as certain. No sliding scale of certainty of BF.
 - ii) **Presumed fact:** If you prove basic fact exists, will presume PF as true.
 - (1) So are proving presumed fact without actually proving it
- 4) Types of links:
- a) **Irrebuttable presumption**
 - (1) Compels the inference. If you find BF, you **MUST** find the PF, no matter what.
 - (2) This is really just a rule of law. Saying BF = PF.
 - (3) E.g., legitimacy – child born under coverture **MUST** be presumed legitimate (no matter what).
 - (4) Take these out of the discussion. Really just a rule of law.
 - b) **Rebuttable presumption**
 - (1) If you find BF, you **MUST** find the PF, **UNLESS**
 - (2) Gets you into C-D → can result in directed verdict for party with burden.
 - (3) **NOT ALLOWED** in criminal cases. Violates:
 - (a) 6A right to jury → would result in directed verdict against D.
 - (b) 5A right to remain silent → can't force D to rebut (put P to its proof).
 - (c) DP → would prop up on artificial evidence, allow conviction on less than BRD.
 - c) **Permissible inference**
 - (1) If you find BF, you may if you wish find PF (if you believe it to the persuasion standard).
 - (2) Merely authorizes finding PF, but doesn't require it.
 - (3) Satisfies the production burden, gets you into B-C range.
 - (4) Doesn't satisfy the persuasion burden. But get a jury instruction! (helpful.)
- 5) Rebuttable Presumptions
- i) **Thayer presumption:** If you find the basic fact, you must find the presumed fact, unless it is rebutted.
 - (1) Process:
 - (a) Moves to CD. Effectively shifts production burden. D rebuts by producing “some” evidence.
 - (b) “Pops” the bubble. Parties go back to where they were w/o the presumption.
 - (c) Does **NOT** affect persuasion burden. Remains with P.
 - (d) **Tell NOTHING to the jury.** This is only an allocation of production burden.
 - (2) Thayer presumption is almost always a trap.
 - (a) Heavy lifting is done by the presumption.
 - (i) Facts may not even reach B. But presumption pushes beyond C.
 - (b) Any contrary evidence can “pop” presumption (usually, even just a scintilla).
 - (i) Then P is back to where she was w/o the presumption at all.
 - (ii) Unless the D fights back, P gets a directed verdict (is beyond C).
 - (c) Whiplash for P – huge posture shift: at one moment contemplating directed verdict in her favor, at the next, directed verdict against her.
 - (3) **Thayer presumption is merely a complicated way of shifting the production burden.**
 - (a) All the Thayer Presumption does is say that PF must be presumed as true, absent contrary evidence → i.e., shifts the production burden.
 - (b) But important difference b/w Thayer Presumption vs. shift in production burden:
 - (i) Thayer pops with a scintilla—get directed verdict **AGAINST** the P.
 - (ii) Shifting production burden requires more evidence. D must put forward enough evidence to reach new production burden. If D's evidence is really weak, may still end up in CD range—get directed verdict **FOR** P. Or if evidence is decent, can end up in BC range—at least get to jury.
 - (c) If State A shifted production burden, and State B just used Thayer, on same evidence:

- (i) State A could result in directed verdict *for* P (b/c D didn't meet production burden).
 - (ii) State B directed verdict *against* P (b/c D "popped" the presumption).
 - (d) Totally crazy! This is why it's a trap. Would be better if we just clearly described how we want the production burden to work.
 - (4) **If not told otherwise, assume Thayer presumption.** Federal rules and most states use Thayer.
 - (5) How to get to the jury even if your Thayer pops:
 - (a) Can make argument that if Thayer pops, should demote to permissible inference. Cf. *Jessup*.
 - (b) This only works if it's a convenience presumption, not policy presumption. Let jury decide whether inherent linkage is convincing.
- ii) **Thayer Plus:** Same as Thayer, but requires "substantial evidence" to pop, not mere scintilla.
 - (1) Process:
 - (a) Moves to CD. Effectively shifts production burden. D rebuts with "substantial evidence."
 - (b) "Pops" the presumption. Parties go back to where they were before.
 - (c) Does NOT affect persuasion burden. Remains with P.
 - (d) Tell NOTHING to the jury. This is still just a stronger shift of production burden.
 - (2) NY is the only state with a Thayer Plus.
 - (3) Determining amount of "substantial evidence" has proved unworkable.
 - (4) Prof thinks can give content by:
 - (a) "Substantial evidence" = amount that would satisfy a shifted production burden
 - (i) Don't "pop" unless would have been enough to satisfy production burden, if you had actually shifted it.
 - (ii) Courts don't usually phrase it like this—usually talk about "substantial evidence," etc.
 - (b) Allows judge to make credibility determinations – if just flat-out doesn't believe witness, can refuse to "pop" the presumption.
- iii) **Morgan presumption:** Shifts the production and persuasion burden.
 - (1) Process:
 - (a) Moves to CD. Shifts production burden.
 - (b) D can rebut, but requires more evidence (b/c persuasion burden has shifted too). C shifts to the left, i.e., is now at 49 instead of 51.
 - (c) Doesn't "pop" like Thayer, because persuasion burden remains on D.
 - (d) Jury instruction: "If find BF, must find PF, unless D rebuts by X standard of persuasion."
- iv) **Morgan Plus:** Guaranteed satisfaction of production burden.
 - (1) Not really a presumption. Does not shift production burden or persuasion burden.
 - (2) Policy judgment that a particular issue is so important it can only a jury can decide it.
 - (3) E.g., presumption of innocence in criminal trials.
 - (4) Process:
 - (a) Guaranteed to be in BC range. Goes to jury.
 - (b) Tell NOTHING to the jury – jury must simply find PF.
- 6) Two reasons to have presumptions:
 - i) Policy
 - (1) Social desire to assist one side of litigation.
 - (2) No intrinsic link b/w BF and PF – just want to help one litigant.
 - (3) If it's a Thayer and it "pops," might go back to AB area, b/c BF has no probative value in itself.
 - (4) Note: Unconstitutional in criminal case! Can't help government establish facts.
 - ii) Convenience
 - (1) Strong inherent evidentiary link b/w BF and PF.
 - (2) Litigant *could* prove PF, but would be very difficult and expensive.
 - (3) Even if presumption is rebutted, BF is still inherently probative of PF in itself. Can still be important element in evidentiary soup as P tries to meet production burden.

- (4) Must examine inherent strength of the link! Especially in criminal case, inherent evidentiary link must be so strong that confident of PF beyond reasonable doubt, based only on finding BF.

7) Permissible inferences

- a) BF permits but does not compel finding PF. Must evaluate the inherent strength of PF.
- Just a reminder to the jury that existing fact standing alone is enough to satisfy persuasion burden.
 - Both judge and jury consider rebuttal evidence against permissible inference. Never “pops.”
- b) Process:
- Moves to BC. Never CD. It satisfies but does not shift production burden. Goes to jury.
 - Possible for D to rebut with contrary evidence and push back to AB. Not guaranteed to get to jury.
 - Jury instruction: “If you find BF, you may if you wish find PF, but only if you believe PF beyond [persuasion standard].”
- c) Think of permissible inference as sliding scale. Its strength depends on how strong the actual inherent connection between BF and PF are. If inherent link is very strong, hard to produce enough contrary evidence to get back to AB.
- d) In criminal cases:
- Policy permissible inferences are not allowed.
 - Can’t catapult government into BC based on permissible inference that carries no inherent probative weight.
 - Convenience permissible inferences fall into two categories:
 - Where gov’t doesn’t have any other evidence: EVALUATE FACIALLY.
 - Rule: Evaluate link facially. Link itself must be strong enough to support BRD.
 - E.g., tax stamp cases. Marijuana 40% - not enough; Heroin 95% - okay.
 - Where gov’t does have other evidence: CUMULATE PROBABILITIES. *Ulster County*.
 - Rule: Test permissible inference “as applied,” in the soup with all the other evidence.
 - Cumulate inherent probability of the PI together with other supplemental evidence.
 - E.g., *Ulster County v. Allen*: Inherent strength of PI insufficient on its own. But when you add in other circumstantial evidence, can cumulate and creep toward B.
 - Note: It matters where B is!
 - In this category, difference b/w Hand and Friendly may be crucial—b/c gov’t is inching its way toward B. Matters whether B is shifted to B’.
 - Sometimes judges actually do assign mathematical probabilities to each element. If comes down in 60% range, say no jury could find beyond reasonable doubt.
 - Dilemma of jury instructions (in cumulation scenario):
 - Undervaluing: If tell jury NOTHING, risk *undervaluing* legislative intent.
 - Overvaluing: If tell jury they “may” find PF risks *overvaluing* persuasive weight of the evidence. Jury verdict should only be based on inherent weight of the evidence.
 - CANNOT use word “presume” – implies burden is shifting → automatic reversal.
 - Prof’s charge:
 - “If you find these facts, you MAY find these other facts, but only if you wish, and only if you find the inference beyond a reasonable doubt. You are entitled and indeed you should view all the other evidence in the case, along with the inherent link.”
 - Avoids undervaluing, b/c at least saying something.
 - Avoid overvaluing, by making quick curative BRD charge.
 - RT charge:
 - “If you find BF, you MAY consider it as evidence of PF, but you may only find PF if you are confident of PF beyond a reasonable doubt. In determining whether you find PF beyond reasonable doubt, you may and should consider the real-world likelihood of the link between BF and PF, together with all other evidence in the case. The burden of persuasion rests entirely upon the P to prove all elements against D beyond a reasonable doubt. The D has no burden to prove anything.”

2. PRESUMPTIONS IN CIVIL CASES

- e) **Hinds v. John Hancock Mutual Life Insurance (Maine, 1959), p. 1162**
- i) Double indemnity life insurance. P must prove NOT suicide to get second half of insurance proceeds.
 - (1) Law: P must prove death caused by violent, external, and *accidental* means.
 - (2) X = Not suicide. BF = Death. PF = Not suicide.
 - (3) Factual stew: H found dead: gun, bullets, contact wound, shot in temple, lots of alcohol; and no known motive for suicide.
 - (4) Note: Trial judge incorrectly excluded party admission. P said she saw husband shoot himself.
 - ii) Maine has presumption against suicide. Law tells us nothing more.
 - (1) Is it a permissible inference? Rebuttable presumption? Prima facie case?
 - iii) If permissible inference:
 - (1) Permissible inference and the contrary evidence battle it out.
 - (2) If inherent link is strong, gets beyond point B, goes to jury. Jury found for widow.
 - (3) If inherent link is weak, might be able to push all the way back to AB range.
 - (4) Note: Prof thinks presumption against suicide is pure policy—inherent probity is 0.
 - (5) If policy presumption, the judge/jury can wash out with enough contrary evidence.
 - iv) If Thayer presumption:
 - (1) Gets beyond point C → shifts production burden to the other side. Other side must come forward w/ contrary evidence tending to show suicide, or else face directed verdict.
 - (2) Then contrary evidence → pops the presumption → goes all the way back to AB → back to where you were w/o it, i.e., no evidence of accident → results in directed verdict for insurance company.
 - v) If Thayer Plus presumption:
 - (1) Contact wound is “substantial evidence” → pops the bubble.
 - vi) If Morgan presumption:
 - (1) Shifts persuasion burden—insurance company must prove suicide by preponderance.
 - (2) Presumption takes P to the CD area. Could get DV in her favor.
 - (3) Then insurance company must satisfy production burden, i.e., move back to BC (or even AB).
 - (a) C moves left slightly (b/c persuasion burden is now at 49, instead of 51).
 - (b) Need enough evidence such that reasonable juror could find that, by a preponderance of the evidence, H committed suicide.
 - (4) Prof thinks contact wound is enough to get back to AB again → directed verdict against the widow. (Satisfies Moran presumption.)
 - (a) Remember: Doesn’t “pop” like Thayer, b/c persuasion burden is always there.
 - vii) If Morgan Plus presumption:
 - (1) This is the only way the widow can win. (We know the jury found in her favor—sympathetic.)
 - (2) Morgan Plus presumption guarantees that she gets to the jury. Policy judgment that something is *so* important, must be found by jury.
 - (3) But Suicide isn’t that important.
 - viii) HOLDING: Evidence was incontrovertibly in the AB range. There was but one possible verdict.
 - (1) Either P must return the \$9,000 voluntarily, or will require new trial.
 - (2) Note: It appears court applied Thayer or Thayer Plus here. Persuasion burden never shifted, and presumption “popped” under weight of contrary evidence.
- f) **United States v. Jessup (1965), p. 1174**
- i) Bail Reform Act
 - (1) In simple cases, replaces money bail with a promise.
 - (2) In serious cases, creates presumption as a means of denying bail.
 - (a) Mechanism: If indicted of A-level drug felony (i.e., kingpin), it shall be presumed that you are a risk of flight (which is one of the significant elements of denying bail).
 - (3) Statute doesn’t tell us what type of presumption it is (though can’t be a Morgan Plus).
 - ii) Framework:
 - (1) X = Risk of flight. BF = Convicted Kingpin. PF = Flight Risk.
 - (2) No jury. AB and CD: decisions as matter of law. BC range: decisions as matter of fact.
 - (a) AB – no reasonable person could find flight risk.
 - (b) CD – no reasonable person could fail to find flight risk.
 - (c) BC – can find flight risk by preponderance.
 - iii) Defense argument:

- (1) 8th Amendment guarantees bail. Can only be denied if risk of flight.
 - (2) Something that presumes flight risk essentially shifts burden of proof to the other side.
 - (3) Due Process requires the government to prove why they have to lock you up.
 - (4) Don't need proof beyond reasonable doubt – but surely up to the government to prove, not the D arguing the other way.
- iv) Dilemma:
- (1) If Thayer → BRA is either unconstitutional or a joke.
 - (a) Unconstitutional: Moves into CD. Shifts production burden. If Defendant remains silent, bail denied. Violates 5A right to remain silent by requiring D to speak to avoid “directed verdict.”
 - (b) Useless: If D simply says, “I won't run away,” pops bubble. Presumption disappears.
 - (2) If Morgan → BRA is unconstitutional.
 - (a) Moves into CD. Shifts production and persuasion burden.
 - (b) If D remains silent, bail denied. Fails to satisfy production burden.
 - (c) But even if D says, “I will not,” not good enough—still denied.
 - (d) Now persuasion burden is on D: D must put forward enough evidence to show more likely than not that he's NOT a risk of flight.
 - (e) This is unconstitutional: can't put persuasion burden on D. Shifts persuasion on important element of bail, and may violate 8th Amendment and due process.
- v) Breyer's Solution:
- (1) Doesn't shift persuasion burden (i.e., not a Morgan).
 - (2) Demotes it to something less (not clear exactly what).
 - (a) Maybe creates a permissible inference (puts in BC range);
 - (b) Maybe just a reminder to judge, like Congress whispering in his ear, that previous conviction should be treated as risk of flight. Just a precatory statement.
- vi) Prof's critique: “Wink and nod” act by Congress.
- (1) If truly just a “reminder” to the judge, then don't need a federal statute to do that. This will be a “sub rosa whisper” to the judges – Congress is telling judges what to do, even though realize can't technically tell them what to do.
 - (2) Similar to Breyer's way of saving the guidelines in Booker – demotes from being mandatory; just precatory—wink wink. Does that violate Winship? Judges still follow the Guidelines.
 - (3) Is there a significant difference b/w de facto and de jure rules?
- vii) Lesson from Jessup:
- (1) By shrinking the presumption into something else, can sometimes save it.
- g) **O'Dea v. Amodeo (CT 1934) p. 1183**
- i) Automobile accident. Claim on insurance policy. Only covered if car used w/ permission of owner.
 - ii) X = permission to use car.
 - (1) Hard to prove, e.g., if owner is dead and no past routine of lending to the person.
 - (2) Will result in directed verdict *against* P if you require him to prove it.
 - iii) Possible legislative solutions:
 - (a) Create a presumption of permission, e.g., if owner is in car with the driver.
 - (b) Put production burden on the insurance company—it must come forward w/ evidence of *lack* of permission.
 - (c) Make permission a permissible inference.
 - (d) Remove permission as necessary element—car should be insured, regardless of who is driving.
 - iv) Connecticut legislature creates a presumption.
 - (a) “Family Car presumption” – if car is in residential use by family, presumption that all family members have permission to use car. ... and shall impose on D burden of rebutting presumption.
 - v) Trial court set aside jury verdict for D
 - (a) Seems to apply Thayer → leaves persuasion burden untouched. Says P could not win even if jury disbelieved D's witnesses.
 - (b) Shows why Thayer is a trap.
 - vi) Supreme Court interprets statute as Morgan.
 - (a) Peculiarly within knowledge of D.

- (b) Legislature, by adding requirement that D rebut, must have intended further effect than mere requirement that D produce any countervailing evidence.
- (c) Further, can't attribute too much nicety to legislature's choice of language—they don't know.
- (d) Therefore, P should have benefit of presumption until D *disproves* permission.
- vii) Result: Reversed; Judgment should be entered in accordance w/ jury's verdict.

h) **TX Dep't of Community Affairs v. Burdine (U.S. 1981), p. 1189 (J. Powell)**

- i) Title VII case. Employment discrimination. Requires proof of discriminatory intent.
- ii) X = discriminatory intent.
 - (1) Need to look inside people's heads to find motive. Very hard to determine; but very important, b/c ascribe harsh legal consequences to having something bad in your head.
 - (2) In early days of Title VII, Ps kept losing. Could show they were qualified applicants, but couldn't demonstrate discriminatory intent. Couldn't reach BC. DV against them.
- iii) MacDonald-Dougllass: Created a presumption of "impermissible discriminatory intent" if:
 - (a) Membership in protected group;
 - (b) Qualified for the job;
 - (c) Apply for the job and denied; and
 - (d) Job stays vacant, or is filled by someone who is *not* a member of protected group.
- iv) Issue: What type of presumption is it?
 - (a) P's argument: Morgan Presumption
 - (i) Policy judgment that once there's a little smoke (the 4 factors) persuasion burden should shift to prove that there's no fire (given social policy of eradicating discrimination).
 - (ii) If P can show those 4 things, both production and persuasion burden shifts to D. Gets her to CD range. Then D must produce enough evidence to *prove* absence of discrimination.
 - (b) D's argument: It's Thayer only.
 - (c) Could also make it a permissible inference.
 - (i) Gets to BC—goes to jury. It's permissible to find PF, but not mandatory.
 - (d) Courts were using all three after McDonald-Dougllass.
- v) HOLDING: It's a Thayer. This remains the law.
- vi) This has helped Ps a ton!
 - (a) Thayer presumption unlocks the door to the evidence. Makes D at least say something.
 - (b) In absence of Thayer presumption, D would simply remain silent. Tactic would be just to stonewall, not say anything at all.
 - (c) Thayer presumption alters these tactics. Has acted as a huge can opener to get the facts out.
 - (i) Some Ds just tried to hiccup, offer hardly anything, to just "pop" the presumption.
 - (ii) But good judges would then demote to a permissible inference—at least get before jury—everything will come up. B/c inherent strength of link b/w BF and PF.
 - (iii) So Ds learned to bring out all their best evidence to try to push the evidence back to the AB range, escape jury.
 - (iv) So long as facts are getting sucked out, no reason to shift the persuasion burden

3. PRESUMPTIONS IN CRIMINAL CASES

- i) Intro: Whenever there is a presumption in a criminal case,
 - (1) It must be a permissible inference, not a true presumption;
 - (a) Otherwise would violate 6A (allow directed verdict), 5A (would have to speak to "pop"), and DP/Winship (convict w/o real evidence).
 - (2) Must analyze the inherent linkage b/w BF and PF to see if legitimate.
 - (a) Policy inference is unconstitutional → violates DP (convict w/o real evidence).
 - (b) If no other evidence, evaluate inherent strength facially → must meet BRD.
 - (c) If supplemental evidence, evaluate strength "as applied" with other evidence. Ulster.
 - (i) But link must still be inherently probable, i.e., at least more likely than not.
 - (ii) Remember: Legislating about the link cannot alter its strength. Violates DP to create artificial boost for P in proof.

j) **Tax Stamp Case (Turner v. United States)**

- (1) Federal law: Essential element of drug prosecution is importation.
 - (i) Creates presumption: If found in possession of drugs, *presume* that it had been imported.
 - (ii) X = importation; BF = possession; PF = importation.
- (2) If defense lawyer, you want to contest this evidentiary connection:
 - (i) Look up the importation stats v. domestic stats.
- (3) E.g., for marijuana, if 40% is imported, and 60% domestic, then
 - (i) Argument: Can't satisfy production burden based on permissible inference that isn't even more likely than not, much less could a jury find beyond reasonable doubt.
 - (ii) This is a false link—no inherent probability to the link. Can't satisfy reasonable doubt standard. Probably can't even satisfy beyond reasonable doubt.
 - (iii) Supreme Court knocked out the marijuana presumption.
- (4) E.g., for heroin, if 95% imported, only 5% domestic, then
 - (i) This permissible inference is OK—this is a presumption of convenience. Jury could find beyond reasonable doubt.
 - (ii) Supreme Court sustained the heroin presumption.
- (5) E.g., for cocaine, if 75% imported, and 25% domestic, then
 - (i) Friendly: reasonable jury can't find something beyond reasonable doubt if only 75% likely. But note: Jurors are different—who knows what a “reasonable doubt” is to each person.
 - (ii) Hand: persuasion burden doesn't shift production burden—would probably find this permissible inference OK.
 - (iii) Supreme Court doesn't know what to do with cocaine presumption.
 - (iv) Note: Don't need the “federalism hook” of the importation tax stamps anymore—drugs have enough effect on interstate commerce that feds can regulate—would be better to just remove from statute. But so long as in there, must look at the inherent probabilities.
- (6) Remember: Whenever there is a presumption in a criminal case, (1) it must be a permissible inference; and (2) must analyze the inherent linkage b/w BF and PF to see if legitimate.

k) **County Court of Ulster County v. Allen (U.S. 1979), p. 1196 (J. Stevens)**

- i) Facts:
 - (a) Police stop car for speeding. 4 people in car. 3 men, 1 girl. Owner not present.
 - (b) 2 handguns in plain view positioned cross-wise in open handbag in front seat.
 - (c) Girl admitted the handbag was hers. Other Ds denied possession.
 - (d) Machinegun and heroin in locked trunk, for which none of the Ds had a key.
 - (e) All four charged with possession of the handguns, the machinegun, and heroin.
- ii) NY Statute created presumption of common possession:
 - (a) The presence of firearm in vehicle is presumptive evidence of its illegal possession by all persons occupying the vehicle (unless on someone's person).
 - (b) Note: Can't be true presumption, b/c criminal. Must be permissible inference.
- iii) Set-up:
 - (a) X = possession.
 - (b) BF = item is in the car.
 - (c) PF = everyone in the car possesses the item (has dominion and control over it).
- iv) Jury verdict:
 - (a) Convicted all Ds on possession of handguns in purse; acquitted all Ds on trunk contents.
- v) 2nd Cir. holds permissible inference is unconstitutional on its face.
 - (a) Rules for defendant – strikes down the statute. Agrees w/ D's argument:
 - (b) Permissible inference is unconstitutional b/c doesn't have sufficient probative link.

- (c) Government is not allowed to artificially catapult itself beyond AB with presumptions that don't carry inherent probative weight. Permissible inference is insufficient on its face.
- vi) Supreme Court (Stevens, J.) reverses 2nd Cir., affirms conviction:
 - (a) One reason: Jury was sophisticated—acquitted on everything in trunk, convicted on everything in car—obviously not just blindly following the presumption.
 - (b) Should not evaluate permissible inference “on its face,” but rather “as applied.”
 - (i) “As applied to the facts of this case, the presumption of possession is entirely rational.”
 - (c) **So long as link has inherent probability, can cumulate with other evidence of PF.**
 - (i) Some language indicates DP only requires link be inherently probable, i.e., 51% or more.
 - (ii) Anytime BF makes PF more likely than not, creates a “rational connection.”
 - (iii) So long as there is a “rational connection,” can add it to the evidence soup with everything else to see if it adds up to BRD.
 - (d) Here, there were other facts indicating common possession.
 - (i) E.g., handbag in plain view, guns awkwardly shoved in.
 - (ii) All together, presumption + other evidence can add up to BRD.
- vii) **Rule: If there is other evidence of PF, test a criminal PI “as applied,” not just on its face.**
 - (1) Divides criminal presumption cases into two very different categories:
 - (i) Where gov't doesn't have any other evidence – test presumption facially.
 - 1. E.g., the tax stamp cases, where government has no other evidence to supplement.
 - (ii) Where gov't does have other evidence – cumulate inherent probability of the PI, then add to all the other stuff.
 - 1. In this category, difference b/w Hand and Friendly may be crucial—b/c gov't is inching its way toward B. Matters whether B is shifted to B'.
 - 2. Sometimes judges actually do assign mathematical probabilities to each element. If comes down in 60% range, say no jury could find beyond reasonable doubt.
 - 3. E.g., assume inherent link in the PI is 52%. Not enough on its own.
 - 4. But also, everyone was looking at it. Add 18%.
 - 5. Other contents in handbag seemed unrelated. Add another 5%.
 - 6. Ask: If you cumulate all the evidence, will they add up to enough.
- viii) Critique:
 - (a) Dissent (Marshall, J.):
 - (i) Court makes inference irrelevant. Valid so long as enough evidence to convict anyway. In which case, don't need inference.
 - (ii) Allows jury to reinforce strength of inference based on other evidence adduced → effectively double-counts the evidence. Double-counting dependent variables.
 - (b) What is the point of the statute? Having the BF already provides some inherent evidence of common possession. What does passing a statute add to it?
 - (c) How can you craft jury instructions that properly convey their role, given this new framework? What do you tell them?
 - (i) One argument: Tell them nothing. Just tell them it was in the car. Let them infer common possession.
 - 1. Critique: Undervaluing the legislature's decision.
 - (ii) Then instead: If you find BF, you “may” find PF.
 - 1. Prof thinks CANNOT use the word “presume” – that implies the burden is shifting – if say “presume,” automatic reversal.
 - 2. But say “may if you wish” infer that possessed by everyone in the car.
 - 3. But then risk overvaluing the persuasive weight.
 - (d) Stevens sets up the horns of a dilemma:
 - (i) Either undervalue legislative intent.

- (ii) Or overvalue persuasive weight of the evidence, when jury is supposed to only operate based on the inherent weight of the evidence.
- (e) Need to draft charge that:
 - (i) Avoids undervaluing by at least saying something.
 - (ii) Avoids overvaluing by emphasizing must find PF beyond reasonable doubt.
- (f) Prof's charge:
 - (i) "If you find these facts, you MAY find these other facts, but only if you wish, and only if you find the inference beyond a reasonable doubt."

4. JURY CHARGES

- a) Intro:
 - i) Never say "presume" or "rebut" → indicates burden is being shifted to D. *Francis*.
 - ii) Very quick Winship instruction can sometimes cure → result in harmless error. *Rose*.
- b) **Sandstrom v. Montana (SC 1979), p. 1213 – presumption of malice**
 - (1) Homicide case. Jury charge: "Law presumes that a person intended the ordinary consequences of his act." BF (homicide) → PF (malice).
 - (2) This is the same as *Mullaney*. Violates *Winship* b/c reasonable jury could believe that burden of persuasion has been shifted to D. And didn't even say rebuttable.
- c) **HYPO – permissible inference of malice:**
 - (1) After *Mullaney*, suppose Maine legislature converted the presumption of malice into a permissible inference.
 - (a) If BF (homicide), may if you wish find PF (malice).
 - (2) Valid?
 - (a) If no other evidence, but just PI alone? I.e., may find malice, based solely on existence of homicide. Is linkage sufficiently strong?
 - (b) This hypo never exists, b/c there's always SOME other evidence re malice, even if just the nature in which crime committed. No prosecution would admit they have NOTHING else. So it's almost always an Ulster situation (where there's other evidence).
 - (c) But useful thought experiment, b/c forces you to evaluate the probative value of that link.
 - ii) REMEMBER: Legislating about the link can't increase the value of the link—can only be based on the real link itself. Artificial boost violates DP.
 - (a) Prosecutors resist this claim. Undervalues the inference. B/c jurors will feel they aren't allowed to make this inference, unless they are told that they may.
 - (b) Defense attorneys counter. Overvalues the inference. Telling jurors they *can* make the inference suggests that they *should*.
 - (c) Way to give a charge to the jury: Tell them they *may* make the inference. But in the very next sentence, tell them they shouldn't do it unless they find the link beyond reasonable doubt.
- d) **Francis v. Franklin (U.S. 1985), p. 1211 (J. Brennan) – rebuttable presumption of malice**
 - (1) Facts: Convict escapes from dentist's office, kidnaps dental assistant. Tries to get a car. Goes to one house, resident doesn't have a car. Goes to the next house, holds up gun and demands car, guy slams door on him. Gun goes off, bullet goes through door, kills the man. Then wife and adult daughter both appear, both refuse car and run away, D doesn't try to shoot them.
 - (2) Jury instruction: "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted."
 - (i) This is *Sandstrom* + rebuttable language + earlier reasonable doubt charge.
 - (ii) *Sandstrom*: Did the same thing as *Mullaney*. Shifted burden to D. And didn't even say rebuttable. Here, the instruction had both reasonable doubt and presumption language.
 - (3) Supreme Court: Here you have an impermissible instruction, per *Sandstrom*, coupled with a good instruction, per *Winship*. The best you can hope for is a very confused juror. Violates DP.

- (i) Juror may have understood as creating mandatory rebuttable presumption. Not OK.
 - (ii) Language that merely contradicts an infirmity does not suffice to absolve the infirmity, unless it explains which of the contradictory instructions carries more weight.
- (4) Most instructions these days:
- (i) “You may if you wish infer intent, b/c usually people intend natural and probable consequences of their actions. However, you may only do so if you find the inference beyond a reasonable doubt.”
- (5) RT charge:
- (i) Inference: “You may, if you wish, infer intent from the defendant’s actions, if you believe beyond a reasonable doubt that his actions indicate he intended the natural or probable results of his actions. However, you may not simply presume this intent. Rather, you should be satisfied of the certainty of this inference BRD.”
 - (ii) Reasonable Doubt: “The burden is upon the State to prove to a reasonable and moral certainty and beyond a reasonable doubt every material allegation in each count of this indictment, and there is no burden on the defendant to prove anything. The burden is entirely on the State. If from consideration of the evidence or lack of evidence, you are not satisfied BRD that State has established the guilt of the defendant, it is your duty to acquit him.”
- e) **Rose v. Clark (1986), p. 1231 – harmless error**
- (1) Charge to jury: All killings are presumed to be malicious, but that presumption is rebuttable. Then followed by a very good Winship instruction.
 - (2) Standing alone, the first part of charge would violate Sandstrom.
 - (3) But when follow it very quickly w/ very strong reasonable doubt charge, even though first part was erroneous, it was harmless error.
 - (4) NEVER say “presumed” or “rebutted” b/c indicates you are shifting something.
 - (5) BUT: can be harmless error, by countering w/ strong reasonable doubt charge.
 - (6) Court finds that it’s possible that a judge could find harmless error—remands.
 - (7) Note: The test for harmless error is that beyond reasonable doubt did not affect outcome. Ironic—must do your own reasonable doubt determination about the effect.
- f) **Hypo – Harmless Error:**
- (1) What if judge eliminated jury and right to counsel, on basis it was harmless error, b/c evidence so overwhelming against D?
 - (2) Can’t do this for basic structural rights.
 - (3) Per se rules: deprivation of counsel or jury CAN’T be harmless error.
 - (4) But then: Doesn’t a charge about reasonable doubt go to the very structure of the criminal justice process too? Why is a reasonable doubt charge waivable, essentially, for harmless error, but not for assistance of counsel?
 - (5) Ask yourself: Whether a Winship charge is EQUALLY structurally necessary in a case, such that it CANNOT amount to harmless error.

II. HEARSAY

Hearsay Rule: Out-of-court statement offered for the truth, cannot be used as evidence. Must bring the person into court, and allow that person to be cross-examined.

A. DEFINITION

Fed. R. Evid.

Rule 801. Definitions

The following definitions apply under this article:

- (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

- (b) Declarant. A "declarant" is a person who makes a statement.
- (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
-

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

1) Psychological Model

- a) Based on 19th century Gestalt psychology.
- (1) Objective reality out there in world.
 - (2) Observer perceives it; perfect picture will appear in mind. ← perception, memory.
 - (3) Observer tells someone about it; download into words and describe. ← ambiguity, veracity.
 - (4) Listener hears the statement; creates picture in her mind. ← perception, memory.
 - (5) Listener can tell the fact-finder; download it into words. ← ambiguity, veracity.
 - (6) Fact-finder hears the statement; creates picture in her mind.
 - (a) Note: What jury hears depends on their life experiences. Important to have cross-section of society in the jury. This is a Con Law issue.
- b) How can communication break down (4 legs of hearsay rule)
- i) Input Leg (where take in the impression);
 - (1) **Perception:** Could have inaccurate perception
 - (2) **Memory:** Memory could fade/change so no longer remember the objective reality correctly
 - ii) Output Leg (communication to listener):
 - (1) **Ambiguity:** Inaccurate transmission of objective reality.
 - (2) **Veracity:** Lying.
- c) Hearsay problem
- i) For usual testimony, jury is the second-level listener.
 - (1) Witness is primary observer.
 - (2) Can test perception, memory, expression, veracity through cross-examination in court.
 - ii) Hearsay adds another level.
 - (1) Same four problems arise all over again.
 - (2) Can't access the input and output legs of the original statement.
 - (3) Can cross-examine the witness in court to death. But can only prove he's accurately reporting the statement. Can't tell you anything about whether the statement accurately reflected reality.
 - (4) **Remember: Credibility of witness is never a hearsay issue.** No ex ante decisions about credibility of witness, even if enormous motive to lie. Addressed through aggressive cross-examination.
- d) **Five Key Components of Hearsay:**
- (1) **Declarant:** Out-of-court person who perceived the objective reality.
 - (2) **Witness:** Person who heard what the declarant said and is in court and able to be crossed.
 - (a) Note: If witness and declarant are same person → special rules.
 - (b) If "witness" is technology, e.g., videotape, must be "authenticated." But newspaper articles can't be—only hearsay.
 - (3) **Proponent:** Party who is putting the testimony into court.
 - (a) Can affect the hearsay rules, e.g., party admission.
 - (b) If proponent is P in criminal matter, always consider Confrontation Clause problems.
 - (4) **Statement:** What was said or conveyed.
 - (a) Can be speech, action (e.g., pointing), or silence (e.g., Mrs. Bill).
 - (5) **Purpose:** Inference that proponent wishes fact-finder to draw from the statement
 - (a) If for the truth, then hearsay; inadmissible unless exception applies.
 - (b) If relevant for some reason *other* than for the truth, not hearsay, because then witness is actually a first-level observer.

- (i) Statement admissible. But not admissible as substantive evidence to satisfy burden.
- (ii) Curative jury charge not to consider for the truth – but hard to ignore skunk in jury box!
- (c) Always ask whether the purpose requires passing through the mind of the first observer.
Watch out for reverse-engineering of reality!

e) Criminal vs. Civil

- i) Hearsay rules are the same in criminal and civil. But concerns are different.
- ii) Concentric circles of concern about hearsay (emanating outward);
 - (1) Criminal (loss of liberty at stake)
 - (2) Civil
 - (3) Civil tried by judge (no risk of jury confusion)
 - (4) Preliminary injunction hearings (lenient hearsay rules)
 - (5) Administrative hearings
 - (6) Legislative hearings
- iii) Remember: Hearsay rule can skew system toward less credible evidence.
 - (1) E.g., exclude upstanding son's statement in Leake, but allow sleazy live witness on stand.
 - (2) Price of requiring all of our drama to appear "on stage" in the courtroom.

f) Roadmap of Hearsay Rules (go in this order)

- (1) 801(c) – Definition of Hearsay → has to be for the truth (this is where you can get in things that aren't for the truth, e.g., verbal impact statements, inconsistent statements for impeachment, etc.)
- (2) 801(a) – Definition of Statement → must be assertion.
- (3) 801(d)(1) – Prior Inconsistent/Consistent Statements for the truth (W must be present)
- (4) 801(d)(2) – Admission (only admissible against the party)
- (5) 804 → all of the 804s require UNAVAILABILITY (b/c they're all "next best")
 - (a) Based on inherent strength of *output* leg. Therefore, require unavailability, b/c we'd rather cross-examine you if we could. These are "second best."
 - (b) 804(b)(1): prior reported testimony;
 - (c) 804(b)(2): dying declarations;
 - (d) 804(b)(3): declarations against interest
- (6) 803 → the 803s DO NOT require unavailability.
 - (a) Based on inherent strength of *input* leg. Therefore, it's the best testimony available, even better than in-court testimony today.
 - (b) 803(1): Present Sense Impression
 - (c) 803(2): Excited Utterance
 - (d) 803(3): Mental State or Physical Condition
 - (e) 803(4): Seeking Medical Treatment
 - (f) 803(6)-(7): Business Records
 - (g) 803(8): Public Records
- (7) ALWAYS REMEMBER CONFRONTATION IF CRIMINAL!

2) **Non-Hearsay**

- a) Three main categories of statements not offered for the truth:
 - i) **Verbal Impact Statements**

- (a) Mere fact that statement was made is what matters. Utterance was heard by someone else, thereby changing legal landscape.
 - (b) **Test: Assume it's a total lie → would it still have the legal significance?**
 - (c) E.g., warning. Only relevance of the statement is whether it was *made*, not whether it was accurate. E.g., Safeway Stores v. Combs (ketchup puddle warning).
 - (d) E.g., threats. Relevant to, e.g., motive, self-defense.
 - (e) E.g., being put on notice for negligence.
- ii) **Statements of Independent Legal Significance**
- (a) Making of the statement has independent legal significance—creates a legal reality.
 - (b) Whether a statement has independent legal significance depends on substantive law.
 - (c) E.g., “That’s your corn,” in Hanson v. Johnson (passed title).
 - (d) E.g., slander/defamation, in Hickey v. Settlemier.
 - (e) E.g., acceptance. Utterance of phrase creates legal relationship.
- iii) **State of Mind (maybe better understood as Non-Assertive Statements)**
- (a) Statement lets us infer something relevant about the state of mind of the declarant.
 - (b) MUST be non-assertive, i.e., used circumstantially.
 - (i) Can only be drawing *inference* about state of mind.
 - (ii) An *assertion* about state of mind is hearsay, but might have an exception.
 - (c) **CANNOT be offered for the truth**, i.e., that state of mind was correct about world.
 - (i) Allows you to go inside declarant’s head. But can’t reverse engineer back out.
 - (ii) I.e., can’t draw inference that state of mind was *true*. E.g., Wright v. Doe.
 - (d) This is the most troublesome of the three types of non-hearsay.
 - (i) Requires going into the declarant’s head (unlike the other two).
 - (ii) Assumes away ambiguity and veracity problems.
 1. Ambiguity: Maybe declarant is being ironic.
 2. Veracity: Maybe declarant is trying to set up an insanity defense.
 - (e) Two different types of state of mind:
 - (i) When state of mind itself is the issue. E.g., “I am Napoleon.”
 - a. Not relevant to prove Prof is Napoleon. Just shows he’s crazy!
 - b. Just going inside declarant’s mind and staying there.
 - c. **Test: Must be able to build firewall b/w mind and reality.**
 - d. RT: Do these have to be non-assertive? Note on p. 492 indicates assertive state of mind statements are inadmissible as hearsay; only non-assertive state of mind statements admissible.
 - (ii) When using state of mind to make an inference about reality. E.g., kidnapping hypo.
 - a. But inference can’t be simply the truth of the statement.
 - i. E.g., “It’s a rainy day” NOT ADMISSIBLE to prove that it was a rainy day; can’t just claim you’re trying to show declarant’s state of mind that she thought it was a rainy day, which tends to show it was a rainy day....
 - b. Maybe better explained as **implied statements** (not worried about lying).
 - i. E.g., Evidence that declarant opened an umbrella IS ADMISSIBLE to prove it was a rainy day (except in NY). B/c it’s non-assertive.
 - c. “How else could she have known” state of mind cases:
 - i. Kidnapper Hypo (describe room → must have been there)
 - ii. Kinder (point to shed → must have seen uncle bury the goods)
 - iii. Muscato (describe sticky tape on gun → must be the same gun)
- iv) **Non-Assertive Statements (actually, another way of understanding State of Mind)**
- (a) Non-assertive statements: not an assertion of fact, or not offered to prove fact asserted.
 - (b) Rule: Declarant did not *intend* to assert what statement is being used to prove. Depends on subjective state of mind of declarant—whether intending to make an assertion or not. Note: If intentionally trying to subvert rule, then it is assertive.
 - (c) Admissible *for the truth* of the implication. E.g., Wright v. Doe (implied statement that believed uncle wasn’t crazy → would be admissible for truth that uncle wasn’t crazy).
 - (d) Problem: Can’t cross-examine output legs. Can’t test ambiguity or veracity.
 - (e) Examples:
 - (i) E.g., opening umbrella → implies it’s raining, but not trying to signal that to anyone.

- (ii) E.g., “put \$5 on the nose” phone call → implies it’s a bookie joint.
 - (iii) E.g., nephew’s letter about sea voyage → implies uncle is of sound mind. Wright v. Doe.
 - (iv) E.g., “D has a gun” → assertive re gun; but non-assertive re fear. Cf. Banks v. State.
 - (v) E.g., “Count the money” → “Verbal parts of acts” → utterances contemporaneous to non-verbal acts that relate to and shed light on that act.
 - (vi) E.g., kidnapping hypo might be better described as non-assertive statement.
 - (f) Admissibility:
 - (i) Common law jurisdictions do *not* admit implied statements (treat the same as express).
 - 1. E.g., Wright v. Doe.
 - (ii) Codification jurisdictions admit implied statements. Only exclude express statements.
 - 1. Fed. R. Evid. 801(a): “A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”
 - (g) Reliability analysis:
 - (i) Implied statements: HIGH ambiguity problem, but LOW veracity problem
 - 1. No self-conscious effort to describe the truth. Less chance of fabrication.
 - (ii) Express statements: HIGH veracity problem, but LOWER ambiguity problem.
 - (iii) Both have equal perception and memory problems.
 - (iv) Hearsay laws continually preference veracity over the other three possible infirmities.
 - (h) Note: This category may actually be a better way of understanding State of Mind.
- b) **Leake v. Hagert, p. 475 – classic hearsay**
- i) Rear-end tractor collision, statute that says tractor has to have light, both parties sue claiming negligence by other party, farmer’s son told insurance adjuster that light on tractor was out. Now son unavailable (at war). Insurance adjuster testifies at trial—says son told me the light was out.
 - ii) Analysis:
 - (1) Proponent: car driver (Hagert).
 - (2) Declarant: farmer’s son.
 - (3) Statement: Light was out.
 - (4) Witness: Insurance adjuster.
 - (5) Purpose: For the truth.
 - iii) Classic hearsay. Court says should have been excluded. But harmless error.
 - iv) Any way to have salvaged? NO.
 - (1) Written? No. Writing doesn’t help. Can’t cross paper. Still can’t test 4 legs of son’s statement.
 - (2) Oath? No. Same problem.
 - (3) Contemporaneous notes by insurance adjuster? No. Still can’t test son’s statement.
- c) **People v. Eady (Mich. 1980), p. 477 (squib case)**
- i) D raped V in car. D’s alleged defense was consent. V’s rebuttal of consent: struggled and honked horn for 30 minutes. Police officer got radio call from dispatcher that horn honking for 30 minutes. When arrived, no longer honking. Note: If honking still going on, then cop would be first-hand witness—no problem.
 - ii) Hearsay analysis:
 - (1) Proponent: Prosecution
 - (2) Witness: Police officer/radio
 - (3) Declarant: 911 caller.
 - (4) Statement: There is honking.
 - (5) Purpose of statement: To establish there really was honking (for the truth).
 - iii) There’s no way to get the statement in:
 - (1) It’s hearsay—not a verbal impact statement. And cop’s state of mind is irrelevant.
 - (2) Only way to get the statement in is to find the original declarant (the person who called 911 to report the honking). That’s very hard.
 - (3) This is one of the reasons why rape was so hard to prosecute for so long.
 - iv) Only possibility:
 - (1) Prosecution could try to make probable cause an issue in the case—offer the statement to establish probable cause for the cop’s actions. The jury gets to hear the statement. Will be given not to consider for the truth. But this charge will be meaningless—jury will consider.

- d) **Schaffer v. State (Tex. 1989), p. 477 (squib case)**
- i) D claimed not guilty b/c actually a government informant. Says he works with cop Jimmy Seals. Prosecution wants to rebut. But can't get Seals to court. Another cop calls Seals, and Seals tells him he doesn't know D at all. Cop tries to testify.
 - ii) Analysis:
 - (1) Declarant: Seals.
 - (2) Witness: Cop.
 - (3) Statement: That D was not an informant.
 - (4) Proponent: Prosecution.
 - (5) Purpose: To establish that D not an informant.
 - iii) Prosecution knows that it's inadmissible hearsay. So tells cop not to tell him what Seals said. Just says, "Based on your conversation w/ Seals, would you recommend dismissing charges against D." Cop says, "No."
 - iv) Held: Not allowed! This is just "backdoor hearsay"—really just reporting what Seals said.
 - (1) Watch out for Prosecution's trying to reverse engineer!
 - v) Hypo: Would this testimony be admissible?
 - (a) Did you talk to Seals? Yes.
 - (b) Did you ask Seals whether D was informant? Yes.
 - (c) Would you describe Seals's state of mind at end of conversation? He was furious, he was ranting!
 - vi) Inadmissible! State of mind irrelevant except as it reflects the truth. Must be able to build a total wall b/w the mind and the reality.
- e) **Central of Georgia Railway Co. v. Reeves (AL 1972), p. 480 – dr diagnosis (verbal impact statement)**
- i) Strict liability on-job injury. Issue is not liability—it's the scope of injury. Railway Co sends their doctor to examine P. Medical examiner says P's back is really bad, can't return to work. Note: There is a hearsay exception for medical records—so maybe could have gotten the medical records. We will learn later.
 - ii) Breakdown:
 - (a) Proponent: P.
 - (b) Witness: P.
 - (c) Declarant: Medical examiner.
 - (d) Statement: You're in bad shape.
 - (e) Purpose: **This is the issue.**
 - iii) If purpose is to show that P's back is bad:
 - (a) Clearly inadmissible—hearsay. Declarant's statement coming in for the truth.
 - (b) Note: No admission exception b/c doctor is not employee of D.
 - iv) P tries to claim **verbal impact statement**:
 - (1) Even if the statement was false, caused P emotional distress.
 - (a) Note: Only relevant if the railroad was somehow responsible for the statement. Not to the point of agency for admission, but the railroad made him go to this doctor—anything that the railroad's doctor said is relevant. If can link the doctor to the railroad, have plausible story to get the statement in. (And then jury will obviously consider for truth.)
 - (2) This is a verbal impact statement b/c impacts on the hearer in a way that creates legal consequences.
 - (3) Best way to test for verbal impact statement: Assume it's a total lie → would it still have the legal significance?
 - v) Alabama court excludes the evidence—says allowing statements to support mental anguish would "open door" too wide.
 - (1) But other states allow it as verbal impact statements. Doctor's statements admissible to show mental effect.
- f) **Safeway Stores, Inc. v. Combs (5th Cir. 1960), p. 486 – warning (verbal impact statement)**
- i) Slip-and-fall case. P slipped in ketchup. Issue: contributory negligence.
 - ii) Hearsay breakdown:

- (a) Declarant: Manager
 - (b) Witness: Manager's wife
 - (c) Statement: Please don't step in the ketchup.
 - (d) Proponent: Safeway.
 - (e) Purpose: That statement was made and overheard by P.
 - (i) Obviously not for the truth—we already know that there was ketchup on the floor!
 - iii) Can think of as verbal impact statement or independent legal significance.
 - (1) Fact that P ignored a warning has independent legal significance → negligence.
 - iv) Note: For cases tried in Alabama, lawyer would have problem:
 - (1) *Reeves* (state supreme court) indicates very narrow window for verbal impact statements.
 - (2) *Safeway* (5th Cir.) indicates much more lenient window for verbal impact statements.
 - (3) Which rule would apply, in a federal diversity case? Argument that evidence rules like civil procedure rules—apply federal rule, even if would come out differently using state rule.
- g) **Kingdon v. Sybrant (N.D. 1968), p. 482 – gossip (verbal impact statement)**
- i) Father disinherits his daughter. Daughter challenges will, saying Father was crazy to think she was illegitimate child of mother and paramour. Estate offers scandalous neighborhood rumors.
 - ii) Analysis:
 - (a) Declarant: Community gossips.
 - (b) Witness: Person who heard the gossip.
 - (c) Statement: There was widespread gossip about the affair.
 - (d) Proponent: Father's estate.
 - (e) Purpose: ****Issue****
 - iii) Purpose:
 - (a) NOT to establish the truth of the rumors, i.e., that affair really happened.
 - (b) BUT to show that Father was reasonable in believing the rumors (not an insane delusion).
 - (c) Inheritance rules say you can leave your property however you want, so long as you're not nuts. These rumors show Father was not nuts. Admissible.
 - (d) Clear dichotomy: totally inadmissible for the truth (neighborhood gossip), but definitely admissible for Father's sanity.
- h) **Hanson v. Johnson (Minn. 1924), p. 486 – “that's your corn” (independent legal significance)**
- i) Tenant-farmer mortgages his 3/5 of the corn crop. (2/5 of the crop belongs to the owner as rent.) Bank seizes a particular crib of corn and sells it to satisfy the defaulted mortgage.
 - ii) Issue: Who owns the corn?
 - (a) If Landlord owns it, bank has converted the property → must re-pay.
 - (b) If Tenant owned it, bank had a proper claim → it's OK.
 - iii) T gestured toward crib and said, “Here is your corn for this year.” LL wants to testify to that.
 - iv) Analysis:
 - (i) Declarant: Tenant
 - (ii) Proponent: LL
 - (iii) Witness: LL
 - (iv) Statement: That's your corn.
 - (v) Purpose: ??
 - v) HOLDING: Admissible. Not hearsay. Independent legal significance. The words assigning the share *created* the legal entitlement.
 - (a) Note: Whether statement has independent legal significance is unrelated to law of evidence → it's based on the substantive law of the dispute.
 - (b) E.g., Look up property law in Iowa. Rule: Oral statement of transfer of personal property, coupled w/ physical manifestation (e.g., pointing to crib), suffices to pass title.
 - vi) Note: LL's strong motive to lie (b/c in his interest) is not enough keep him off the stand. Cross-examination takes care of this.
 - vii) Hypo:
 - (1) If town pastor went to visit T, and T told town pastor, “My LL has always been good to me. That's his corn over there.”
 - (2) Town pastor is absolutely credible—no motive to lie, no one doubts his competence as witness.

- (3) For hearsay breakdown, everything is same as above, except the witness is now the Pastor.
 - (4) INADMISSIBLE → statement to third party is not enough to pass title in any state.
 - (5) Irony: This highly credible evidence is excluded; while the incredible evidence in Hypo 1 gets to come in.
- i) **Hickey v. Settlemier (Oregon, 1993), p. 484 – defamation (independent legal significance)**
- i) P sues for slander, stemming from 20/20 news show about P’s alleged animal abuse. Neighbor/godmother (D) made three allegedly slanderous statements. Slander – requires publication. 20/20 tape is offered in evidence.
 - (1) Statements #1 and #2 were broadcast directly on camera.
 - (2) Statement #3 was paraphrased by the reporter for the camera.
 - ii) Statements #1 and #2 → ADMISSIBLE. paradigm of independent legal significance.
 - (1) Analysis:
 - (a) Declarant: D.
 - (b) Witness: The videotape. (Note: Authentication is the substitute for cross-examination when technology is the declarant, rather than person; have to authenticate its ability to “perceive.”)
 - (c) Statement: P abused animals.
 - (d) Proponent: P.
 - (e) Purpose: Independent legal significance (fact of publication).
 - (2) ADMISSIBLE.
 - (a) Not being offered for the truth (P doesn’t want to prove that he beats the dogs!).
 - (b) Don’t care what D really believed. Here, the statements themselves have independent legal significance—just to show publication of the statements.
 - iii) Statement #3 → INADMISSIBLE. Reporter is just like the pastor in the *Hanson* hypo.
 - (1) Note: **This is double hearsay.**
 - (a) Witness 1: Videotape. → authenticated → competent witness to accurately depict report.
 - (b) Witness 2: Reporter.
 - (2) Hypo: If under substantive law, mere statement to reporter is “publication,” then Reporter becomes the witness to the statement of independent legal significance. Admissible? NO.
 - (a) Still can’t cross-examine the witness. Only appears on video. Need to cross-examine the input and output legs of both the witness and the declarant. Here, the input and output legs of the declarant don’t matter, if the statement had independent legal significance. But, can’t cross-examine the input and output legs of the witness. INADMISSIBLE.
 - (b) The fact that matters: That the statement was made.
 - (c) How do you know statement was made: Reporter says so.
 - (d) Can you cross-examine reporter? No.
 - (e) Have proof reporter said it, b/c on videotape. But can’t determine if statement was really said, and if it had the right accusatory aspect to it.
- j) **Banks v. State (MD 1992), p. 489 – V’s fear (state of mind as pretext for truth)**
- i) Criminal prosecution for homicide. Girlfriend stabbed boyfriend. D’s defense: self-defense (battered woman syndrome). He has assaulted her many times, and she was defending herself. D submits evidence of prior abuse by boyfriend. P submits evidence that D committed more prior abuse than V.
 - ii) Three statements:
 - (1) V’s telephone call to V’s mother the day before: “D is brandishing scythe.”
 - (2) V’s telephone call to V’s sister: “I need to move out b/c D so abusive.”
 - (3) Prior statements to police officers who responded to DV calls at house, where V said he was assaulted.
 - iii) Statement #1:
 - (1) Analysis:
 - (a) Proponent: State (remember Confrontation Clause!!)
 - (b) Declarant: Victim
 - (c) Witness: Victim’s Mother
 - (d) Statement: I’m being assaulted (assertion)
 - (e) Purpose: ** any way to tell a story to render statement useful that it be said, not that it be true?? **

- (2) Purpose:
 - (a) P's true purpose is to show D was aggressor, to rebut D's self-defense allegation.
 - (b) Note: A good judge would have hearing on burden of proof before letting jury hear this at all.
- (3) P's argument: Statement offered for V's state of mind (fear of D); not for the truth that D really was wielding the scythe.
 - (a) BUT V's state of mind (fear) is totally irrelevant! Only relevant if the fright was actually caused by reality, i.e., that she really was wielding the scythe.
 - (b) If you flip the facts, it would be relevant—D's reasonable fear matters to self-defense. Relevant that D was frightened the day before.
 - (c) Note: V's state of mind is only relevant if D claims suicide or accident.
- iv) Statement #3:
 - (a) Assertions → Inadmissible, just like Statement #1.
- v) Statement #2:
 - (a) Express vs. Implied statements. This is an implied statement of fear.
 - (i) "I am afraid." – express statement of fear.
 - (ii) "I want to get out of here." – implied statement of fear.
 - (b) Test: Ask whether declarant has to be *intending* to say what you're using the statement to say.
 - (c) Prof: Would be admissible as implied statement.
 - (d) BUT: V's state of mind is irrelevant. AND: Outweighed by prejudicial impact.
- vi) HOLDING: All statements were hearsay. Admitting was highly prejudicial. Reversed.
- vii) Hypo:
 - (a) Could mother testify to seeing a bruise on V's arm? YES, this is just first-party observation. Doesn't require going into V's head. (Note: If abuse of V were relevant.
- k) **State v. Gomez (Idaho 1994), p. 487 (squib case) – "Count the money" (verbal acts)**
 - (1) Rule: If question *could* elicit hearsay, judge should sustain objection, unless proponent can prove the out-of-court statement on which testimony is grounded is *not* hearsay.
 - (2) Cop's testimony: "Did you overhear any conversation indicating transfer of funds?" "Yes."
 - (3) If cop overheard factual assertions, then he is relating content/purport of hearsay → inadmissible.
 - (4) If cop overheard verbal acts, e.g., "Count the money," then he is only relating a conclusion he draw from non-hearsay statements → admissible.
- l) **People v. Green (Cal. 1980), p. 492 (squib case) – V's fear (can be relevant)**
 - (1) D charged w/ kidnapping & murder of wife (V). V's friend testifies that D threatened V's life.
 - (2) HOLDING 1: V's state of mind IS relevant here. Admissible on its face.
 - (a) Offered as circumstantial evidence of V's fear; not for the truth that D really made the threat.
 - (b) Relevance determined by substantive law. Kidnapping law: Must be against the V's will. Need to know if V would have accompanied D voluntarily.
 - (3) HOLDING 2: But D entitled to have statement excluded b/c limited probative value substantially outweighed by potential prejudice. Plus, jury instruction to consider for limited purpose can't cure; that's the bare minimum required, regardless of the probative/prejudicial balancing test.
- m) **Kidnapping Hypo**
 - (1) Kidnapped victim rescued—lived for a few days, then died. Police officer visited in hospital. V could not identify kidnapper (always wore mask). But perfectly described the room where she was kept. The room is D's room. State arrests D.
 - (2) Admissible as state of mind evidence (NOT hearsay).
 - (a) Inference: Only way she could describe this room so perfectly is if she were there. Only offering the statement to prove that she was there. Not to prove that the room really looked that way (that's independently established by other evidence). State of mind.
 - (3) State of mind is the most troublesome exception.
 - (a) Sometimes, only care about state of mind itself → e.g., insanity ("I am Napoleon").
 - (b) But here, allowing an inference back outside the mind. Only way she could describe this room so perfectly is if she were there.
 - (4) Need to cross-examine the cop—to make sure he's not making it up.
 - (5) And eliminate every other possible explanation (e.g., that cop didn't plant it).

- (6) But if do that, then admissible! Making an inference, and the inference is relevant.
 - (7) If this troubles you, figure out why.
 - (a) If don't think inference is strong enough → that just goes to probative value, not hearsay.
 - (b) If b/c can't cross-examine veracity and ambiguity on the output leg of declarant's statement → the same problem appears in the "I am Napoleon" case.
 - (8) Better explanation: This is a non-assertive statement.
- n) **Betts v. Betts (Wash. 1970), p. 494 note case – kid afraid of mommy**
- (1) Declarant: 5 yr old child; Witness: Foster mother; Proponent: Dad who wants custody; Statement: Mom's boyfriend killed my brother and he will kill mommy too.
 - (2) Dad's theory for admissibility: state of mind of child relevant for deciding if it is in her best interest to live with mother/boyfriend → valid analytically.
 - (a) Statement not being offered for the truth, it is being offered to show that child is afraid of mom and her boyfriend
 - (3) Question is if this is too prejudicial to let in?
 - (a) Have to weigh prejudicial impact v. probative value
 - (b) This determination is going to be colored by the equities → is D a bad guy?
- o) **Loetsch v. New York City Omnibus Corp. (494 note case) – predicting \$ to husband**
- i) Wrongful death action by husband for wife's death. Damages depend on pecuniary benefits he *would* have received, if W had lived. Ds introduce wife's will, where W calls H cruel and indifferent, leaves him only \$1.
 - ii) Declarant: Wife; Witness: Will (must be verified like videotape); Proponent: D; Statement: H sucks.
 - iii) Purpose: State of mind.
 - (1) Not relevant to show that H really was cruel and indifferent.
 - (2) Relevant to show W's state of mind that she didn't like her husband → then making prediction into future to predict how W would have behaved.
 - iv) Note: This could also be considered mental condition exception to hearsay, where being used to make predictions about hypothetical behavior.
- p) **Sollars v. State (494 note case) – setting up insanity defense**
- (1) Homicide case, D is claiming insanity and offers letters that he wrote while in a mental institution
 - (2) Declarant is D; Witness are the letters; Statement is nonsense about prez; Proponent is D; Purpose is to show state of mind (delusional)
 - (3) Problem with letting these in is you can't cross output legs, don't know if he wrote these letters b/c is truly delusional or if he is faking it (he knew letters going to be put in his file).
 - (4) This is problem with assertive/non-assertive line → you assume that the non-assertive statement is meant to be non-assertive but here if you can't cross then you don't know that for sure.
- q) **United States v. Reyes (1994), p. 494 – matchbook (culpable inference relies on hearsay)**
- (1) Cocaine conspiracy. 4 Reyes brothers agree to cooperate. 2 plead guilty and get very short sentence. 1 gets charges dismissed. Those 3 implicate older brother. That brother then implicates Stein. Evidence against Stein was impeccable.
 - (2) Only problem: Reyes won't be most credible witness—has prior convictions, and it will come out that he is getting leniency for testimony. Good lawyer will make Reyes look like cheap low-life trying to buy way out of jail. So prosecution wants to put in at least a little corroboration (so not relying 100% on 1 witness).
 - (3) Call the primary investigator—she tells very exciting story of the bust, including the tip, the scuba divers, the cocaine tube on the hull, etc.
 - (4) Introduces two pieces of evidence that cost the prosecution the conviction:
 - (a) Conversation b/w DEA agent and the 2 Reyes brothers.
 1. Prosecution asks if they implicated Rafael Reyes and Jeffrey Stein. She says yes. Note: not clear why Reyes brothers aren't testifying. Probably taking shortcut.
 2. Breakdown: Declarant: 2 Reyes brothers; Witness: DEA agent; Statement: They implicated D; Proponent: Prosecution.
 3. Purpose: If for the truth, classic hearsay.

4. Prosecution claims: it's only for state of mind of DEA agent—it was a verbal impact statement on the DEA agent, that affected her state of mind. Trial court accepts; allows evidence; instructs jury to only consider for DEA agent's state of mind.
 5. But DEA agent's state of mind is legally irrelevant. PC for the search is not an issue. It's only relevant to the narrative—helps explain why she pursued investigation as she did. But inference of whether DEA agent doing a good job or not is irrelevant.
 6. This is hearsay. DEA's state of mind is *only* relevant if it's actually true. (And note: these were assertive statements.) Trying to reverse engineer.
 7. But could possibly say it was harmless.
- (b) Matchbook w/ telephone numbers for 2 people in Colombia that Reyes was “to get in contact with,” plus Stein's address in Queens.
1. This matchbook *only* creates guilty inference if can connect Stein to Colombians.
 - a. Stein's address in Queens → independently verified → not relying on hearsay.
 - b. Colombian drug dealers → no independent verification → relying only on what Reyes had told DEA agent.
 - c. Here, relying only on DEA agent's hearsay statement for the damning connection.
 - d. Want to cross-examine the Reyes brothers! Their statement is what counts here!
 - e. Note: If can independently prove that the phone numbers were for Colombian drug dealers, then admissible circumstantial evidence. No problem. But if must rely on hearsay statement for that fact, then excluded.
 2. HOLDING: INADMISSIBLE. Clearly hearsay. Devastating corroborative evidence.
 3. And definitely not harmless. Highly prejudicial. This one is worse than #1.
 - a. Prejudice factors: (1) Does statement address important disputed issue at trial? Same info known through uncontested evidence?; (2) Statement made by knowledgeable declarant such that it will be credited by jury?; (3) Will declarant testify at trial, and thus submitted to cross-examination? If so, will he testify to the same effect as the out-of-court statement? Is out-of-court statement coming in anyway, through another exception?; (4) Can curative or limiting instructions effectively protect against misuse or prejudice?

r) **Wright v. Doe d. Tatum (1838), p. 500 – letters to decedent (implied statements)**

- (1) Effort to break a will. Will left huge amount of land to a commoner—would populate House of Commons w/ people who would vote for expanded franchise. Conservatives trying to break will. Liberals trying to uphold the will.
- (2) Argument: Testator must be crazy to leave all his land to his steward. Issue is his competence as testator. Created will in 1822 and 1825. Can break will if show he was crazy.
- (3) Trial court upholds the will. Appealed to House of Lords.
- (4) Result: Remand for new trial b/c lower court accepted inadmissible hearsay evidence.
- (5) Three principal disputed pieces of evidence:
 - (i) 1784 letter from cousin describing sea voyage.
 - (ii) 1786 letter from vicar to settle land dispute.
 - (iii) 1799 letter from relative clergyman thanking for favors.
- (6) Purpose: To show that Testator was of sound mind.
 - (i) Note: In a modern court, letters would be irrelevant. Mental competence in 1784-99 is useless to determine mental competence in 1822-25.
- (7) Lower court admits it, and cites it in opinion. T is eccentric, and had radical ideas, but competent.
- (8) Analysis:
 - (a) Declarants: The letter writers.
 - (b) Witnesses: The letters (the vehicle that carry the out-of-court statements into court).
 - (c) Proponent: Side trying to save will.
 - (d) Statement: That T is mentally competent.
 - (e) Purpose: For the truth.
- (9) Argument: Only admitting for letter-writers' *state of mind*.
 - (a) But: State of mind of the letter writers is irrelevant, except as it shows the truth.
- (10) Therefore, hearsay. Should reverse, result in new trial.

- (a) Family trying to break will wins. Gets new trial. Evidence excluded. Will breaks.
 - (11) What could proponent stand up and argue, as last resort?
 - (a) First, harmless error – there was other evidence showing competence.
 - (b) Second, implied assertions. This case is the beginning of the fountainhead of implied assertions.
 - (12) Implied assertions
 - (a) Nephew didn't write, "Dear uncle, I'm so glad you're of sound mind and capable of making wills." Instead, just described his sea voyage. Not trying to state what the evidence is being offered for.
 - (b) This is like the "umbrella" case—putting up your umbrella implies that it is raining—but not trying to signal to anyone that it's raining.
 - (c) **This is an implied state-of-mind statement offered for the truth.**
 - (13) Argument for implied vs. explicit statements:
 - (a) Implied statements have higher ambiguity risk, but lower veracity risk (lower likelihood of self-conscious lying). No difference on perception and memory legs.
 - (b) Explicit statements have lower ambiguity risk, but higher veracity risk.
 - (14) In most codification jxs now, only assertive hearsay excluded, but non-assertive hearsay admissible. If make this rule, expand the scope of admissible evidence dramatically.
 - (a) Many state of mind cases can actually be understood as non-assertive.
- s) **"Bookie Joint" Hypo**
- i) Cops bust into bookie joint—but all evidence gone. Then phone call, "Put \$5 on the nose of X."
 - ii) Not admissible as state of mind—b/c only relevant if true.
 - iii) BUT: this is an implied statement.
 - iv) Federal Rules require statement be assertive. Non-assertive is OK.
 - v) Problem: Can never cross-examine to figure out what declarant *really* meant to say.
 - vi) Beware assertive statements masquerading as non-assertive:
 - (1) What if someone who knows the rules tries to evade the rules, by making it sound implied, but actually is explicit. That's the problem. Never know if the guy at the other side of the phone is actually intending an assertive statement, but knows that he must do it as if it is implied.
 - (2) If you say, "I am Napoleon," in order to make me think that you are crazy, that is an ASSERTIVE statement.
 - vii) Assertive vs. Non-assertive line depends on subjective state of mind of declarant—whether intending to make an assertion or not.
- t) **Headley v. Tilghman (1995), p. 505 – "Can I come by?" (implied statements)**
- (1) Cops bust into "drug house," w/ a little bit of cocaine, some scales, money, etc. Not enough to show conspiracy to sell. D's pager goes off; cop calls back, Jamaican man says, "Are you up? Can I come by? Are you ready?" (This case is just like Prof's "bookie" hypo.)
 - (2) HOLDING: Admissible as non-hearsay. These statements were performative, operative, part of an act. Admissible as circumstantial evidence that beeper used to receive requests for drugs.
 - (a) BUT: Requires expert testimony to create the guilty inference. Statements on their own were innocuous (like matchbook in *Reyes*). E.g., Oguns – "Have the apples arrived yet?" – need expert to testify that "apples" means "cocaine."
 - (3) Critique:
 - (a) These statements were pretty ambiguous. This is the danger of the non-assertive line.
 - (4) Imagine four statements:
 - (a) "Thank you for busting the cocaine factory."
 - (i) Clear hearsay. Excluded.
 - (b) "Is the cocaine ready yet?"
 - (i) Non-assertive implied statement. May be admissible. This is the line.
 - (c) "Are you up? Can I come by? Are you ready?"
 - (i) Court admitted as implied statement. But what does it prove?? This is like the matchbook, absent evidence that the other phone numbers are drug dealers.
 - (ii) Only should be admissible if can provide evidence that speaking in "code" – e.g., Oguns – "have the apples arrived yet?" – need expert to testify that "apples" means "cocaine."

- (d) “Isn’t it a nice day?”
 - (i) Irrelevant. (Unless can prove code.)

u) **Regina v. Kearly (507 note case) (GB 1992) – opposite of Headley**

- (1) Breaking up drug den. Phone rings 7 times w/people asking if the stuff ready, can I up and get it, House of Lords excludes under strict application of Wright rule.
- (2) Compare *Kearly* and *Headley*: Which of the two rules makes more sense?
 - (a) *Wright* rule (non-assertive statements still hearsay) seems to be deflecting error in favor of D, BUT at the same time prohibiting credible, probative evidence.
 - (b) *Headley* rule seems more about deflecting error in favor of P → admits some thin evidence as in *Headley* but then gets in all the probative stuff that *Kearly* doesn’t allow.

v) **Silver v. New York Cent. RR Co (Mass. 1952), p. 510 (note case) – silence as implied statement**

- (1) Train car got stuck in Cincinnati overnight on cold night. P sues RR for injury. RR puts porter on stand. Testifies that other passengers did not complain about cold.
- (2) Purpose:
 - (a) If only goes to question of notice to RR → admissible.
 - (b) But here, it’s for the truth, i.e., that it wasn’t cold → depends on jx.
- (3) In *Wright* jx → silence treated as hearsay, excluded.
- (4) In *Headley* jx (most U.S. states) → silence treated as non-assertive, admissible.
- (5) Case Holding: Admissible if circumstances of P and other passengers were substantially the same and porter was available to receive complaints.
- (6) Critique:
 - (a) Silence is admissible. But passengers’ sworn affidavits stating “It’s not cold” are not. Crazy!
 - (b) Huge ambiguity problems in admitting silence as testimony.

w) **Kinder v. Commonwealth (1957), p. 510 – pointing at shed (non-assertive, non-verbal statement)**

- (1) Owner of coal mine sees truck. In back, sees stuff from his own coal mine. Goes up to the driver, and asks how he got it. Answer: I bought it from some guy. Who? Don’t know. When? Don’t know. Owner goes to get cops. Truck drives off. By the time cops catch D, truck is empty. But arrest D based on owner’s statement. Cops take the 2 guys into custody, then drive their 5-yr-old nephew home. Start talking to the kid. Do you remember the stuff in the back of the truck? Where is it? Kid points (nothing verbal). Points to shed—finds the goods buried under shed. Pros can’t call the kid as witness—5 yr old is incompetent (can’t understand oath). Instead, call the cop as witness. “Don’t tell me what kid said—just tell me what he did.” Cop testifies that kid pointed.
- (2) Q1: Why can a child who is incompetent as witness be competent as a declarant?
 - (a) Most courts find complete disconnect b/w competence and ability to be a declarant.
 - (b) Prof thinks not as obvious. Why allow it as substitute testimony, if not real testimony?
- (3) Q2: Does it matter that it’s not verbal?
 - (a) KY court says no hearsay, b/c not verbal statement—this is just behavior.
 - (b) This is wrong. It was a communication. **This is non-verbal assertive hearsay.**
- (4) Q3: Is this admissible?
 - (a) KY court’s analysis is wrong—but their result is right: admissible.
- (5) Theories of admissibility:
 - (a) Probable Cause
 - (i) PC is not an issue in this case. So irrelevant to explain why cops searched the shed.
 - (b) State of Mind → admissible
 - (i) This is the same as the kidnapping hypo. Statement is offered to prove state of mind of the boy (i.e., that he knew where the goods were). Then inferring there’s no way boy could know where the goods were stored without guilty conduct.
 - (ii) Remember: probative value need not be 100%-- admissibility doesn’t require certainty.)

- (c) Non-assertive → admissible
 - (i) Kid is not trying to say anything about the guilt of his uncle → Can use as implied statement that uncle is guilty. Like the umbrella on the rainy day.
 - (ii) Kid is asserting that the goods are over there → inadmissible for proving where the goods are (but no problem, b/c already independently corroborated that this was true).
 - (iii) Kid is *not* asserting that he watched his uncle bury them there → therefore, admissible for proving that he watched his uncle bury the goods.
 - (iv) Under this theory, it would be **non-assertive non-verbal hearsay**. Which, under the federal rules, is NOT hearsay.

x) **United States v. Muscato (EDNY 1982), p. 512 – sticky tape on gun (non-assertive)**

- (1) W described gun with sticky tape. Turned out to match gun seized from co-D. No other way W could have known. Just like kidnapper hypo.
- (2) **HOLDING: Admissible as non-assertive utterance showing state of mind.**
 - (a) “How else could he have known” theory of admissibility. Statement shows awareness of some fact, otherwise established; and fact of his knowledge creates important inference.
 - (b) E.g., Bridges v. State (kidnapping hypo); Kinder (pointing at shed).
- (3) Problems considered by court:
 - (a) Realism – jury will really use it for the truth.
 - (b) Reliability – more reliable if W also available to testify (as here).
 - (c) Probative value – depends on there being no other explanation for how he knew.
- (4) Note: Court finds could also be admissible as non-hearsay as prior consistent statement rebutting charge of recent fabrication, under 801(d)(1)(B).
 - (a) And if not that, then could at least come in for credibility purposes (not substantive evidence).

B. PRIOR STATEMENTS OF WITNESSES

Fed. R. Evid.

Rule 801. Definitions

- (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
- (d) Statements which are not hearsay. A statement is not hearsay if--
 - (1) **Prior statement by witness**. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

1) INTRODUCTION

- a) With prior statements, **declarant = witness**.
- b) Sometimes admissible b/c declarant can be cross-examined (even though otherwise, hearsay).
- c) Two competing nightmares:
 - i) Prosecution Nightmare (NY): Witness intimidation
 - (1) If NEVER admit prior statements for truth, there is inducement/motive to witness tamper → intimidate into recanting. If necessary for production burden, and witness recants, then will have to dismiss the case.
 - ii) Defense Nightmare (CA): Cops fabricate confession
 - (1) If ALWAYS admit prior statements for truth, would create incentive for police to fabricate confessions for people they're sure are guilty. Cop then testifies to "confession" in the station house that never happened. If D denies, then "confession" is prior inconsistent statement that can come in for truth.
- d) Consider context:
 - i) Criminal (will be different b/c of ***Confrontation Clause***)
 - ii) Civil
 - iii) Administrative
- e) Levels of formality of prior statements:
 - i) Casual statements to private persons
 - ii) Casual statements to government agents
 - iii) Sworn statements to private persons
 - iv) Sworn statements to government agents
 - v) Formal proceeding under oath
 - vi) Opportunity for cross-examination, but cross didn't happen
 - vii) Subjected to cross-examination (might also be prior reported testimony)

2) PRIOR INCONSISTENT STATEMENTS

- a) Intro:
 - i) **Rationale: Deferred cross today suffices for prior statement yesterday.**
 - ii) These are the gist of cross-examination. Most out-of-court statements are in this category.
 - iii) Old common law rule: Cannot impeach your own witness (rejected about 25 years ago)
 - (1) Flows from defense nightmare → P calls a witness knowing she will say A. Then falsely claim she previously said B. Witness will deny, but jury will hear it.
 - (2) This rule hurt Ps. Call witness, then witness surprises you on stand. Then rule preventing P from confronting her w/ the prior statement. Happens all the time for Ps.
 - iv) **CURRENT RULE:**
 - (1) **Always admit prior inconsistent statements for impeachment.**
 - (a) Must give W opportunity to explain.
 - (b) If W denies making statement, can prove statement was made by calling third party.
 - (c) Not admissible for truth: just to say this guy says X and says Y, can't believe anything.
 - (2) **For the truth, there is a spectrum of admissibility rules, depending on jx.**
 - (a) Main issue: Is deferred cross-examination adequate?
 - (i) W recants; W denies making statement; W forgets → usually enough.
 - (ii) W takes 5th; W disappears; W dies → never enough.
 - (3) **Confrontation Clause analysis (if criminal)**
 - (a) Guarantees one "bite" of cross-examination.
- v) **Analysis under Fed. R. Evid. 801(d)(1):**
 - (1) **Hearsay analysis:**
 - (a) W must testify and be "subject to cross-examination concerning the statement." 801(d)(1).

- (i) Satisfied when “placed on witness stand, under oath, and responds willingly to questions.” *Owens*.
- (ii) If W recants, denies, or claims memory loss → satisfied. *Owens*.
- (iii) If W takes 5th or is dead → not satisfied. (though *Owens* only says 5th “may undermine.”)
- (b) Prior statement must be inconsistent.
 - 1. Note: If memory loss witness, might be able to argue consistent OR inconsistent. Depends on if can satisfy formality rules or recent fabrication charge.
 - 2. Theoretically, memory loss is like death. Nothing to be inconsistent with. But, don’t treat that way b/c of Prosecution nightmare.
- (c) Prior statement must have been taken under oath at trial, hearing, proceeding, or deposition.

(2) **Confrontation Clause analysis: ONE BITE RULE**

- (a) If prior statement was subjected to cross-examination, satisfied. *Cal. v. Green*.
- (b) If W is currently available for cross-examination:
 - (i) Recants, denies → OK. Deferred cross is enough.
 - (ii) Takes 5th, dies → NOT OK. No bite.
 - (iii) Memory loss → OPEN QUESTION
 - 1. *Green* didn’t answer b/c preliminary hearing testimony was already cross-examined.
 - 2. *Owens* is strongest precedent for proposition that memory lapse witness suffices for confrontation clause. (But it was pre-Crawford.)
 - 3. Prof thinks SCOTUS will reject. Will heavily depend on fact pattern.
 - 4. The questions to consider are: which nightmare are you most afraid of, and how to mitigate those nightmares, while maximizing the evidence that comes in.
 - a. P’s nightmare: D will intimidate W.
 - i. Can resolve w/ forfeiture.
 - b. D’s nightmare: Cops will fabricate.
 - i. Not a concern if formal proceeding, e.g., GJ.
 - ii. Plus can cross-examine the cop.
 - c. Evidence: Want valuable but reliable evidence.
 - 5. Note internal tension b/w hearsay rules and Confrontation Clause.
 - a. Lapsed memory witness is *unavailable* for purposes of Rule 804 (exceptions to hearsay rule, e.g., prior reported testimony).
 - b. But “subject to cross-examination” for purposes of Rule 801 (prior inconsistent).
 - c. How could W be capable of being crossed for purposes of Confrontation Clause (e.g., *Owens* – amnesia), but unavailable for hearsay? Transcends laws of physics. Prof thinks this internal tension inherently unstable.

Note: Maybe better for P if W totally recants, then if just forgets. B/c then get to introduce prior statement!

b) **Spectrum of Hearsay Admissibility Rules:**

- i) California (most liberal admissibility rule) (Defense nightmare):
 - (a) So long as W is capable of being crossed, ALL prior inconsistent statements come in for truth, including stationhouse interrogation.
 - (b) Need only prove statement was made, e.g., W admitted statement but recanted, or proved by third person.
 - (c) D nightmare: Creates incentive to fabricate stationhouse “confessions.”
 - (d) This is the norm for most jx for civil cases.
- ii) Recantation jx:
 - (a) So long as W admits making statement (though recants), admit for the truth.
 - (b) But don’t admit if denies it outright.
- iii) Federal Rule (801(d)(1)):
 - (a) Admit for truth so long as it was made at a formal proceeding and under oath.

- (b) Admissible even if witness recants, denies, or forgets. *Owens*.
 - (i) Rule 801(d)(1) requires that W “testifies at the trial or hearing and is subject to cross-examination concerning the statement.” → satisfied when “placed on witness stand, under oath, and responds willingly to questions.” *Owens*.
 - (c) IN: grand jury, prelim. hearing, deposition. Senate hearing? Immigration proceeding?
 - (d) OUT: police interrogation → Cures defense nightmare.
 - (e) But no prior cross-examination necessary.
 - (i) So long as W is present at trial, prior statement is admissible, then convict based on the prior statement alone.
 - (f) Creates incentive to kill the witness → only way to exclude the statement.
- iv) Immediate Cross-Examination:
- (a) Admit for truth if statement was made under oath *and* contemporaneously cross-examined (e.g., preliminary hearing, deposition).
 - (b) For civil, use CA rule.
- v) Common Law (e.g., NY) (most extreme exclusion rule) (prosecution nightmare):
- (a) NEVER admissible for the truth (only for impeachment).
 - (b) Deferred cross-examination is worthless.
 - (c) P Nightmare: Creates incentive to witness tamper → intimidate into changing testimony; P won’t be able to meet its production burden, b/c can’t use prior statement for the truth.
- c) **Rowe v. Farmers Insurance Co. (MO 1985), p. 522**
- i) Car burned on Aug. 13, 1982. Insurance denies claim for car, claims P torched his own car. P says didn’t burn his car, sues for benefits.
 - ii) D’s Witness: P’s cousin Chester Carroll.
 - (1) 1st Statement (to the cop in Nov. 1982): Claims he overheard P saying he would burn his car for the insurance money.
 - (a) Multiple hearsay: Need exception for each level.
 - (i) P’s statement: admission. Admissible so long as can prove the statement was made.
 - (ii) C’s statement: need exception, b/c no longer saying it at trial.
 - (2) 2nd Statement (at deposition): Claims heard nothing.
 - (3) 3rd Statement (at trial): Claims heard nothing.
 - iii) How to admit W’s prior statement to the cop?
 - (1) Universally admissible for impeachment of credibility, i.e., to show W is liar.
 - (a) But this is not enough. D has NO evidence. Needs prior statement to satisfy its production burden. Destroying its own witness’s credibility gets it nowhere. Back to zero.
 - (b) Note: Rule against impeaching your own witness is gone.
 - (2) **New Rule: Prior inconsistent statements are admissible as substantive evidence if witness appears in court.**
 - (a) “When declarant is available for cross-examination . . . enough of the dangers of hearsay and unreliability [are] absent to justify substantive use of prior inconsistent statements in civil cases.”
 - (i) Unlike usual hearsay, have declarant on stand and can cross-examine them.
 - (b) Benefits of permitting as substantive evidence:
 - (i) Helpful in determining the truth; protects parties from erratic witness who changes his story; protects parties and witnesses from witness intimidation (b/c rewards from changing testimony are less); fresher recollection; avoids selective memory problems.
 - (c) Reasons for excluding:
 - (i) Now that Cousin is disclaiming the prior statement, can’t effectively cross-examine about the statement. No way to get a hand hold. This was the winning argument for a long time—kept statements out for anything but impeachment.

- (ii) But dam broke about 25 years ago. Now, rules vary dramatically across jurisdictions.
- (3) If only witness were cop, NO jurisdiction would admit statement.
 - (i) Witness: Cop; Declarant: Cousin; Statement: Overheard P say he would burn his car.
 - (ii) INADMISSIBLE. Need to cross-examine Cousin.
- (4) But if Cousin appears as witness, SOME jx will admit (w/ widely varying conditions).
 - (a) Proponent: D; Witness: Cousin; Declarant: Cousin (same person!); Statement: Overheard P saying he was going to torch the car.
 - (b) Now, can introduce statement for the truth. B/c the declarant himself is in court, and you can cross-examine him.
 - (c) Issue: Is the deferred cross-examination adequate for the hearsay?
- (5) Upshot of Rowe:
 - (a) Always admit statements for impeachment.
 - (b) And for truth, have spectrum of rules.
 - (c) In CA: Admit statement, so long as Cousin testifies (can't do it through the cop). [This is why the incentive now shifts to killing the witness.]

d) California v. Green (U.S. 1970), p. 530

- i) Criminal case (confrontation in play!). Drug bust—drug dealer who has been supplying drugs to kids in local schools. Porter (16-yr-old kid) caught selling marijuana to undercover officer. Interrogate him at station house. Want to find out supplier. Porter says Green is supplier.
- ii) Statements:
 - (1) Stationhouse (Porter to Cop): “Green is my supplier.”
 - (2) Preliminary Hearing (Porter): “Green in my supplier.”
 - (3) Trial (Porter): “No recollection at all. Was on acid whole time.”
- iii) Assume Prosecution needs Porter’s testimony to satisfy production burden.
- iv) Hearsay Analysis:
 - (a) Can it come in as prior inconsistent statement in NY?
 - (i) NO. Green walks free in NY. (Impeaching is not enough.)
 - (ii) Note: Prosecution could try a different exception – try to use preliminary hearing as prior reported testimony. Lesson: Don’t get pigeonholed into one hearsay exception theory.
 - (b) Can it come in as prior inconsistent statement in CA?
 - (i) Yes. BOTH prior statements come in in CA, so long as Porter is on the stand.
 - (c) Under federal rules?
 - (i) Yes. Preliminary hearing statement admissible—under oath in formal proceeding. And current memory loss does not defeat. *Owens*.
 - (d) In jurisdictions that require prior cross?
 - (i) No. No cross examination in preliminary hearing.
- v) Confrontation Clause analysis:
 - (a) ONE BITE RULE: Confrontation Clause guarantees D one bite of cross-examination. After that, can be used against you for everything.
 - (i) True vice underlying Confrontation is conviction based solely on ex parte affidavits.
 - (b) Application:
 - (i) 1st Statement: → don’t have to reach this question, b/c duplicative with 2nd statement.
 - (ii) 2nd Statement: This was at preliminary hearing.
 - 1. Question: Is formal opportunity for cross enough, even if don’t use it, and really can’t use it b/c judge will stop you?
 - 2. Grand jury is ex parte. D not present, no cross. Preliminary hearing is more adversarial (D is present)—but it’s a low threshold. Gov’t won’t reveal most of their evidence. If try to cross-examine at prelim hearing, judge will go nuts. Judge can’t make credibility findings. Has to take state’s testimony as true; based on that, decide if grounds to go forward. Cross-exam at prelim hearing is usually useless. Is it “real” cross, when credibility is not an issue?
 - 3. Court says Porter’s testimony at preliminary hearing was subjected to “extensive cross-examination” by D’s counsel.
 - (iii) Answer: YES. This is enough, under “one bite” analysis.
 - (c) Problem: How do you cross-examine a lapsed-memory witness?

- (i) P will put the lapsed-memory witness on the stand, just to introduce the prior statement.
- (ii) How do you cross when W is saying he has no memory—was in drug-induced haze?
- (iii) Here, problem is resolved by prior cross at preliminary hearing.
- (iv) BUT: If it had been grand jury, what result???
- (v) Prof: Trend of lower courts to find that memory lapse cross-examination suffices. But he thinks SCOTUS will reject.

e) **Hypo (Grand Jury Testimony)**

- i) Grand jury testimony that D is loan shark. Then Prosecution trying D for loan sharking 8 months later.
- ii) How could grand jury testimony come in?
 - (1) The ONLY way to use it is if you've got recantation. Then earlier statement comes in as prior inconsistent—and D gets his one bite—at trial.
 - (2) But if witness is dead, flees, takes the 5th → no way to get it in.
 - (3) Open question: What if Witness says doesn't remember? How do you treat that?
- iii) In some sense, Prosecution is better off having its Witness recant on stand (b/c then statement comes in), than having Witness simply say he doesn't remember, even though weaker than recantation (b/c statement might not come in, b/c D doesn't get his one bite).

3) **PRIOR CONSISTENT STATEMENTS**

a) Introduction:

- i) We do *not* allow prior consistent statements simply to buttress W's in-court testimony.
 - (a) Prior consistent statement, e.g., videotaped testimony from before.
 - (b) Rationale from prior inconsistent statements equally applies here (inversely):
 - (i) Buttress credibility—this guy keeps his story straight.
 - (ii) But most jx do not allow—even though this rationale makes sense.
 - (c) Why not?
 - (i) We like our courtroom to be a theater—don't want to shift the main action off-stage.
 - (ii) But in other countries, they allow.
 - (d) Ask: Is it better to have courtroom be a theater, or have a cold record come in?
- ii) Only two ways PRIOR CONSISTENT STATEMENTS can come in:
 - (1) To rebut D's charge of recent fabrication (801(d)(1)(B)):
 - (i) E.g., to show that Witness said the same thing before recent fight w/ D. Or before took a plea deal. Etc. Anything that creates bias or motive.
 - (ii) BUT: Can only come in if statement occurred b/f the motive for fabrication. E.g., if always hated D, then not allowed to put in prior consistent statements. *Tome*.
 - (iii) *Tome v. U.S. (U.S., 1995), p. 540*
 - 1. Father claimed child's accusations resulted from motive to move back with mother. If statements had been made before the alleged motive arose, then would have been admissible. But Kennedy says common law does not admit if alleged motive already existed.
 - 2. Logic: Strong argument that testimony has nothing to do w/ the motive, if existed prior to alleged motive.
 - 3. But if alleged motive pre-existed, then prior statement tells us nothing about the motive to fabricate. Then just being offered to buttress—not allowed.
 - (2) To buttress an in-court ID (801(d)(1)(C)):
 - (i) Limited exception to buttress in-court IDs, which are pretty meaningless.
 - (ii) Any good lawyer can point out how useless an in-court ID is—it's obvious—D is sitting in the defendant's chair! No probative value at all.
 - (iii) So, courts allow prior consistent statements to demonstrate prior IDs, to buttress in-court ID.
 - (iv) Note: Remember to attack sufficiency of out-of-court ID too (e.g., everyone else in line-up wearing white socks....).

b) **U.S. v. Owens (U.S. 1988), p. 554 (J. Scalia) – memory lapse witness**

- (1) Prison guard beaten. Cop visited guard in hospital—got prior statement. By the time of trial, physically capable of coming to court; but can't remember anything b/c blow to the head. Quintessential memory lapse witness, where jury has total sympathy for the witness.
 - (2) Guard's testimony:
 - (a) Remembers ID'ing the D. But not the assault. Could not remember other visitors at hospital.
 - (3) Then put cop on stand.
 - (a) Testifies that W couldn't remember events, but I showed him a line-up, and he very clearly pointed out D. Recognized him.
 - (4) Hearsay Analysis:
 - (a) Court admits to buttress in-court ID. (prior consistent statement.) Common law has always allowed.
 - (b) Counter-arg: There is NO in-court ID here!! Nothing to buttress. Just offered as independent factual evidence. (This is an evidence objection.)
 1. Federal Rule: doesn't require in-court ID, as the common law does. Just says, "Identification of person, made after perceiving the person."
 2. Defense nightmare? But can cross-examine the cop, and the witness vaguely remembers it happening.
 - (c) Counter-arg: Not "subject to cross-examination" under Fed. R. 801:
 - (i) 801 requires "subject to cross-examination." → Court says satisfied if placed under oath and responds willingly to questions. Memory lapse doesn't defeat.
 - (ii) 804 says unavailable if testifies to lack of memory.
 1. Shows Congress knew how to specify memory lapse if they wanted to.
 2. But produces anomaly: memory-lapse witness is both "subject to cross" and "unavailable." But Court says rules have different purposes, no reason the two rules should coincide.
 - (5) **Confrontation Clause!! NO BITE!!!**
 - (i) This is the only SCOTUS case Prof knows about w/ no bite.
 - (ii) Only real response: W is present. Can cross-examine him. Fact that he says he doesn't remember shakes his credibility somewhat. Can do what you can.
 1. "We do not think [a Roberts] inquiry is called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination."
 - (iii) This is the strongest precedent for proposition that memory lapse witness suffices for confrontation clause.
 1. Farthest SCOTUS has gone in admitting non-cross examined statements for the truth.
 - (6) Dissent (Brennan, J.):
 - (a) Thinks violates Confrontation.
 - (i) B/c of profound memory loss, W is no more subject to cross-examination than a third party introducing the statement (which would be clearly barred).
 - (ii) Past and present John Foster are like two different people.
 - (iii) Only "tools" of cross-examination are mere plausible explanations that D could argue to jury—but can't be advanced by cross.
 - (iv) And no way to mitigate the hearsay dangers, e.g., misperception, memory failure.
 - (v) Majority's rule assures only the empty right to pose questions.
 - (vi) Preferred Confrontation Clause rule: Cross-examination must afford fact-finder basis for evaluating the truth of the prior statement.
 - (b) Thinks majority's construction of 801(d)(1)(C) is unconstitutional under 6A Confrontation.
- c) **Tome v. U.S. (U.S. 1995) (J. Kennedy), p. 540 – to rebut motive to falsify**
- (1) Statements by child re Dad's sexual abuse. D claimed child's accusations resulted from motive to move back with mother. Alleged motive pre-existed the statements.
 - (2) At trial, child had great difficulty testifying. P introduced other witnesses to testify to her prior statements.
 - (a) 7 statements: to babysitter; social worker; mother; 3 physicians. All implicated D.
 - (3) HOLDING: Fed. R. Evid. 801(d)(1)(B) incorporates common law temporal limit.
 - (i) Statements made after the alleged motive to fabricate arose are INADMISSIBLE.

- (ii) If statements had predated the motive, then would have been admissible.
- (4) Rationale:
 - (i) If statements existed prior to motive, strong argument that testimony has nothing to do w/ the motive.
 - (ii) But if alleged motive pre-existed, then prior statement tells us nothing about the motive to fabricate. Then just being offered to buttress—not allowed.
 - (iii) Federal Rule only admits prior consistent statements as substantive evidence if for purpose of rebutting motive to falsify. NOT to merely bolster credibility.
 - (iv) Time limit is only way to preserve the distinct rationale. Otherwise, just general bolstering.
- (5) Note: Confrontation Clause problem is lurking in background.
 - (i) If statements DID come in, there would be a huge confrontation problem.
 - 1. No effective cross of the child in court (and don't want to, anyway. Poor kid.)
 - 2. And post-motive statements are only relevant for truth—need to confront.
 - (ii) Prof thinks Kennedy is heading off a major Confrontation Clause problem by construing federal rule narrowly.
 - 1. RT: Couldn't pre-motive statements raise Confrontation Clause problems too? They're being offered for the truth too (b/c 801 allows *both* to rebut motive *and* for the truth). And probably testimonial.

C. PRIOR REPORTED TESTIMONY

Fed. R. Evid.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(b) Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

- 1) Intro
 - a) Reported testimony = transcripts of testimony given by a witness at some former deposition, hearing, or trial in the same or another case
 - i) Paradigm Case: Re-trial after appellate court vacated verdict. Witness has died in interim. Can re-use his testimony from the first trial.
 - b) This is *hearsay*. But create an exception.
 - i) Rationale: Previous cross yesterday suffices for trial today (reverse of prior inconsistent statements).
 - ii) This is a *second best* rule. Requires unavailability, b/c otherwise, would prefer to cross-examine today.
 - iii) General way to distinguish b/w hearsay exceptions that require unavailability vs. not:
 - (1) Depends on which leg is particularly strong that justifies the exception.
 - (2) If input leg is particularly reliable, unavailability not required. E.g., excited utterance.
 - (3) If output leg is justification, then require unavailability, b/c would prefer to cross. E.g., dying declaration.
 - c) Procedure: Must read the prior testimony into the record. Very boring. And jury can't assess demeanor.
 - d) Confrontation Clause concerns:
 - i) Generally, no Confrontation Clause problem (b/c had cross yesterday). Got your one bite.
 - ii) But the further you move from common law paradigm, the more you open up Confrontation problems.
 - (1) E.g., prior testimony from civil when could not foresee criminal use → now using for criminal.
 - (2) E.g., prior cross was done by different party (“predecessor in interest”).
 - e) Remember to try many hearsay exceptions!
 - i) E.g., in Green (memory lapse witness):

- (a) Could argue unavailable → prior reported testimony.
 - (b) Could argue subject to cross → prior inconsistent statement (if formal) or prior consistent statement (if precedes motive to fabricate, or buttressing ID).
- ii) Rules of thumb:
- (1) If witness confirms testimony → use prior consistent.
 - (2) If witness recants → prior inconsistent (depends on level of formality).
 - (3) If witness forgets → prior inconsistent, prior consistent, prior reported (b/c “unavailable”).
 - (4) If witness takes 5th or dies → prior reported, if subject to cross.
- 2) **Requirements:**
- i) Unavailability of witness (b/c this is only second best evidence).
 - ii) Prior cross-examination w/ commonality of interest (to guarantee effective substitute).
 - (a) Common law: Need same issues, same motive, same parties → obsolete.
 - (b) Gaines test: Did the target party have a chance to cross-examine?
 - 1. If so, then commonality of interest is satisfied.
 - 2. Motive suffices even if stakes very different (e.g., offensive vs. defensive posture, criminal vs. civil). So long as significant stake in civil (even as P), can use in crim.
 - 3. Mere opportunity for cross-examination is enough.
 - (c) Federal rule: Even if target party is different, can still use if:
 - 1. Prior party was “predecessor in interest”
 - i. Not defined by rules. Obviously, if assign legal interest, suffices.
 - ii. Lloyd defined broadly to essentially mean same motive. Other courts more narrow.
 - iii. In criminal context, is read narrowly (or Confrontation is explicitly invoked) to assure parties are very close, or legally identical.
 - 2. Equivalent motive.
 - i. DiNapoli: Equivalent motive = interest of substantially similar intensity to prove/disprove same side of substantially similar issue.
 - ii. Must consider: (1) What’s at stake; (2) Burden of proof; (3) Cross-examination – what was undertaken and what was foregone.
 - iii. DiNapoli: GJ cross by P insufficient if already had enough evidence to indict.
 - iv. Prof: Thinks can’t justify distinction b/w GJ and preliminary hearing here, though courts may make this distinction. D has very little opportunity or motive to cross at prelim hearing. Plus, all credibility judgments must be decided in P’s favor. So cross to attack credibility won’t even do any good.
- 3) **Gaines v. Thomas (S. Carolina 1962), p. 723 – “target party”**
- i) Truck collision b/w Martin & Peerless Co. (driver: Byars). Martin dies. Bystander Gaines is hurt.
 - ii) Case 1: Martin’s estate v. Peerless for wrongful death.
 - (a) Byars is the only person w/ knowledge (b/c Martin died). Testified for D that Martin was at fault (crossed the line).
 - (b) Does it matter whether the jury believed Byars in Case 1? We don’t know whether jury believed his testimony.
 - iii) Case 2: Gaines v. Martin’s estate.
 - (a) Byars has now died.
 - (b) Gaines wants to submit Byars’s previous testimony from Case 1.
 - iv) Issue: Can Gaines use Byars’s previous testimony?
 - (a) Under traditional common law rule, not allowed. Required same parties, same issues, same case. (Retrial scenario.)

- (b) Here, issue is basically the same (who crossed the line).
- (c) But, different parties (though Martin's estate is the same).
- (d) Plus, before being used defensively. Here, being used offensively.
- v) Argument for allowing testimony:
 - (a) Just like expansion of mutuality in preclusion context.
 - (b) Identical issue, and identical cross-examination motive. Martin has had his day in court.
 - (c) Acknowledge that it's second-best (must prove unavailability), but shouldn't throw out the testimony. Not unfair b/c Martin was the party who crossed.
 - (d) **New Test: Did the target party have a chance to cross-examine?**
 - (e) If so, and witness is truly unavailable, then target party got everything he is assured. This is now accepted everywhere. Has supplanted the same issue, same parties, same case rule.
- vi) Argument against:
 - (a) Note: Preclusion issue—if Gaines was sideline-sitter in first case, maybe should have joined instead of “wait-and-see.”
 - (b) Incentive to cross in first case may not be as strong as in second case—offensive versus defensive stance.
 - (c) Rule doesn't care. Doesn't matter if P in Case 1 and D in Case 2. Stakes are the same.
 - (i) If Case 1 and Case 2 were both criminal, same thing—stakes the same.
 - (d) But: What if stakes in Case 2 are much higher? E.g., Imagine Martin doesn't die.
 - 1. Case 1 is injury action against Peerless.
 - i. Testimony that Martin drunk, hit Gaines.
 - 2. Case 2 is involuntary manslaughter prosecution against Martin.
 - i. Allow testimony from Case 1 that Martin hit Gaines?
 - (e) Considerations:
 - 1. Evidence issue: Are the stakes sufficiently high such that motive suffices?
 - i. Most courts admit—so long as target party had significant stake in the civil proceeding (even as P), can use in criminal proceeding.
 - 2. Confrontation Clause issue?
 - i. No. There was already one bite. Here, the evidence rule is the only issue.
 - (f) Issue: Are we worried about ACTUAL cross or just OPPORTUNITY to cross?
 - 1. In civil cases, the opportunity is usually enough.
 - i. If lawyer made tactical decision not to cross in civil proceeding, usually admissible in second case. Even if lawyer is different.
 - 2. In criminal cases, still don't know if Confrontation Clause is satisfied by mere opportunity to cross, when lawyer makes a tactical decision not to cross.
 - i. May matter if criminal proceeding was at least foreseeable (e.g., preliminary hearing, as opposed to civil proceeding).
 - 3. Prof thinks SCOTUS will find that mere opportunity is enough
 - i. But worrisome. Very different balance in criminal case. Might be willing to take a chance in civil case, but not criminal.

4) Lloyd v. American Export Lines, Inc. (3rd Cir. 1978), p. 725 – “predecessor in interest”

- i) Running fight b/w Lloyd and Alvarez on ship. Unclear who's at fault.
- ii) Case (1): Lloyd sues Am. Export under admiralty doctrine—negligent hiring.
 - (a) Am. Export impleads Alvarez
- iii) Case (2): Alvarez counterclaims against Am. Export.
 - (a) Lloyd drops out (can't find him b/c merchant seaman); judge finally dismisses his claim for non-prosecution.
- iv) Alvarez testifies that Lloyd was to blame.
 - (a) Am. Export wants to rebut. But Lloyd is the only other eye-witness; and he's unavailable.

- v) Am. Export wants to introduce prior testimony.
 - (a) Prior Testimony: Transcript from Coast Guard license-revocation proceeding. Both Am. Export and Alvarez were present at the hearing.
- vi) Issue: Can we use the testimony as a Lloyd substitute?
 - (a) If not, court only gets to hear one side of the story.
- vii) Big jump from Gaines: Target party has changed.
 - (a) Alvarez didn't do the actual (or hypo) cross in the first proceeding.
 - (b) Assume he couldn't. In admin hearings, party can be present but not cross. (In this case, he actually was allowed, but ignore.)
- viii) At Coast Guard proceeding, only the Coast Guard crossed. How do we know if that suffices?
- ix) True issue: Was cross examination an adequate substitute?
 - (a) Want commonality of interest. Guarantee of commonality of motive.
 - (b) If same party as target party, it is adequate. Gaines.
 - (c) If different party, how to determine if adequate?
- x) Federal Rule:
 - (1) Two-step test:
 - (a) Prior party must be predecessor in interest;
 - (i) But doesn't define predecessor in interest. Obviously, if assign legal interests, then predecessor in interest. But beyond? Hard to know.
 - (ii) Prof thinks this was attempt to narrow instances in which prior testimony used—effort to stave off Confrontation problem.
 - (b) Equivalent motive.
- xi) The further you move from the common law paradigm, the more you open up Confrontation Clause problems.
 - (1) Looking at sufficiency of testimony, not the people.
 - (2) Split: In civil cases, this stuff is being widely used. In criminal cases, reading predecessor in interest narrowly, or else explicit Confrontation Clause, so make the parties very close, e.g., legally identical.
- xii) Most common contexts:
 - (1) Criminal prosecution that wants to make use of administrative investigations. E.g., SEC investigations; Immigration proceedings, etc.
- xiii) Should it turn on whether Alvarez had the opportunity to cross?
 - (1) Maybe thought Coast Guard was doing fine.
 - (2) Or maybe didn't hire lawyer b/c not himself the target of disciplinary proceeding.
 - (3) Troublesome.
- xiv) Note:
 - (1) Prof agrees that Lloyd court basically read "predecessor in interest" to mean same motive. Some courts have done this, others have read as more meaningful.
 - (2) Shows pitfalls of codification—can privilege text w/o understanding the background of the rules. Was not supposed to be the same thing as "same motive."

5) **United States v. DiNapoli (2nd Cir. 1993), p. 747 – “equivalent motive”**

- i) Wiretap recordings with speaking about price fixing. Ds charged with racketeering scheme to rig bids for concrete work on high-rise buildings. Obviously some deal w/ government – if you testify, we'll remember that at sentencing.
- ii) Called before Grand Jury. Asked, “Did you ever hear of something called the club?” Witnesses say, “No.” Surprises P. Something has happened. P pushes them more. “Are you sure?” They continue to deny. Then, indicted.
- iii) Question: At subsequent trial, can Defense use statements at Grand Jury, as prior reported testimony?
 - (1) P can't use it—b/c there was no cross-examination by D.
 - (2) But here, P was present and surprised, and pushed them a bit. Cross?
- iv) At trial, the Ds take the 5th. Not testifying.
- v) D says, however, want to put on 'prior reported testimony.'
 - (1) Note: not prior inconsistent statement—b/c 5th is nothing—nothing to be inconsistent with. Same as if died.
- vi) Seems to satisfy Gaines: D wants to use; target is the same (Prosecution); and subject to cross.

- vii) Question: Was there an equivalent motive to cross? (804(b)(1)).
 - (1) 2nd Cir. says no—inapt motive. Don't have sufficient motive, b/c had enough evidence to indict anyway.
 - (2) **HOLDING: Requires interest of substantially similar intensity.**
 - (a) "In assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue."
 - (i) Must consider:
 - 1. What's at stake
 - 2. Burden of proof
 - 3. Cross-examination – what was undertaken and what was foregone.
 - (b) Problem: Not supposed to use GJ as a discovery device—point is to produce enough evidence to indict and that's all—not supposed to press witness for more info. So if P already had enough evidence, why was he pushing these Ws?
 - (3) Cynical view:
 - (a) When P wants to use prelim hearing testimony against D at trial, courts admit, even though D didn't cross examine, and everyone knows he never would. Further help to D: All credibility judgments at preliminary hearing must be decided in P's favor.
 - (b) Now, when D wants to use, and P really did cross-examine (though not extremely), can't admit.
 - (c) Prof doesn't think can justify the distinction b/w preliminary hearing and GJ here.
- viii) Note: [Prof thinks] IF P had not had enough evidence to indict, then the cross-examination at preliminary hearing WOULD have sufficed. Motive would be apt.
 - (a) If motive were enough, then would suffice for both prior reported testimony AND prior inconsistent statements.
- ix) Awkward rule: Requires judge to make judgment about sufficiency for motive for cross in all these settings. Don't have enough evidence. Making suppositions only. Rule is based on soft determination.

6) **Ohio v. Roberts (U.S. 1980), p. 737 – Confrontation Clause**

- i) Boyfriend criminally charged w/ using Girlfriend's father's checks and credit card. Charge: fraudulent check and credit card. Defense: She told me it was OK—I assumed she had permission.
- ii) Preliminary Hearing:
 - (a) D's lawyer sees Girlfriend outside courthouse at preliminary hearing. Puts her on stand.
 - (b) Testimony: She says she didn't give permission. D's lawyer pushes her some.
 - (c) Note: D's lawyer's zeal in putting Girlfriend on stand at preliminary hearing has created bad testimony that wouldn't otherwise exist!
- iii) Trial:
 - (a) P wants to rebut defense by using Girlfriend's testimony from Preliminary Hearing.
- iv) Hearsay analysis (use *Gaines, Lloyd*):
 - (a) No problem—same parties, same case, same issues. Satisfies the full-fledged common law requirement. Note: By 1890, no requirement that testimony appear at full trial.
 - (b) Clearly unavailable—she's gone.
- v) Confrontation Clause issue:
 - (a) Note: Testimony was on direct at preliminary hearing. Court says labels don't matter. The substance was cross-examination. Court says doesn't matter, b/c substance was cross.
 - (b) Only issue: Is preliminary hearing enough? Answer is yes.
 - 1. Problem: At preliminary hearing, D couldn't argue that she was afraid of her father, b/c credibility can't be contested at preliminary hearing. Now used at trial.
 - 2. But under doctrinal rules, this is an easy case.
 - (c) **Creates Two-Step Test:**
 - 1. **Firmly established hearsay exception; AND**
 - 2. **Individualized indicia of reliability.**
 - (d) Crawford eliminates this test. Discards reliability. Test becomes:
 - 1. Testimonial; and if so,
 - 2. Subject to cross.

- (e) NOTE: Ohio v. Roberts comes out the same under Crawford test—it was testimonial and subject to cross.

D. ADMISSIONS

Rule 801. Definitions

(d) Statements which are not hearsay.

A statement is not hearsay if--

(2) **Admission by party-opponent.** The statement is offered against a party and is

(A) the party's own statement, in either an individual or a representative capacity or

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

1) Introduction

a) **Admission: Statement by a formal party that is adverse to the party's trial interests.**

b) Federal rules define as "non-hearsay." Prof thinks more like a hearsay exception.

c) Rules:

(1) Statement by a formal party (or agent); ****consider who has made damaging statements when choosing your parties for a lawsuit!****

(2) Used *against* that party;

(3) Damaging to that party *at the time of trial*;

(4) Need not be based on personal knowledge (but must manifest belief that it's true);

(5) Vicarious admissions are possible.

(6) Admissions come in *for the truth!* (Don't need to pussy-foot around on the purpose.)

d) Predicate fact-finding:

i) According to federal rules, fact-finding is done by judge to a preponderance. Can consider statement, but probably need some other independent evidence of the fact, e.g., conspiracy. *Bourjaily*.

ii) Note: Always have right to have jury pass on predicate fact-finding too. E.g., tell jury if don't find conspiracy to a preponderance, then disregard the co-conspirator statement as against the other D.

e) Rationales:

i) Functional rationale:

(1) Want to be able to use confessions. Otherwise, would be excluded hearsay.

(2) Old common law did not allow parties to testify – wanted testimony only from disinterested persons. Worry about damning immortal soul by putting under oath w/ strong temptation to lie. Under this system, would lose the confession every time. Needed hearsay exception.

ii) Intellectual rationales:

(1) **Litigation is a game** – if you make a mistake, you can't complain.

(2) **Self-cross** – nothing stopping you from taking the stand and explaining away the statement.

iii) Problems with Self-Cross rationale:

(1) In criminal cases, puts huge tension on 5th Amendment: price of self-cross is surrendering 5A privilege, resulting in admission of prior crimes, etc.

(2) If have no knowledge (e.g., in vicarious admissions), hard to explain away.

- f) Implied and adoptive admissions
- i) **Conduct:** A party's nonassertive conduct may be the basis for an admission
 - (1) But some cannot be used as matter of policy, e.g., pleading guilty in crim cases, remedial measures taken after accidents (b/c want the person to fix the broken stoop!).
 - ii) **Adoptive admissions:** A party who knowingly and voluntarily adopts or ratifies another's statement that is inconsistent with the party's trial position is treated as having adopted the admission.
 - iii) **Silence:** A party's silence or evasion may be treated as a manifestation of adoption or belief in the truth or another's statement. Three requirements:
 - (1) Comprehension: Party must have been present and capable of hearing and understanding the statements or accusation
 - (2) Capable of denying: The party must have been physically and mentally capable of denying the statement
 - (3) Motive: The party must have had an opportunity and a motive to deny, such that a RP would have denied the statement
 - (4) Note: Crim cases: 5A prevents prosecution from using D's refusal to answer questions as an admission of guilt.
- g) **Vicarious Admissions in Civil Law:**
- i) If A says something, not automatically admissible against B, unless legal relationship exists that allows us to treat them the same for liability purposes. Usual context: agency relations.
 - ii) Two types: (federal rule is now the majority rule)
 - (1) 801(d)(2)(C): **Authorization** → must explicitly authorize statement on the subject (easy).
 - (2) 801(d)(2)(D): **Employment/Agency relationship** → statement by agent or servant, concerning scope of agency, made during agency relationship.
 - (i) "Agency authorization test" → Is the statement about something that the principal authorized the declarant to do? (this is now the dominant test)
 - (ii) Supplanted "control group test" → Is the speaker sufficiently high in the corporation to be running the show—only then, can they speak for the corporation. (This was the test until about 25 years ago)
 - (iii) **Whistle-blowers:** Statements come in under agency relationship test. If within the employee's domain of authority, can be used against boss or company to satisfy production burden. BUT: Statement must be made while still employed. Disgruntled fired employee's statements can't come in. After employment ends, no longer "speaking for" company; no vicarious admissions.
 - iii) Rationale:
 - (1) Self-cross rationale breaks down for vicarious admissions. Must only be game theory of litigation.
- h) **Vicarious Admissions in Criminal Law:**
- i) **Co-Defendants – no vicarious admissions**
 - (1) Two co-Ds are separate—each is his own principal. Neither is an agent for the other. No vicarious admissions possible. D1's statement cannot be introduced against D2.
 - (2) **Bruton Rule (Co-Defendants):**
 - (a) If admission by Co-D1 implicates Co-D2, and Co-D1 takes the 5th so that Co-D2 cannot cross-examine him, then Co-D2 has Constitutional right to severance and separate trial. Jury instruction to only consider as against Co-D1 is not enough to save it.
 - (b) Prosecution's trick: Will redact the part that implicates Co-D2 to evade Bruton rule; keep in same trial; jury will realize who the other person was.
 - (c) Remember: No Bruton rule if can charge co-Ds as co-conspirators! Then it's all OK!
 - ii) **Conspiracy – vicarious admissions allowed**
 - (1) 801(d)(2)(E): **Co-Conspirators** → during the course and in furtherance of the conspiracy.
 - (2) In American criminal law: Every co-conspirator is deemed to be an agent of every other co-conspirator. (Criminal analogue of employment agency relationship.)
 - (3) Co-conspirator hearsay exception is the greatest evidence generator ever created. Every admission is admissible against every other co-conspirator.

- (4) Conspiracy = Meeting of the minds to engage in illegal act in the future, coupled w/ a single overt act toward furtherance. E.g., making a telephone call, writing letter, renting car.
- (5) Remember: Have to follow agency rules
 - (a) Must first establish agency relationship—i.e., prove the conspiracy as a preliminary matter.
 - (b) If someone withdraws from conspiracy before the statement, not admissible against him—has withdrawn his agency authorization.
- (6) All states limit to the “furtherance” stage.
 - (a) Some used to include concealment phase. Creates problems—b/c often already in jail at this point. Put an informant in the cell w/ him, wait for him to talk. Admissible against everyone in conspiracy, even if declarant refuses to testify at trial. HUGE confrontation clause issue! Made in highly unreliable settings—incentive to make something up to help your own case.
 - (b) All states now confine the rule to the “furtherance” stage. Still have to worry about the “furtherance” stage though.
- (7) Problem: What if co-conspirator does not testify (either dies or takes the 5th)?
 - (a) Obviously admissible against him on admissions rationale.
 - (b) Issue: Admissible against the others? Confrontation problem??

2) **Bill v. Farm Bureau Life Ins. Co. (Iowa 1963), p. 563**

- i) Kid found hanging in a barn. Question: Suicide or asphyxiation gone wrong. Insurance company denies life insurance claim, on basis of suicide. (Assume persuasion burden rests on insurance co to prove suicide, by preponderance since it’s a complete defense.)
- ii) D’s evidence: Physical evidence supports suicide. Clearly satisfies production burden. But want more for jury. D calls medical examiner to testify. Testifies that went to house, asked father, “Do you have any doubt that it was suicide?” Father shakes his head, as he is crying.
- iii) Hearsay analysis:
 - (a) Declarant: Father (Mr. Bill) (Note: He’s a party.)
 - (b) Proponent: Insurance Company.
 - (c) Witness: Medical Examiner.
 - (d) Statement: Head shake indicating no doubt about suicide.
 - (e) Purpose: For the truth.
- iv) Rule: **Party admissions come in for the truth.** Just like statements made at trial.
- v) Note: In 1963, prior inconsistent statements not admissible for truth. So had to get in as admission for the truth.
- vi) Trial court: Splits the baby – would allow if express statement, but head shake is too ambiguous.
 - (1) Rejects adoptive admissions (where you accept words spoken by another) as too ambiguous.
 - (2) If Mr. Bill had said, “I have no doubt my son committed suicide,” would have let it in.
- vii) Options:
 - (a) Let it in.
 - (b) Split the baby – only admit direct statement. (trial court)
 - (c) Exclude it.
 - (d) Exclude it only for Mrs. Bill, but not Mr. Bill (b/c they’re co-plaintiffs).
- viii) HOLDING: Statement is admissible as admission against interest.
 - (a) Rejects ambiguity problem → leave to the jury to interpret.
- ix) KEY: Justified by self-cross. Both Mr. Bill and Mrs. Bill are free to take the stand.
- x) Adoptive admissions:
 - (a) Mr. Bill – medical examiner puts words in his mouth, and Mr. Bill assents in some way, adopts the words. Argument: same as if he said them himself.
 - (b) Mrs. Bill – adopted by silence. When words said in your presence that would ordinarily trigger denial, and you don’t deny, can argue adopts the words by not denying.
 - (i) There is a lot of debate in criminal law whether adoption by silence is permissible. E.g., “You raped my wife,” and don’t deny....

3) **United States v. McKeon (2nd Cir. 1984), p. 572 – vicarious admissions (lawyer)**

- i) This case is the gateway to vicarious admissions.
- ii) Lawyer makes opening statement to jury in 2nd trial: Wife did not Xerox. In 3rd trial, changes theory: Wife did Xerox. Factual inconsistency.
- iii) Rule: Admissible if “prior argument involves assertion of fact inconsistent with similar assertions in a subsequent trial.” p. 576
 - (1) Other requirements: inconsistency must be clear; equivalent of testimonial statements by D; determine by preponderance that innocent explanation for inconsistency does not exist, and inference P seeks to draw is fair.
 - (2) Note: No requirement that D be consistent across trials. Burden is on P to prove → D can focus on whatever weakness he likes. Rule only comes into play when clear factual assertion, equivalent of testimonial statements by D.
- iv) Theory must be that the lawyer is speaking for the D.
- v) Fountainhead of vicarious admission idea.
- vi) **United States v. GAF Corp. (2d Cir. 1991), p. 578**: Prosecution amended indictment for third trial. Held: Ds allowed to introduce prior indictment. Jury entitled at least to know of material change in version of facts b/w trials.
- vii) **Superseded pleadings** also qualify as admissions. (But can still exclude under 403 balancing.)

4) **Mahlandt v. Wild Canid (8th Cir. 1978), p. 582 – vicarious admissions (agent)**

- i) Civil. Employee (Poos) had wolf in yard. Little kid mauled. Issue: Did kid crawl under fence, or did wolf drag him over? Poos wasn't home, no personal knowledge of event. Testifies at trial.
 - (1) Poos's statements to President:
 - (i) Phone call: Wolf bit a child.
 - (ii) Leaves note on door: I want to talk to you about wolf bit a child.
 - (iii) Board meeting notes: Discussion of legal question of wolf biting child.
 - (2) Question: What's admissible against whom?
 - (i) Poos's statements are clearly admissible against him.
 - (ii) Are they also admissible against company? Was Poos speaking “for” the corporation?
 - (3) Holding: Poos's statements admissible against both Poos and the company. But company board minutes admissible only against company (not Poos) (b/c not his agent).
 - (4) Rationale for vicarious admissions
 - (i) Self-cross rationale fails—only works when target is also the declarant. Principal can't really testify, b/c has no knowledge.

5) **Bourjaily v. United States (U.S. 1987), p. 590 – co-conspirators**

- i) Drug case. Confidential informants can't testify at trial—b/c would get killed, or at least cannot be used ever again. Greathouse – informant. Talks to Lonardo—set up drug deal. Lonardo says his “friend” will be the distributor. Greathouse talks on phone to “friend.” Arranges for “friend” to pick up drugs in his car. Cops arrest Lonardo and Bourjaily the moment the drugs are placed in Bourjaily's car. Also find \$20K in Bourjaily's car. This evidence is enough to get B for possession—but want to charge with possession w/ intent to distribute (much higher felony).
- ii) Hearsay breakdown:
 - (a) Declarant: Lonardo.
 - (b) Statement: My “friend” is distributor, will pick up the drugs.
 - (c) Witness: Tape of telephone conversation (b/c Greathouse can't testify)—have to authenticate tape; but then it's OK as witness. Only needs to prove that statement was made.
 - (d) Proponent: Government
 - (e) Purpose: For the truth → this is hearsay, unless there's an exception!
- iii) Theory of admissibility:
 - (a) Co-conspirators. Each reciprocal agents of the other. Same as if B had said it himself.
- iv) Requires preliminary determination:
 - (a) Procedure:
 - (i) Judge makes the determination. Standard is preponderance (universally). Burden on P.
 - (b) What evidence can be considered?

- (i) Old bootstrap rule: Gov't can't bootstrap into admissibility of vicarious admission, by using the vicarious admission to prove existence of conspiracy.
 1. Bourjaily throws this out. Can use the statement itself.
- (ii) Remaining issue: Whether the statement alone is enough.
 1. Federal rule: Need statement PLUS something else. Statement alone is not enough.
 2. Bourjaily satisfies this perfectly: statement PLUS showed up together w/ the car.
 3. Under old rule, would need to be able to prove conspiracy just by opening the trunk.
- v) **HOLDING: Court can consider hearsay statement itself to determine existence of conspiracy.**
 - (a) Open question: Whether statement *alone* could ever be enough, w/o independent evidence.
 - (b) Textual: Rule 104(a) supersedes no-bootstrapping rule, b/c says evidence rules don't apply.
- vi) Last argument: Confrontation Clause objection
 - (a) Lonardo is taking the 5th—not testifying. If he testified and repeated statement, would be easy—just cross-examine, like any government witness. But unavailable.
 - (b) Under Ohio v. Roberts: need firmly rooted hearsay exception + individualized guarantees of reliability.
 - (i) Firmly established? YES.
 - a. Lower courts issue: meaning of “firmly established” – does it mean OLD, or analytically defensible? Courts were throwing out co-conspirator exception as bunk. Appellate courts rejected—it means “old.” Co-conspirator exception satisfies.
 - (ii) Any particularized guarantees of reliability?
 - a. Rehnquist says not necessary for a firmly rooted hearsay exception → most controversial thing he did on the court.
 - b. Roberts said you need 2 things. But really only 1 thing.
 - c. Bourjaily ELIMINATED particularized guarantee of reliability. Subsumed Confrontation Clause entirely under rules of Evidence.
 - (c) Under Crawford
 - (i) Only applies if testimonial! Most co-conspirator statements in furtherance of conspiracy are going to be operative statements, not narrative.
 - (ii) Prof thinks testimonial means narrative—telling story to police about what happened.
 - (iii) If so, then Rehnquist was right after all in Bourjaily—the whole game is evidence. Confrontation Clause operates in very narrow area.
 - (iv) Prof thinks Crawford was really a response to Bourjaily, not Ohio v. Roberts (if had faithfully adhered to Roberts, not as problematic). Rule: Get rid of balancing tests—require cross examination for everything.

E. DECLARATIONS AGAINST INTEREST

	Admission	Declarations against Interest
Admissible against whom?	Against party (or against principal in agent-principal relationship)	Against the world
Relevant time period for testing admissibility	Test the statement at the time that it is introduced at trial. If it hurts the party then, then admissible (b/c the psychological theory is not operating).	Test at the moment made (b/c psychological theory underlying it—people don't say things that hurt them unless they're really true).
Personal Knowledge?	Does not require personal knowledge (e.g., Mr. Bill) (but must believe it's true)	Requires personal knowledge (b/c psych model doesn't work w/o personal knowledge)
Vicarious?	Vicarious admissions are possible	No such thing as vicarious declarations.
Requires unavailability?	No (game theory only).	Yes (psych model re reliability).

1) Introduction

- a) Psychological Model:

- i) Declarations against interest are admissible b/c considered very reliable.
 - (1) **Output leg** is supposed to be particularly strong.
 - (i) Human nature not to say something harmful to your interest unless it is really true.
 - (ii) Critique: Social conventions lead people to take responsibility for things that aren't really their fault. E.g., "I'm sorry" when someone steps on your foot.
 - (2) **Input leg** might be a little stronger too.
 - (i) B/c declarant won't say something unless really sure.
 - (3) Note: Doesn't matter *whom* you're telling. Doesn't matter if bragging to friends or confessing to priest. Theory is that God is listening. Prof: Context *should* matter. But it doesn't.
- b) **Requirements (see Carpenter v. Davis, dissent):**
 - (1) **Peculiar means of knowing;**
 - (2) **Against interest at the time made;**
 - (3) **Interest must be clearly apparent** (so as to be in the declarant's mind when statement made);
 - (4) **Unavailability at trial.**
- c) Very similar to admissions → but operate very differently, and very different theoretical basis.
 - (1) Admissions:
 - (i) Based on game theory. Only admissible against party who made it.
 - (2) Declaration Against Interest:
 - (i) Based on psych model; considered good testimony. Admissible against the world.
 - (ii) Note: If parties have been strategically structured *just* to avoid an admission, courts will expand declaration against interest exception to get it in. Carpenter v. Davis.
 - (3) Usual prosecution trick: Take an admission; Then call it a declaration against interest to nail someone else with it.
 - (4) Williamson narrowed federal rule to only allow as declaration against interest that part that inculcates the speaker—the rest isn't (more likely trying to curry favor). But once that narrowed, is there any difference b/w declaration against interest and admission?
- d) Types of "Interest":
 - i) **Pecuniary Interest**
 - (1) Stand to lose money.
 - (2) Common law only allowed pecuniary interest. Still the most common type.
 - (3) Can manipulate the scope:
 - (a) To admit statement:
 - (i) Expand the time-frame, do reverse treasure-hunt. E.g., Carpenter v. Davis, Cole v. Cole.
 - (b) To exclude the statement:
 - (i) Strictly adhere to psychological model!
 - (ii) Measure at the time the statement was made.
 - (iii) And interest should be obvious enough to have psychological effect.
 - ii) **Penal Interest**
 - (1) Stand to be subjected to criminal sanction.
 - (2) Historically, not allowed. Modern law allows, but raise issues.
 - (3) **Prosecution Nightmare**: exculpatory
 - (i) May have been manufactured by a crook with nothing to lose, just to help his buddy. Then he won't testify, doesn't care about contempt, already doing 40 years.
 - (ii) DP requires admission of exculpatory statements. But still have nightmare worry.
 - (iii) **Traditional approach** (e.g., federal rules): Require corroboration. Not admissible unless corroborated. Corroboration requirement does not violate DP. Allows court to exclude the statement if there isn't reason to believe it.
 - 1. Corroboration of what? Credibility of witness, credibility of declarant, or truth of statement?
 - 2. 2d Cir. requires corroboration of both credibility of declarant (based on circumstances of statement) and truth of statement (based on whether evidence in record supports statement). United States v. Salvador (1987), p. 621.
 - 3. Brown (NY) only required corroboration that statement was made, i.e., credibility of witness (reliable b/c he was a cop).

(iv) Alternate approach: Shift persuasion burden to D of whether to believe the exculpatory statement (though not necessarily the ultimate fact) → tells jury you don't have to use this evidence at all if don't believe by preponderance.

1. RT jury charge: D has offered evidence to corroborate the statement made by W. If, based on the statement and the corroborating evidence, you believe that the statement is more likely than not true, then you may consider it in your determination of whether the P has ultimately proved the D's guilt beyond a reasonable doubt. However, if you do not believe that the X statement is more likely true than not true, then you need not—and indeed should not—consider it at all in your ultimate determination of D's guilt in this crime.

(4) Defense Nightmare: inculpatory

- (i) Guaranteed Confrontation problems → b/c using against third person, and often testimonial (e.g., narrative statement to someone about the past).
- (ii) Why more worrisome than pecuniary? Fear: statement was never made; cops are just making it up. B/c declarations against penal interest often arise in law enforcement context, more worried that they're being made up.

iii) Social Interest

- (1) Stand to be subjected to social opprobrium by friends.
- (2) No jurisdictions allow. But can probably squeeze into the ever-expanding pecuniary interest box.

2) DECLARATIONS AGAINST PECUNIARY INTEREST

a) Cole v. Cole (1992), p. 605 – martial home

- (1) Man dies intestate. Issue: Did he own half of the marital home? If he owned half, this half goes to kids from his first marriage. If second wife (widow) owns all, then nothing to kids.
- (2) Legal Presumption: Marital home is co-owned: ½ and ½. (If widow doesn't rebut, will result in directed verdict). To Rebut: Widow must show he didn't give her any money.
- (3) Widow testifies.
 - (a) Witness: widow; ****note: motive to lie is not a hearsay concern! Can cross!****
 - (b) Declarant: decedent;
 - (c) Proponent: widow;
 - (d) Statement: "I can't contribute to the purchase of the home, b/c I have to pay so much in child support."
 - (e) Purpose: For the truth (relevant to show that husband didn't contribute).
- (4) Admissibility theory: Declaration against interest
 - (a) Argument: Statement in derogation of his property rights—results in less ownership of the house—therefore, against his pecuniary interest.
 - (b) Response: At the time the statement was MADE, it was NOT against his interest—he gets to live for free in a house without paying anything—this is in his interest!
 - (i) If you measure at the time of the trial, then it is against his interest (in derogation of his property rights)—but that's not when you measure it!!
- (5) Court allows the statement. This is the law in every jx. Stretch out the time frame.
 - (a) But indefensible based on the psychological theory. Should be measured at the time the statement was made → remember to make this argument at trial!!! Lawyers blow this—you can get the judge to rule for you.

b) Declarations that are self-serving and disserving at same time

- (1) **Writing acknowledging partial payment of debt**: If SOL still far away, considered preponderatingly disserving. If SOL has expired, preponderately self-serving b/c removes bar that has already fallen.
- (2) **Adoption Contract** – considered against interest b/c you lose your child, even though pecuniary advantage.

c) Carpenter v. Davis (1968), p. 608 – “Yes, I know, it's not your fault.”

i) Facts:

- (1) Terrible auto accident. Man extricates himself, calls for help, then goes to talk to woman in other car. Says, "I'm sorry, lady, you pulled out right in front of me." Woman responds, "Yes, I know, it wasn't your fault." Then she dies.
- ii) Legal action: Loss of consortium (action based on lost of earning power of the deceased spouse).
- iii) Breakdown:
- (a) Witness: defendant **motive to lie solved by cross-examination**
 - (b) Proponent: defendant
 - (c) Declarant: deceased woman
 - (d) Statement: "Yes, I know, it wasn't your fault."
 - (e) Purpose: for the truth (trying to prove it was not his fault).
- iv) If this were wrongful death action, would come in as admission, b/c lawsuit "on behalf of" dead person. Note: Another area where self-cross doesn't help—party is dead. Cross-examine the guy as hard as you can—but jury decides whether to believe him. Statement comes in as admission. Husband brought loss of consortium action in order to avoid this admission.
- v) HOLDING: Factual portion of statement ("Yes, I know") is admissible as declaration against interest. But opinion portion ("It's not your fault") is not admissible.
- (a) Declarant must have personal knowledge.
 - (i) Yes, I know → personal knowledge, i.e., we pulled out in front → OK.
 - (ii) It's not your fault → no personal knowledge → excluded.
 - (b) If it were a party admission, opinion is admissible. Justified by game theory and self-cross.
 - (c) But for declaration against interest, opinion is too open to ambiguity, where W not in court to explain.
- vi) Dissent (Finch): Would admit entire statement, b/c H really standing in W's shoes.
- vii) Dissent (Seiler): Would admit entire statement, b/c "it's not your fault" is as much fact as it is opinion.
- viii) Dissent (Storckman): Would exclude the entire statement. Double rationale for excluding:
- (a) All opinion – by merely removing the comma, the statement is "Yes, I know it's not your fault." Entire statement is expression of opinion only.
 - (b) Not declaration against interest.
 - (i) Declarations against interest require: (1) peculiar means of knowing; (2) against interest at time made; (3) interest must be so apparent to be in the declarant's mind when statement made.
 - (ii) Here, W's sole interest was in getting out of car and surviving. Pecuniary interest was nowhere in her mind. Psych model breaks down.
- ix) How is this a declaration against interest?
- (a) When lying in wreckage dying, have to be thinking that would be detrimental to tort action brought by husband later on. Shows how stretched the doctrine is.
 - (b) Negative treasure hunt—if you can find any piece of the treasure that somehow could get lost, then admissible. Depends on how imaginative the lawyer is – we have so warped the pecuniary interest model. How do you psychoanalyze the declarant?
 - (c) Huge departure from the psychological model—this exception now operates in purely formal territory.
- x) What if this were a criminal action?
- (a) Prof doesn't think this statement would be admissible in criminal context. Only in civil.
- xi) Underlying principle justifying this result:
- (a) If statement would have been admissible against the party as a party admission, but have somehow structured the parties to get the testimony out, then we will stretch the exception as much as we can to keep it out. Court wasn't going to keep out the testimony just b/c called it loss of consortium.
- d) **Gichner v. Antonio Troiano Tile & Marble Co (note, 615)**
- (1) Facts: Warehouse burns down, employee of lessee tells fire marshall that they were in there drinking and smoking but that they didn't start the fire and building wasn't on fire when they left.
 - (2) Breakdown:
 - (a) Proponent = Lessor
 - (b) Dec = Employee (absent at time of trial)
 - (c) Witness = fire marshall

- (d) Statement = we were smoking in there
- (e) Purpose = Truth
- (3) Is this vicarious admission → scope of employment question → probably doesn't fit in there
- (4) Dec against interest
 - (a) Ct lets statement in as declaration against employment interest
 - (b) Is this accurate application of model, especially where employer is going to be vicariously liable? So not only are foundations of model shaky but are holding declaration against interest of someone who didn't even make the statement.

3) DECLARATIONS AGAINST PENAL INTEREST

a) People v. Brown (1970), p. 616 – exculpatory

- i) Facts: D claims self-defense. (Claims victim turned gun on him.) P couldn't find gun – prosecutes. Then find third party who was involved. W gives statement that he picked up the gun. P doesn't push hard to testify. D subpoenas. W takes 5th, threatens w/ contempt, still won't talk.
- ii) Question: Can you call the cop to repeat that Witness said he picked the gun up?
 - (1) Witness: cop
 - (2) Declarant: third party (now unavailable)
 - (3) Proponent: defendant
 - (4) Statement: I picked up the gun.
 - (5) Purpose: for the truth.
- iii) Note: no confrontation clause problem, b/c D is the one introducing.
 - (1) No defense nightmare. Only prosecution nightmare.
- iv) Theory of admissibility: Declaration against penal interest → would open him up to criminal liability.
 - (a) In 1950s, this argument wouldn't work – only pecuniary interest matters.
 - (b) This is the first case where declaration against penal interest is allowed.
 - (c) Court finds strong corroboration
 - (i) But corroboration is only that the statement was MADE—b/c cop is the witness; know the statement is made. No corroboration that it was true! Third party might be his friend, who made it up just to help him.
 - (ii) But if don't allow it, might violate DP – D has a right to all the exculpatory evidence to help him.
- v) Crazy under psych model to separate pecuniary and penal.
- vi) But, fabricated statements can come in to create reasonable doubt—Ds get off.

b) Williamson v. United States (1994), p. 622 – inculpatory statements about third parties

- (1) Cops pull Harris over; trunk-full of cocaine. Harris tells different stories: (1) Unidentified Cuban gave him the drugs; Williamson lent him the car, but Cuban is the big cheese; (2) Actually, there is no Cuban. Williamson is the bad guy. In fact, he was driving right in front of me when you pulled me over. I was just scared to tell you that before. Then Harris refuses to testify at trial.
- (2) Admission?
 - (a) Against Harris, YES. In fact, this is why you try the Ds separately—so you can put in the full admission w/o anyone objecting based on Confrontation Clause.
 - (b) Against Williamson, NO. No vicarious admission. This is not a co-conspirator statement b/c not in furtherance. Can't use statements made after the guy is out of the game. Still need the co-agency relationship.
- (3) Declaration against penal interest:
 - (a) Theory: admitting he was engaged in serious crime – narrating incidents of the crime – and the narration includes a third person – but the part of the story including third person just makes it worse for him, b/c shows the crime is bigger.
 - (b) THEREFORE, it's declaration against penal interest → admissible against the WORLD. It's good testimony. Plus, had internal corroboration – Williamson's name
 - (c) Inculpatory nightmare: take statements that are classic admissions that name third persons; make admissible against world.
- (4) Issue: Admit entire statement, so long as generally self-inculpatory, or only the particularly self-inculpatory parts?

- (5) O'Connor's opinion
 - (i) Construes federal rule very narrowly. The only declaration against interest is the statement against yourself. When inculcate third party, usually trying to minimize your own culpability. Therefore, no such thing as declaration against penal interest that goes beyond the speaker.
 - (ii) Mere proximity to self-inculpatory statements does not make more reliable. Post-arrest statements are highly suspect. Might mention others to deflect blame. But confessions are admissible if not attempt to shift blame or curry favor. Note: neutral-seeming details can be self-inculpatory if link to crime.
 - (iii) Avoids any confrontation clause problem.
 - (iv) Prof: Doesn't think there's a difference anymore b/w declaration against penal interest (in federal) and admissions.
- (6) Many states don't follow *Williamson*. Allow much broader declarations against interest.
 - (i) In those states, will run into Confrontation Clause. Will depend on testimonial line.
- (7) Compare *Williamson* to *Crawford*:
 - (a) In *Crawford*, were W's statements about H sufficiently self-inculpatory to be admissible against H? Probably not. Hard to foresee her potential accomplice liability. Plus, some parts were only about H. But maybe no incentive to shift blame when it's your H?

b) Crawford v. Washington → overrules Ohio v. Roberts

- (1) Facts: Wife says victim tried to rape her. Husband gets in a fight with him and kills him. D's claim: self-defense. Question whether V reaching for knife. W tells story to police that doesn't include any weapon on V. At trial, W invokes marital privilege. P wants to play tape of the story she told to police to rebut self-defense.
- (2) W's statement is hearsay b/c of D's inability to cross b/c she takes marital privilege
- (3) 2-step analysis
 - (a) Evidentiary → Wash. Admits as declaration against penal interest.
 - (i) State of indep legal sig → NO
 - (ii) Verbal impact statement → NO
 - (iii) State of mind → Classic reverse engineering → maybe get in here??
 - (iv) Prior reported → NO b/c doesn't meet formality
 - (v) Prior inconsistent → NO b/c she is unavailable
 - (vi) Vicarious admission → in Wash marital privilege like 5A → can't use
 - (vii) Dec against interest → against social interest of wife?
 - (viii) Dec against penal interest (what P argues)
 - 1. Theory: Could have nailed W on conspiracy charge. But risk must be obvious enough that it operates on psychology. Can't be this attenuated.
 - 2. This is probably wrong, but only a matter of evidence law (state issue).
 - (b) Confrontation clause: *Washington* says satisfies *Ohio v. Roberts*
 - 1. Traditional hearsay exception (declaration against interest) +
 - 2. Individualized indicia of trustworthiness (fundamentally interlocking stories).
 - (c) SCOTUS abandons *Roberts*. This case shows
 - 1. Declaration against interest is a firmly established hearsay exception—but here taken to extreme—psychological force wasn't operating—shows how easy it is to take a firmly established exception and twist it to satisfy it.
 - 2. Individualized indicia... this statement cries out for cross-examination.
 - (d) Scalia rule:
 - 1. If testimonial → requires cross-examination.
 - 2. If non-testimonial → 6A doesn't apply.
 - 3. Simultaneously deepens and narrows Confrontation Clause.
 - 4. Issue: What counts as testimonial? If boils down to assertive/non-assertive line, then *Bourjaily* was right all along → evidence is the whole game.

F. DYING DECLARATIONS

Rule 804. Hearsay Exceptions; Declarant Unavailable

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .

(2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

- 1) Requirements:
 - i) ONLY available in criminal cases (note: federal rule also says civil);
 - ii) Declarant KNOWS they are dying;
 - iii) Declarant IDENTIFIES the killer.
- 2) Stated Rationale:
 - i) Exceptionally reliable, b/c of consciousness of death. Won't go meet Maker w/ lie on your lips.
 - ii) This religious explanation doesn't hold up in modern society.
- 3) Functional Rationale:
 - i) Don't want murderer to go free. Just create a hearsay exception.
- 4) This is the ONLY exception to the Crawford rule!
 - i) FN in Crawford says doesn't require confrontation b/c exception existed at time of founding.
 - ii) Can't fit into Scalia's universe. Just reconciles it as historical anomaly that existed at time of founding. Must have intended to include exception.

G. SPONTANEOUS, CONTEMPORANEOUS AND EXCITED UTTERANCES

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

1) Intro to Res Gestae

- a) 4 types of res gestae exceptions
 - i) **Excited utterance** – “Oh my god” verbal reflex.
 - ii) **Present sense impression** – calm report on contemporaneous events.
 - iii) **Description of physical condition** – moans and groans about internal sensations.
 - iv) **Statements of mental condition** – assertive statements about state of mind.
- b) Rationale:
 - i) All justified by rough simultaneity b/w statement and event.
 - ii) Input: No memory problem. Output: Less fabrication opportunity. Considered very reliable.
 - iii) The more time that elapses b/w event and utterance to allow calculation by the speaker, the less value.
- c) In the civil context, these res gestae categories open up HUGE amount of hearsay.
 - i) Seems like a no-confidence vote in the hearsay rule. Keep subverting it.
 - ii) Ask if the hearsay rule is worth the expense, effort, uncertainty if shoot it through with so many holes.

First two are descriptions of *external* reality. Considered reliable, but feasible to run legal system w/o.

Last two are descriptions of *internal* reality. Indispensable exceptions. No other way to access.

2) Excited Utterances (“Oh my God”)

- a) Verbal reflex. Requirements:
 - (1) Startling event;
 - (2) Immediate verbal response.
- b) Considered valuable evidence.
 - (1) Input leg:

- (a) Memory: STRONG, b/c no time elapses.
- (b) Perception: no assurances.
- (2) Output leg:
 - (a) Ambiguity: big problem; no time to reflect, gather thoughts.
 - (b) Veracity: STRONG, b/c no time to fabricate.
- c) Must be virtually simultaneous!
 - (1) If any time elapses to allow calculation, speaker can consider his own interest, value is gone.
- d) Critique:
 - (1) High ambiguity problem. Irony: If take time to catch your breath and put together a little narrative about what just happened, then inadmissible.
 - (2) Reflects a policy choice of valuing veracity over ambiguity problems.
- e) Every state admits excited utterances.
 - (1) But now has been swallowed by present sense impressions, in most states.

3) Present Sense Impressions (“I am a camera”)

- a) Contemporaneous descriptions of events declarant is presently (or recently) observing.
 - i) Calm and cool. No need for excitement.
 - ii) Question: How much time can pass? Must argue from first principles—based on the theory of reliability justifying the exception in the first place. Is it only memory?
- b) Reliability:
 - i) Memory is STRONG, b/c simultaneous. But all other problems are present.
- c) Admissible in all but 12 states.
 - i) Has basically swallowed excited utterances, b/c if you have simultaneity, don’t need excitement.
- d) Critique:
 - i) Reduced veracity safeguard, b/c declarant is calm and has time to reflect.
- e) **Houston Oxygen (TX Sup. Ct. case) – car accident (“They’re going so fast.”)**
 - i) Car accident; declarant in another car had said, “They’re going so fast they’re going to have an accident.”
 - ii) Not excited utterance – she was calm when she said it. Allowed as present sense impression.
- f) **Commonwealth v. Coleman (1974), p. 634 – V’s phone call to mother**
 - i) Facts:
 - (1) Victim calls mother—says boyfriend is there, threatening to kill her. Then phone goes dead. Mother calls police. Cops find that victim has been stabbed.
 - (2) D on trial for 2nd degree murder. D is angling for self-defense or voluntary manslaughter. Says V had attacked him unprovoked with a letter opener.
 - (3) To rebut heat of passion: Prosecution wants to introduce V’s telephone call.
 - ii) Hearsay:
 - (a) Declarant: victim
 - (b) Proponent: prosecution
 - (c) Witness: mother
 - (d) Statement: he’s pushing me around
 - (e) Purpose: for the truth
 - iii) P’s theory of admissibility: Excited Utterance → rejected.
 - (a) D’s response: Too much time passes. This isn’t “oh my god.” She took the time to think “I should call my mother to get help.” She’s thinking, contemplating, calculating.
 - (b) Under old common law, this statement would be inadmissible.
 - iv) P’s new theory: Present Sense Impression → creates new exception.
 - (a) Only requirement: virtual simultaneity. Statement is a narrative virtually simultaneous with the event. Question: How close must it be to event?
 - (b) Only way to limit time-frame → requires theory of why present sense impressions are reliable. If only memory, then could expand quite a bit. Some say: 12 hours is too much time.
 - (2) State of mind?
 - (a) Relevant just b/c Victim was frightened?

- (b) But not relevant on its own → only relevant as proof that D must have hit her.
- (c) We allow mental state to prove “forward” – e.g., my intention to do it is evidence that I did it. E.g., she was frightened, therefore she hit.
- (d) But we don’t allow mental state to prove “backward” – e.g., she was frightened, therefore he must have hit her.
- (3) Note: Case doesn’t even deal with Confrontation Clause.
 - (a) Analysis: Was this statement testimonial?
 - (b) Prof thinks not testimonial – narrative to third person not connected w/ police, simultaneous to event. (But it’s open question.)
 - (c) If this is not testimonial, then HUGE exception to Confrontation Clause → most present sense impressions will come in in criminal trial.
- g) Davis v. Washington (2007)**
 - i) Girlfriend calls 911; says boyfriend threatening her; phone cuts out. 911 operator calls back, gets story, then finds out his name, including middle initial. Police arrive 4 minutes later. Boyfriend is gone. D charged with felony violation of protective order. Girlfriend refuses to testify.
 - ii) Prosecution wants to introduce recording of 911 call (that’s the only evidence they have):
 - (a) Declarant: victim
 - (b) Witness: 911 recording
 - (c) Proponent: prosecution
 - (d) Statement: boyfriend is in the house, pushing me around.
 - (e) Purpose: for the truth (to show he was in the house, acting aggressively).
 - iii) Hearsay exception:
 - (1) Excited utterance or present sense impression.
 - (2) Note: No unavailability requirement. Girlfriend just doesn’t want to testify.
 - iv) Confrontation Clause:
 - (1) Issue: Testimonial?
 - (a) Here, she’s talking to state official (in Coleman, it was just her mother). This official is engaged in thoughtful interrogation of the victim (even asked for middle initial).
 - (b) D’s Argument: Must be testimonial where government is engaged in interrogation, and then government wants to introduce for prosecution.
 - (c) P’s Response: Purpose was to respond to emergency. Finding out if armed, etc., to protect victim.
 - (2) HOLDING: First half is functional, responding to emergency → non-testimonial.
 - (a) Analogy: Statements to doctor for treatment – not intending to provide a narrative – intending to ask for help.
 - (b) Second-half becomes testimonial—when she gets calmer, and spells his name, etc.
 - (3) Note: Confrontation Clause does not require unavailability!! Query: Should it??
- h) Hammon v. Indiana (companion case)**
 - i) Also DV case. Police arrive. Separate husband and wife: husband in kitchen, wife in living room. Ask wife what’s going on. There’s glass around. She finally tells them—he threw down the furnace, etc. At trial, wife won’t testify. Want to introduce her statements to police.
 - ii) Hearsay exception?
 - (1) Probably not excited utterance. But probably present sense.
 - iii) Confrontation?
 - (1) Emergency is over. No longer info needed to allow police to respond. This is the police eliciting information about what happened not so they can respond to it, but so they can decide whether it was criminal or not.
 - iv) Real problem is the absence of the woman on the stand.
 - (1) For confrontation, shouldn’t you require unavailability? How do we feel about having an absent witness in criminal case without any explanation of her absence?
 - (2) Now: forfeiture argument: if D has engaged in course of conduct designed to terrify the V, then argument D has forfeited confrontation clause rights.

H. PHYSICAL OR MENTAL CONDITION OF DECLARANT

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

1) Present Physical Condition

a) Basics:

- i) Declarant is describing his current physical condition.
 - (1) Moans and groans exception.
 - (2) This is how you prove pain.
 - (3) Must be your CURRENT condition. How you feel right now.
- ii) No requirement of unavailability → b/c contemporaneous statement is the best evidence.
- iii) Reliability: Strong input leg:
 - (1) Memory: simultaneous;
 - (2) Perception: it's your own body.

b) Two complications:

i) **Statements about past condition admissible when made to seek treatment:**

- (1) This is the *only* relaxation of the simultaneity rule. Can admit backward-looking statements (e.g., how you felt yesterday) if made to a doctor, or for treatment.
 - (2) In federal rules, this is a separate rule: 803(4).
 - (3) How much of narrative to doctor is germane to treatment?
 - (a) Often tell doctor not just how you feel; but also *why*. Is *who* ever relevant??
 - (b) Try to limit scope of narrative to just that that doctor needs to provide adequate treatment.
 - (c) Movement in medical profession: "holistic" treatment—treat the whole patient. Argument that narrative of the event is crucial to adequate care. E.g., child describing sexual abuse by family member → necessary to treatment, b/c trauma is unique. E.g., rape by acquaintance.
 - (d) Line may be similar to testimonial/non-testimonial line. Need to know how much is necessary to treatment.
 - (4) Who qualifies as someone providing treatment?
 - (a) Why limit to doctors, if same motive for truth-telling exists with teachers, social workers, etc?
 - (b) Answer is across the board. Some jx allow social workers, some not. Some jx allow ambulance workers, some not. Ask: which are legitimate? How broad to cast the net? So that not only physical condition statements come in, but also the narrative that accompanies it.
 - (c) Hospital records explode this exception. Must decide which ones come in. Key question is always: what is NEEDED for treatment? (as opposed to mere collateral narrative?)
 - (5) Confrontation Clause:
 - (a) Where to draw testimonial line?
 - (b) Analogize to Davis/Hammon – if like 911 call seeking aid, then non-testimonial. But if reflecting on past event w/o purpose of seeking aid, then testimonial.
- ii) **Nature of silence**
- (1) When is SILENCE probative? E.g., if the dog doesn't bark.
 - (2) Consider when failure to speak is probative of your internal condition.
 - (3) Fidelity v. Jones – lack of complaints to friends/family admissible as evidence that not sick.
 - (4) Silver v. New York Cent. RR Co (Mass. 1952), p. 510 – cold train car (silence).

c) **Fidelity v. Jones (AL 1966), p. 645 – no complaints of sickness (silence)**

- i) Insurance case. Man dead in bathtub. Coverage if it's an accident (e.g., tripped and fell). No coverage if result of illness (e.g., blacked out due to his physical condition).
 - ii) Note: Big burden of proof issue—can't tell from case what the particular allocations were here.
 - iii) Insurance theory: Decedent was sick.
 - iv) To rebut: Friends and family testify that he did *not* complain of sickness in weeks leading up to death.
 - v) Hearsay analysis:
 - (1) Declarant: decedent
 - (2) Proponent: plaintiff (beneficiary of insurance contract)
 - (3) Witnesses: friends
 - (4) Statement: silence
 - (5) Purpose: for the truth (that he was not afflicted by pain).
 - vi) Almost every court accepts this evidence as an implied statement. But query whether appropriate.
 - (1) Should silence be proof of good health? What if felt shitty and didn't say anything? Can't recognize physical symptoms unless someone describes them.
- d) Silver v. New York Cent. RR Co (Mass. 1952), p. 510 – cold train car (silence)**
- i) Long-distance train; very serious blizzard; train gets stopped in rail yards for 12 hours; claim: train staff grossly negligent in failing to keep heat in the car; passenger suffered injury from the cold. Call porter as witness. “Did anyone complain to you that it was too cold?” Porter says, “No. Nobody said anything to me during the 12 hours marooned in rail yards.” Court admitted as quintessential non-assertive statement.
 - (a) Declarant: passengers who are silent
 - (b) Witness: porter
 - (c) Proponent: train company
 - (d) Statement: silence
 - (e) Purpose: for the truth → to prove the temperature in the car.
 - ii) Note: Clearly admissible for state of mind
 - (1) To show porter's state of mind to show never put on notice for the cold; therefore, no liability. This would be easy (clearly admissible). Not hearsay.
 - (2) But for the truth, it's hearsay, unless jx allows non-assertive, or it's physical condition.
 - iii) Analysis: Jones vis-à-vis Silver:
 - (a) In Silver
 - (i) Situation more acute → greater expectation would speak up.
 - (ii) Porter might actually be able to fix the situation → more similar to seeking treatment.
 - (iii) Silence more probative.
 - (b) In Jones
 - (i) Time frame is much longer – at what point do we say he *should* have complained?
 - (ii) Friends and family → maybe more likely to complain, b/c feel more comfortable with them? But maybe less likely, b/c there's nothing they can do to fix the situation?
 - (iii) Depends on culture, it seems.
 - iv) Remember the problems with using silence as implied statement:
 - (1) Bizarre. If passenger had actually STATED that he felt warm (and now unavailable), would NOT be admissible (unless statement of physical condition).
 - (2) By contrast, SILENCE gets to come in, though only a weaker, more ambiguous form of the actually vocalized statement. If in jx that allows non-assertive hearsay (e.g., the umbrella to prove rain), then also silence admissible. But need to figure out instances.
- e) United States v. Tome (10th Cir. 1995), p. 647 – child abuse statements to doctor**
- i) Can get in PAST physical description → YES IF made to a doctor for the purposes of treatment
 - (1) Rationale: Won't lie if you're trying to get proper treatment. So if are describing past physical condition to doctor that is relevant to present treatment, reliable.
 - ii) Problem:
 - (1) Rationale breaks down for small child who can't understand implications – isn't seeking treatment herself.
 - iii) Why just doctors?

- (1) Dissent: If model is right, then limiting to just doctors makes no sense. Should include teachers, social workers, etc.
- (2) People at margins (ambulance drivers, nurses, healthcare professionals) → this is all coming in
- (3) BN thinks only matter of time before extend to teachers, social workers.
- iv) Memory problems:
 - (1) Any time that are going back in time are going to have memory problems → if sufficient guarantees of trustworthiness to doctor, why not others?
- v) Narrating:
 - (a) Narration comes in IF and only IF relative to treatment.
 - (b) If dad's abuse is relevant to psych treatment and comes in.
 - (c) Puts pressure on model → why does doctor need to know *who* did it? Query whether just using this as a way to get in evidence that is really probative.
- vi) Confrontation:
 - (a) This seems pretty clearly testimonial. Narration about past events.
 - (b) But: Analogy to 911 → seeking treatment, not trying to tell a story? Hard.

2) Statements of Mental Condition

- a) Real world distinction btw state of mind non-hearsay and declaration of mental condition
 - (1) Declaration of mental condition
 - (a) Is hearsay → admissible for the truth → but we create an exception
 - (b) Person is intentionally asserting their state of mind → automatic questioning of veracity leg
 - (c) In crim cases need to test confrontation clause (if used against D).
 - (d) May make inferences into the future (i.e., intentions), but not backward into the past (i.e., memories). (Possible argument that backward should be allowed as to speaker himself.)
 - (2) State of mind non-hearsay
 - (a) Non-assertive statement that is being used to infer state of mind of declarant. Truth of statement itself *cannot* be the purpose.
 - (b) As long as non-assertive → no implications with Confrontation clause
 - (c) May not go backward to reality, i.e., reverse engineer.
- b) Range of mental condition statements:
 - (1) **"Pure" mental conditions** (** non-controversial)
 - (i) Assertive statement about state of mind where the mental condition itself is the relevant issue, e.g., insanity, mens rea, etc. Unlike state of mind non-hearsay, these can be *assertive*.
 - (ii) E.g., United States v. DiMaria (2d Cir. 1984) – "I only came here to get some cigarettes real cheap" – admissible as state of mind negating intent to buy stolen cigarettes.
 - (2) **Predictions about HYPOTHETICAL behavior** (** relatively non-controversial**)
 - (i) To make predictions about how declarant might have behaved. Since there's no objective reality, this is probably the best evidence.
 - (ii) E.g., Loetsch (p. 494 note case) wrongful death action – W's statements re H's infidelity relevant to whether she would have supported him. Could admit as mental condition or non-assertive state of mind.
 - (3) **Predictions about ACTUAL behavior** (of first-party) (Hillman)
 - (i) Every American jx allows. Based on inference that we carry out our intentions.
 - (ii) Allowed to make *forward*-looking predictions about behavior based on state of mind. E.g., "I will go to Chicago next week."
 - (iii) E.g., Hillman case. Walters's letter saying he's going to Crooked Creek. Admissible to prove that he really went to Crooked Creek.
 - (4) **Predictions about ACTUAL behavior of third persons** (Pheaster)
 - (i) Inference that third persons will act in accordance w/ speaker's intentions.

- (ii) Pheaster – “I’m going to meet Angelo” – used to prove not just speaker’s future acts, but also Angelo’s future acts.
 - (iii) This is the battle ground. Many jx are allowing Pheaster.
 - (iv) Problem: No psychological model to explain why 3rd party would act in accordance with our intentions.
- (5) **Evidence of prior events that only goes to DECLARANT’S actions** (Prof’s category)
- (i) E.g., “I went to Chicago last week.”
 - (ii) Open question. This is in between Pheaster and Shephard.
 - (iii) Strong argument that people’s memories are better evidence of reality than their future intentions. So if allow Hillman, should allow these.
 - (iv) Counter-argument: Will swallow hearsay rule. *Everything* is memory!
 - (v) Shephard doesn’t answer, b/c was used to prove that third party acted certain way.
 - (vi) Arguably, kidnapper hypo and Kinder go here: inferring actions in past.
- (6) **Evidence of prior events involving third parties** (backward-looking states of mind) (Shephard)
- (i) E.g., Shephard: “This whiskey tastes funny. I think my husband poisoned me. If I die, please have this drink tested.”
 - (ii) Statement: whiskey is poisoned → state of mind only relevant for truth → goes to past events and third parties → excluded.
 - (iii) Only exception: Will contests and undue influence. In the context of wills, can use mental condition, e.g., fear, to go backward in time to show that the fear resulted from something third party did in past. Argument: acting under improper influence when made will.
- 3) **United States v. DiMaria (2d Cir. 1984), p. 654 – pure mental state**
- a) Facts: D charged with trafficking stolen cigarettes. Contemporaneous statement to cops: “I only came here to get some cigarettes real cheap.” Relevant to mens rea: Suggests meant to buy bootleg cigarettes, not stolen cigarettes. At trial, D takes 5th (probably to keep out past crim convictions)→ so D is attempting to testify w/out getting on stand b/c his statement negates his intent to traffic.
 - b) Court: Admits the statement.
 - i) Relevant to material legal issue, i.e., tends to disprove necessary mens rea.
 - ii) Statement of his current thoughts (state of mind).
 - iii) Possible self-serving motive does not go to admissibility → goes to weight, leave to jury.
 - c) Query whether D should be allowed to “testify” through his past statements, but not now.
- 4) **Loetsch v. New York City Omnibus Corp. (494 note case) – predicting hypothetical behavior**
- ii) Wrongful death action by husband for wife’s death. Damages depend on pecuniary benefits he *would* have received, if W had lived. Ds introduce wife’ will, where W calls H cruel and indifferent, leaves him only \$1.
 - iii) Purpose: State of mind → Relevant to show W’s state of mind that she didn’t like her husband → then making prediction into future to predict how W would have behaved, had she lived.
 - iv) Note: Could also be considered non-assertive. B/c not asserting her state of mind, inferring it.
- 5) **Mutual Life Insurance v. Hillmon (U.S. 1892), p. 659 – predictions about future**
- i) Huge insurance case. Widow brings action against all 9 insurance companies to recover from policy. Defense: This is a huge scam. Hillmon just ran away. “Body” that was found was actually murdered man named Walters, dressed up to look like Hillman. Result: Widow recovered on some, not on others. To this day, no one knows if it was a scam. The case we have is the 3rd insurance company case. Goes to SCOTUS.
 - ii) Evidence: Letters from Walter. One of them says “I’m going out to Crooked Creek in Colorado to look for a mining camp with Hillman.” Then, body is found at Crooked Creek. Allegation: body is Walters, not Hillman. Forensic evidence inconclusive. Insurance company offers the letters in evidence to prove that Walters went to Crooked Creek (and therefore body *could* have been his).
 - (a) Declarant: Walter
 - (b) Witness: letters
 - (c) Proponent: defendant (insurance company)
 - (d) Statement: I’m going to Crooked Creek

- (e) Purpose: for the truth (that Walters actually went to Crooked Creek).
 - iii) This is making a PREDICTION about OBJECTIVE REALITY. (Different from mere hypothetical world, as in Loetsch). Based on inference that we carry out our intentions.
 - iv) Now, every American jx allows this exception: can go up into the head of the declarant and then springboard out—but only if going forward.
- 6) **United States v. Pheaster (9th Cir. 1976), p. 662 – predictions about future acts w/ a third party**
- i) Decedent’s statement: “I’m going to go meet Angelo to pick up the marijuana; I’ll meet you back here later.” P wants to introduce this testimony.
 - (a) Declarant: decedent
 - (b) Witness: friends
 - (c) Proponent: prosecution
 - (d) Statement: I’m going to go meet Angelo.
 - (e) Purpose: to show he really did go meet Angelo.
 - ii) Prosecution offers as *Hillmon* statement—offered only to prove his intent to go there.
 - iii) Distinction: Not only worried about declarant acting consistently w/ his own intent. Also worried about Angelo is going to meet him there.
 - iv) **HOLDING: Statement of intention to do something with another person, where the issue is whether it happened, is admissible.**
 - (a) “Angelo will be in the parking lot tonight” → inadmissible (not state of mind).
 - (b) “I’m going to meet Angelo in parking lot tonight” → admissible as state of mind implicating third party.
 - v) This is the battle ground of mental condition statements. Forward-looking statements to prove actual future events, but to prove not only that declarant did something, but also a third party.
 - vi) Many jx are allowing Pheaster. Argument: No psychological model to explain why 3rd party would act in accordance with our intentions. But allow.
- 7) **Shepard v. United States (U.S. 1933), p. 669 – backward looking statements about third party acts**
- i) Murder case in which the husband (doctor) is accused of killing his wife.
 - ii) D’s defense: Wife was suicidal. Offers evidence that she said she had no wish to live. Used as *Hillmon* state of mind exception: if suicidal, likely that she committed suicide.
 - iii) P’s rebuttal: Wife told nurse: “This whiskey tastes funny. I think my husband poisoned me. If I die, please have this drink tested.”
 - (a) Declarant: decedent
 - (b) Witness: nurse
 - (c) Proponent: prosecution
 - (d) Statement: whisky is poisoned
 - (e) Purpose: for the truth, i.e., whiskey was really poisoned.
 - iv) Would be admissible for the purpose of rebuttal, i.e., to negate that she had a suicidal mind.
 - v) Problem: P introduced as substantive evidence, i.e., for the truth.
 - (1) Not dying declaration – not enough consciousness of impending death.
 - (2) Not state of mind – testimony faced backward and not forward. Spoke to a past act, and more than that, to an act by someone not the speaker. Inadmissible.
 - vi) Upshot:
 - (1) “This whiskey is poisoned” → non-assertive statement to prove not suicidal → not hearsay.
 - (2) “This whiskey is poisoned” → assertive statement that she thinks the whiskey is poisoned → only relevant for the truth → trying to prove a third person’s actions in the past → not OK.
 - vii) Confrontation Clause:
 - (1) Problem: Can’t cross-examine the wife—she’s dead.
 - (2) Is statement testimonial? Backward-looking narrative, or responding to emergency?
- 8) **Kinder v. Commonwealth (1957), p. 510 – state of mind to make inferences about past**
- a) *Kinder* (p. 510): 5-yr-old’s mental state (knowing where the goods are buried) → can use as inference that watched uncle bury them there (i.e., his own past action of watching uncle).
 - b) *Kidnapping Hypo*: Victim’s state of mind (knowing what the room looks like) → can use as inference that previously was in that room (i.e., her own past actions) → therefore, D was her kidnapper.

- c) Theory: Making inferences about the declarant's own past actions, based on his current state of mind (state of mind is intermediate step in the chain of reasoning leading to D's guilt).
 - i) BUT: Isn't this really an attempt to make inference about third party actions? I.e., not really interested in what boy did in the past, but what uncle did. Isn't this Shephard?
 - ii) No. Shephard required inference about past third party actions that weren't directly observed by declarant. This is different, b/c inference *directly* follows from state of mind (no other explanation).
 - iii) Therefore, if nephew had said, "I remember watching my uncle bury them under the shed" → admissible? Under mental state exception, no difference. (no assertive/non-assertive line.)
- d) RT: These cases seem better explained as non-assertive statements. Because they weren't making assertions about their states of mind. They made assertions about the world, from which you could infer state of mind of knowledge, from which you could infer material fact. Seems like better explanation.
- e) But, in kidnapping hypo, could argue her statement was assertive – intended it to incriminate D. So this gives an alternate explanation for admissibility.

9) **United States v. Annunziato (2d Cir. 1961), p. 671 – blend of forward- and backward-looking**

- i) Federal Union Law: No union officer could accept anything of value from an employer. Allegation: union officer took 2 payments. Jury acquits on \$50 payment. Convicts on \$300 payment. Results in 3 years in jail. Union officer appeals on grounds that inadmissible hearsay came in at trial.
- ii) Statement #1:
 - (1) Haas's statements (employee): D walked in and said, "I'm not here for no social call," and picks up yellow envelope from the table and walked away.
 - (i) Note: No hearsay problem → b/c D is the defendant → it's an admission.
 - (ii) That he picked something up – that's just classic witness testimony.
- iii) Statement #2:
 - (1) President (Turker) of the company (who is now dead—that's the problem) says to employee (Mayhew): "Take this envelope, and give it to Annunziato." Employee at first resists. But boss insists, "I made a commitment, I need you to do it."
 - (2) Gov't offers as statement of mental condition.
 - (3) Issue: forward-looking or backward-looking?
 - (4) Statement: Take this envelope and give it to Annunziato; it's for a commitment I've made.
 - (a) Commitment I've made: obviously backward looking.
 - (b) Give to Annunziato: that's forward looking.
 - (5) Question breaks down into relevance:
 - (a) If offered to show in payment of financial commitment, then it's backward looking.
 - (b) If offered to show that envelope was delivered, then forward looking. But we know that Annunziato got the envelope, b/c of Haas's testimony.
 - (c) If we didn't have Haas's testimony, could argue is like Hillman—declaration of intention. But then it's a Pheaster problem—third party has to act in accord with intention (President didn't take it up himself).
 - (6) J. Friendly lets it in. But Prof thinks it's harder than that.
 - (a) Could you admit as non-assertive statement? Maybe. That's why non-assertive can be huge hole in hearsay rule.
- iv) Statement #3:
 - (1) President asks Treasurer for \$300. Treasurer asks for reason. Says, "Put down Mayhew's name. It's for a job."
 - (2) Backward or forward? About what he did in past, or his intent in future?
- v) Statement #4:
 - (1) Turker (President) is talking to his son over dinner. Turker says, "Annunziato requested \$250 for a particular project." Asked what he intended to do, "I agreed to send some up for him."
 - (2) This is the piece of evidence that really nails D. Only one that actually connects to money.
 - (3) Son testifies that this is what Father told him. Court admits as forward-looking.
 - (4) Court said thrust of statements faced forward not backward so okay (if only faced backward, i.e. pres said no intent to give him \$ than probably wouldn't get in).
 - (5) But which is it? Statements usually include a little past and a little future—I'm going to do something because of something in past.
- vi) CONFRONTATION QUESTION!!

- (1) BIG QUESTION: What would Scalia do with Turker's statement to his son? (i.e., Confrontation problem?)
- (2) Is it narrative?
- (3) And can a narrative to a relative ever be testimonial?
- (4) Prof thinks this should be testimonial. But thinks Court would say NOT testimonial.
- vii) The more we allow mental condition statements, the more we'll have cases like Annunziata.
 - (1) Prof used to think the testimonial = narrative and nontestimonial = functional. So that co-conspirator statements are nontestimonial, b/c operational, but statements to a friend about what the conspiracy is is testimonial.
 - (2) How do you apply to statements like those in Annunziata? Prof doesn't know answer.

10) Wills – state of mind can be used to prove suspicious events in past ONLY in wills context

- a) The only exception to the backward-looking bar: wills.
 - i) In the context of wills, can use mental condition, e.g., fear, to go backward in time to show that the fear was the result of improper influence, etc.
 - ii) E.g., if leave everything to Uncle Moe. But also a statement of deceased indicating fear of Uncle Moe. Can be offered for backward-looking purpose of showing that Moe did something in past to cause the fear.
- b) Hypo 1: Woman states that she regrets making will.
 - i) This would be admissible, as a matter of evidence. But inadmissible as a matter of relevance.
 - ii) This is an irrelevant state of mind: regretting a will is irrelevant to the law of wills. Whole point of wills is formality, to avoid contest based on mere subjective expression of regret.
- c) Hypo 2: Woman states she only made will b/c son asked her to.
 - i) Writing a will just b/c someone else asked you to do it is also irrelevant. Also inadmissible.
- d) Hypo 3: Woman says to husband: "We're going home to Reno now, and I want you to protect me from Aunt Jane. She's always very cruel to me and I'm scared of her."
 - i) Admissible if Aunt Jane is beneficiary. Could be used to prove both that (1) fear was caused by something in the past, and also that (2) if she expressed fear on one day, also had fear 30 days before when created will.
 - ii) Could consider it a 4a case – goes to declarant's behavior—at time made will, was not acting on own volition.

11) State of mind exceptions summary

- i) "I am Napoleon" (2 categories)
 - (1) To prove he thinks he's Napoleon → state of mind exception
 - (2) To prove he's crazy → non-assertive state of mind non-hearsay
- ii) Kinder/Kidnapping Hypo
 - (1) Assertive statement of something irrelevant (e.g., where tools buried) → infer state of mind (e.g., knowledge) → from that, infer a relevant fact about the world.
 - (2) B/c non-assertive → non-hearsay.
 - (3) Note: Prof is uncomfortable with this admissibility theory, b/c so unclear what declarant is intending. Hard to build solid evidence rules around this distinction.
- iii) Loestch
 - (1) "I don't love H" → assertive statement about state of mind → relevant to prove hypothetical future behavior → This is hearsay, but satisfies state of mind exception.
 - (2) "H is cheating on me" → non-assertive statement about state of mind → relevant to prove hypothetical future behavior → This is non-hearsay (b/c non-assertive).
- iv) Hillmon exception
 - (1) Assertive statement of relevant state of mind, e.g., intention, to prove he acted consistently with his intention → hearsay, but state of mind exception for forward-looking statements. OK.
 - (2) Critique: Predictive inference is not always reasonable. People abandon intentions all the time.
- v) Pheaster exception
 - (1) Assertive statement of relevant state of mind, e.g., intention, to prove that speaker *and* third party acted consistently with the intention → hearsay, but state of mind exception in some jx.
 - (2) Highly contested, b/c no psychological explanation for why third parties would follow intention.
- vi) Past Behavior of Declarant – exception? (Prof calls 4(a))

- (1) Assertive statement of state of mind, e.g., memory, to prove past behavior of declarant.
- (2) Open question. Probably more reliable than Pheaster and Hillmon. But too wide of floodgates?
- (3) Kinder and the Kidnapping Hypo could more plausibly be placed here. Limited exception for springboarding backward out of mind of declarant, just to prove declarant had done something.
- (4) E.g., Kinder: To prove he had witnessed the tools being buried.
- (5) E.g., kidnapping hypo: To prove she was in the room.
- vii) Shephard: Backward, 3rd person
 - (1) Assertive statement to prove third person's actions in the past. NOT ALLOWED. Essentially all memories – would swallow hearsay rule.
 - (2) Only exception: Will contests and undue influence.

G. BUSINESS ENTRIES AND PUBLIC RECORDS

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

1) INTRODUCTION

- a) Developed as rule of convenience in 1870s so that shopkeepers didn't have to lose a day's work every time patron didn't pay for his goods. In modern day, it would be ridiculous to bring entire workforce to court for every commercial transaction dispute. This is the most used hearsay exception.
- b) Rationales:
 - i) Necessity – live testimony is very expensive; workplace would grind to halt if demanded it.
 - ii) Contemporaneous record – records from the time better than live testimony today.
 - iii) Intrinsic accuracy of company records– b/c they rely on them for success, there are institutional constraints to ensure they're accurate.
 - (1) This last rationale is problematic. Not only negligence. But also huge incentive to cook records.
- c) Paradigm Case:
 - i) Shopkeeper's book – transactional records of a store could be used as evidence that a sale was made, and as evidence that payment was not received. Shopkeeper need not testify himself.
- d) How much to expand the exception? (always compare back to shopbook)
 - i) Corporate records
 - ii) Police officer's memo book (keeps in back pocket, turns in at end of shift)

- iii) Government investigation reports
- iv) Personal diaries
- e) Reliability:
 - i) **Input leg:**
 - (1) Memory, perception strong → near contemporaneous. (perception is weakest.)
 - ii) **Output leg:**
 - (1) Veracity, no-ambiguity strong → Company relies on them, no foresight of litigation.
 - iii) Remember: If record comes in, lose the ability to cross-examine the witness!
 - (1) Think about what you're missing.
 - (2) Can NEVER examine witness's perception, i.e., whether he really saw what he thought he did.
- f) **Business Records vs. Government Records**
 - i) 803(6) – Business records – admissible in both civil and criminal cases.
 - (a) Requirements: near contemporaneous; by person with knowledge; kept in the course of a regularly conducted business activity; regular practice of making the record; unless circumstances indicate lack of trustworthiness.
 - (b) Jacoby rule: Record must be the product of “regular practice” or business and in the “usual course” of that business, unless circumstances indicate lack of trustworthiness. But record itself need not be routine.
 - (c) Supposed to reflect routine activities of the institution.
 - (d) Can be private, non-profit, or government entity (don't need profit motive).
 - (e) In most jx, police reports get shoe-horned in here.
 - (f) But HUGE confrontation clause problem—those observations almost always testimonial.
 - ii) 803(8) – Official record – only available in civil cases; and for exculpation in criminal case.
 - (a) This is where investigative reports fall.
 - (b) Requirements: record of public offices or agencies; legal duty to observe and report (but cops' reports excluded in criminal cases); OR investigation reports (in civil only, or against government in criminal); unless circumstances indicate lack of trustworthiness.
 - iii) It REALLY matters which exception you use. But what is the difference?
 - (a) Prof thinks business record exception emerged from shopkeeper's books—for a private economic enterprise—not a public official.
 - (b) But now the textual rule is considerably broader than that. Generally applies to government activity now.
- g) **Business Duty to Report**
 - i) Two questions that need to ask w/any bus record
 - (1) Was business record kept accurately?
 - (a) Was there a bus/gov't duty to keep accurate records
 - (2) Does the record reflect an accurate reality
 - (a) Routineness (Jacoby); AND
 - (b) Lack of motive to lie (Palmer) → then OK
 - ii) First-layer declarant in business records is often satisfied by business duty to report.
 - (1) That's why first-person observations in record are usually uncontested.
 - (2) Example: Issue of whether shirts were loaded onto ship. If each layer of record keeping had a business duty to report, then home free.
 - (3) At each layer, must satisfy the requirements of: routinized, no motive to lie, etc.
 - iii) Business duty to report substitutes for cross-examination.
 - (1) It's what makes us comfortable with allowing record to speak for the witness.
 - (2) But remember: Lose the ability to test the declarant's input legs, no matter what.
 - iv) Cop has “business duty to report” that satisfies the hearsay exception.
 - (a) Cop has business duty to report what he saw. This is seen as sufficient safeguard. But lose ability to test whether really saw what he thinks he saw. Seen as complete substitute for output leg. And no memory problem if contemporaneous. But there's a perception problem.
 - (b) Note: Cop's memos are inadmissible in criminal context.
 - v) But bystanders don't have business duty to report—only civic duty.
 - (1) That's why you have to find another hearsay exception.

vi) If routine economic business record, will probably have business duty to report at each layer. Won't be hard. It's only when depart from traditional shopbook case, and include people that don't have business duty to report, that run into problems.

h) **Operation of Rule:**

- i) Declarant creates a record → declarant and record collapse into one → record becomes the witness.
- ii) Record must satisfy the business records exception (i.e., business duty to report).
 - (1) Routine, regular course of business, no motive to falsify, etc.
 - (2) **REAL QUESTION: Are we comfortable not having the witness come to court?**
- iii) All underlying declarants must satisfy hearsay rule (including first-level declarant).
 - (1) Records almost always include MULTIPLE layers of hearsay.
 - (2) Johnson v. Lutz rule: Must analyze hearsay of *each layer*. All the record can do is substitute for the absent witness who created the record. Can't save the underlying hearsay levels.
 - (3) Always ask: If record-writer herself were on the stand, would she be allowed to testify to this?
 - (4) EVERY LAYER must satisfy hearsay rule. Any break in the chain and the whole thing is out.
 - (5) Note: Irrelevant whether statements are anonymous, named, sworn, etc. – still hearsay.
- iv) Most common ways to satisfy underlying hearsay layers:
 - (1) Business duty to report (e.g., classic shopkeeper, cops) ← for classic econ record, all layers.
 - (2) Excited Utterance (A can write down B's excited utterance)
 - (3) Present Sense Impression (A can write down B's description of contemporaneous event)
 - (4) Mental Condition (A writes down B's description of present mental condition)
 - (5) Physical Condition (A writes down B's statement of present physical condition)
 - (6) Non-Hearsay Statement (can be embedded in record)
 - (7) Declarations Against Interest
 - (8) Admissions (e.g., cop writes down confession in memo book; can use to prove confession made)
- v) ALWAYS REMEMBER CONFRONTATION: Every layer must satisfy CONFRONTATION!!
 - (1) Declaration against interest, present sense impression, etc. will probably fail.

2) BUSINESS RECORDS

a) **United States v. Jacoby (11th Cir. 1992), p. 680 – Cover Your Ass memo**

- (1) Criminal prosecution arising from savings & loans scandal. Bank makes fraudulent transactions designed to evade banking authorities' requirements. Boss commands associate to close a loan w/o the proper paperwork. Associate finally agrees, but writes "Cover Your Ass" memo for the file (i.e., that boss told him to close the loan and that the paperwork was on its way). Bank goes into insolvency. P goes through files. Finds the memo. Indicts boss. Associate takes 5th.
- (2) How to use memo against boss?
 - (a) Vicarious admission? Could indict associate, charge as co-conspirators.
 - (b) Declaration against interest? No. Not against his interest at the time. And even if it were, inculpatory statements only admissible against the declarant (that's O'Connor's rule).
- (3) Trial court: Admits under catch-all exception, b/c "not a routine type of thing."
- (4) Circuit Court: Admits as business record.
 - (a) **RULE: Routineness is not the touchstone of admissibility. Rather, record must be the product of "regular practice" or business and in the "usual course" of that business, unless circumstances indicate lack of trustworthiness.**
 - (b) HOLDING: ADMISSIBLE, b/c whenever Associate believed it necessary to explain something or record an unusual circumstance, made a memo. Significant part of his "regularly conducted business activity" was closing real estate loans; frequently made memos in context of that activity.
- (5) Is this right or wrong?
 - (a) Routinized? Here, not regular. But this shouldn't totally defeat.
 - (b) Biggest problem: This is self-serving. Clearly anticipating criminal liability in future, and writing to insulate himself in the future.
 - (c) We don't care about regularity per se—doesn't matter if he writes memos like this every day. Just becomes a systematic, exculpatory record.

- (d) Real question: Are you happy not having him on the stand, b/c of independent reinforcement that it's true?
- (e) On the other hand: If don't allow, Jacoby walks. (Prosecution should have given the associate immunity to get him to testify; Prof thinks P wanted to have it both ways.)
- (f) Reason to use: at least the record is simultaneous.
- (g) Note: Confrontation might be triggered here, b/c memo was more narrative than usual business record.

b) United States v. Strother (2d Cir. 1995) p. n. 685 – isolated narratives aren't business records

- i) Prosecution for check fraud. D says he just asked the teller to put check on hold (not to cash it). D offers 2 business records of bank as proof of his theory
 - (1) Memo prepared 13 days after telephone call at boss's request;
 - (2) Memo read and signed 2 months later by teller when put on probation from incident.
- ii) Issue: whether teller's narrative statement to her boss about what happened and narrative statement to personnel department as part of accepting probation should be a bus record
 - (1) Why shouldn't it be a business record?
 - (a) Narrative statement → model breaks down, there is no guarantee for trustworthiness, in fact there are circumstances that makes us suspicious.
 - (b) "We are reluctant to adopt a rule that would permit the introduction of memoranda drafted in response to unusual or isolated events, particularly where the entrant may have a motive to be less than accurate."
 - (2) 2nd Cir. accepts as prior inconsistent statement
 - (a) Can't be used for the truth but can be used for impeachment which in this case is all the D really cares about.

c) Palmer v. Hoffman (U.S. 1943), p. 692 – records anticipating litigation aren't business records

- i) Negligence suit. Bad train accident. 2 days later, state public safety commission investigates (as they do for every train accident). Interview everyone, including train engineer (who has since died).
- ii) Plaintiff's theory: Railroad at fault b/c (1) should have bell; (2) should have whistle; (3) should have light; and none happened. Interview with engineer: Says he was using bell, whistle, and light, and out of no where people jumped onto tracks. P testifies at trial that none were present. Jury believes him. Awards huge damages.
- iii) D wants to introduce record of public service comm'n investigation containing engineer's statement.
- iv) **Result: report is excluded.**
 - (1) "It is manifest that these reports are not for the systematic conduct of the enterprise as a railroad business." Point of records exception is not regularity per se (otherwise, could just create a "business" of accident record-keeping). "Regular course" of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business." "These records' primary utility is in litigating, not railroading."
- v) Is this right? Compare to Jacoby.
 - (1) The moment you start gathering info with an eye to future liability, the motive to falsify appears, and underlying justification of business record exception falls down entirely.
- vi) This case cited for the fact that investigative records are not as reliable as corp records
 - (1) This bright line distinction b/tw gov't/corp records is disappearing and gov't records being let in
 - (2) What is problem with letting this in?
 - (a) Record based on statement of 3rd party that had motive to lie → this doesn't fit w/in model
- vii) 2 questions that need to ask w/any bus record
 - (1) Was bus record kept accurately?
 - (a) Was there a bus/gov't duty to keep accurate records
 - (2) Does the record reflect an accurate reality
 - (a) Routineness; AND
 - (b) Lack of motive to lie → then OK

viii) Upshot: Palmer sets up a one-way street.

- (1) Inculpatory stuff comes in (either as declaration against interest or vicarious admission). E.g., suppose engineer had said, “I feel terrible, but I forgot to ring the bell, blow the whistle, and use the light.” → admissible, b/c declaration against interest.
- (2) Exculpatory stuff excluded.
- (3) Argument: That’s good! Bad stuff is more likely true, so should come in. Good stuff shouldn’t come in, b/c have motive to falsify.
- ix) How can railroad fix?
 - (1) Create record-keeping mechanism that requires employee to keep detailed records on the activity on which subsequent litigation could be based.
- x) Critique:
 - (1) Depends on assumption that record-keeping mechanisms are actually adhered to. Rather than filled out in bulk at the end of the month. Or frantically completed after the accident.
 - (2) Can make very good argument that keeping of the records is important to the railroad, b/c they care about their own safety routines.
 - (3) But can you ever avoid the motive to falsify? Can you avoid the Cover Your Ass memo?
- d) **Johnson v. Lutz (NY 1930), p. 697 – layers of hearsay**
 - i) Wrongful death action. Collision b/w truck and motorcycle. Cop rushes onto scene immediately after accident. Questions bystanders. Writes it all down in his memo book. At the end of each tour of duty, all incidents in memo book have to be put into report—turned into department.
 - ii) Note: Most jx now admit police reports as business records. Even though rule originally arose for shopkeeper’s book, i.e., private economic enterprise. Generally applies to government activity now.
 - iii) ISSUE: Once record qualifies, HOW MUCH of it comes in?
 - (1) Two theories:
 - (a) If business record, everything comes in.
 - (b) Business record is only substitute for cop’s presence → compress cop and memo book into single witness. Question is only whether cop could have testified to the bystanders’ statements.
 - ii) **RULE: Business record can only substitute for the witness. Every other hearsay layer must satisfy hearsay rule too.**
 - (1) Whenever have business record, must break it down into layers of description culminating in the record. The record itself is exempt, b/c of business records exception. But every layer must still be accounted for—by either not being hearsay, or qualifying as a hearsay exception.
 - iii) **Way to test: Imagine no record—imagine the person who wrote the record is testifying on the stand—would he be allowed to testify to that?**
 - (1) Hearsay analysis (must chart!):
 - (a) Witness: the record (stands in for the cop)
 - (b) Declarant: the bystander → this is hearsay, even if cop were on the stand!
 - (2) Note: Problem is not that bystanders are anonymous.
 - (a) Not saved by writing down their names. Nor taking an oath. Still hearsay!
 - e) HYPO 1: Record by observer of 1st person observation of event: e.g., cop saw accident, writes down what he saw, and files it with his memo.
 - i) Admissible. If he can take the stand and say what he saw, then his record book can take the stand to say what he saw, b/c confident that memo book is accurate description of what he saw.
 - ii) Prof thinks this is wrong.
 - (1) Concede that the memo book is what he *thinks* he saw. But need to cross-examine him to determine if that’s what he really saw! No judge accepts this argument.
 - (2) Prof thinks the same unease that makes us worry about his testifying to 3rd person statements, b/c don’t get to cross, should also make us worry about not crossing the cop—can’t examine the input and output legs.
 - (3) Can still “cross-examine” the record in a way—to show not kept in usual course, or that cop had a motive, etc. But even if exhaust that, doesn’t mean
 - iii) **CONFRONTATION CLAUSE BLOCKS THIS IN A CRIMINAL CASE.**
 - (1) But generally, in civil case, these are being used.
 - b) HYPO 2: What if 20 seconds later, and some guy stunned wandering around saying, “I’ve never seen anything like it, it’s the worse thing I’ve ever seen, truck went right through the light...”

- (1) Getting close to an excited utterance. Maybe present sense impression by third party. Question is how much time elapsed between.
- c) HYPO 3: Most common: declarations against interest
 - (1) Cop talks to driver of truck, driver says, “The sun was in my eyes, I saw the light at the last second, I can’t believe I did that.”
 - (2) This could be declaration against interest. But also ADMISSION. Can used in criminal case.
 - (3) Could the memo book suffice for cop’s testimony?
- d) HYPO 4: What if vicarious admission?
 - (1) Truck driver’s statement being used against his boss?
 - (2) Layer 1: Business record
 - (3) Layer 2: Declaration against interest (or party admission)
 - (4) Layer 3: Vicarious admission against the company.
- e) HYPO 5: What if cop pieces together report from physical evidence and makes an assessment of what probably happened = 1st person opinion based on facts
 - (1) Prefer to cross-examine the cop. Business record model doesn’t really apply to bus record of opinion based on fact.

3) PUBLIC RECORDS

- a) Why not treat investigative reports like business record?
 - (1) Almost always prepared in the shadow of litigation, or at least something disciplinary. Something has happened that requires a report—very different from routinized records.
 - (2) Never admissible in criminal cases—b/c very nature of report has government involved in investigative role—puts on collision course w/ confrontation clause. Rather than wait for confrontation clause to block, evidence rules preempt.
 - (3) Also, policy reason: want government to prepare these reports. If we use them against government, they won’t do it anymore.
 - (a) Though we do allow them in civil cases.
- b) **Beech Aircraft Corp. v. Rainey (U.S. 1988), p. 701**
 - i) Airplane crash. JAG report. Report stated: “We’ll never know for sure what happened. It could have been engine failure. In my opinion, it was more likely pilot error. But we’ll never know.”
 - ii) 803(8) – creates exception for “factual findings” in government investigative reports.
 - iii) Issue: Were these opinions/conclusions “factual findings,” within meaning of R. 803(8)?
 - iv) **HOLDING: “Factual findings” are not limited to facts → includes factually based conclusions or opinions.** Exception is meant to admit the entire report, not just the “facts” section.
 - v) Question: What if investigator relied on third party interviews in creating his report?
 - (1) **Miller v. Field (6th Cir. 1994), p. 708 (notes case)**
 - (a) Holding: If investigator relied on hearsay statements in preparing his report, inadmissible.
 - (b) Safeguards on preparer: business duty to accurately relate information.
 - (c) No such safeguards on hearsay declarant. Same as Johnson v. Lutz.
 - (2) No clear SCOTUS rule on this. But most lower courts agree.
 - vi) Upshot:
 - (1) If guy had seen accident → OK to admit
 - (2) If guy had investigated hard facts of accident, then expressed opinion → OK
 - (3) BUT guy made his opinion based on some 3rd party statements → NOT ok
 - vii) Johnson v. Lutz will probably carry the day → keep out factual conclusions based on hearsay.
 - (1) BUT: Hard to swallow throwing out strong relevant evidence just because can’t find all those 3rd persons to testify.
 - viii) Why to distinguish from Lutz:
 - (1) Johnson was a cop.
 - (2) But here have specialized investigator (e.g., aeronautics expert) whose job it is to find out what went wrong, it’s crazy to throw out his report, just because he talked to 3rd parties.

- (3) So far, the hearsay rule proponents are winning.
- (4) If don't do this, would set up huge treasure for 3rd person hearsay under business records.

c) **Commonwealth v. DiGiacomo (PA 1975), p. 714 – hospital records**

- i) Homicide prosecution. Defense: Mitigation defense. Like third-person defense. I shot him to prevent him from killing my good friend. D wants to introduce hospital records to show how severe the injuries were to his friend. Note: Friend not testifying—probably b/c long criminal history. Defense lawyer subpoenas hospital records. Describes injury when admitted.
- ii) Issue: How much of hospital record is admissible?
- iii) Hearsay layers:
 - (1) Doctor examines. Then states problems.
 - (2) Nurse listens. She writes down what doctor says.
 - (3) Codified in business record.
- iv) Nurse satisfies business record exception.
 - (1) Collapse nurse and record into single witness. We're very comfortable that she wrote down exactly what she heard. We're almost certain that if she were here, she'd say exactly what the records say.
- v) But what about the doctor's words?
- vi) HOLDING: Exclusion of doctor's diagnosis amounted to harmless error (b/c jury heard that friend was in hospital for 2 months).
 - (1) Does not reach question of whether the record containing diagnosis was admissible. But "I cannot agree that a prohibition on the admission of all hospital records containing diagnoses is necessary."
- vii) Prof thinks this is the same as Johnson v. Lutz.
 - (1) Comfortable with saying to nurse: you have better things to do with your time. You don't have to come to court to tell us what you wrote down. Perfectly happy with saying your written document is exactly what you would say if you came to testify.
 - (2) BUT: Underlying layers! If nurse testified, what could she testify to?
 - (i) The narrative to the admitting nurse can come from many people: doctor, patient, cop bringing patient in, etc.
 - (ii) Could she testify to the doctor's diagnosis? Would a hearsay exception cover?
 - (iii) Would a hearsay exception cover victim's narrative of what happened to him?
 - (iv) Suppose v's narrative was necessary for nurse to know what treatment to provide—would it then fall into the treatment exception?
 - (v) What if the assailant was identified in the admitting hospital record? E.g., Louie beat me up.
 - (3) Prof thinks doctor's diagnosis does not come in, b/c doctor = bystander talking to cop (in Johnson v. Lutz). Need him to come in so we can cross-examine.
 - (4) Counterargument: doctor had business duty to accurately report to nurse what was wrong. Not just a bystander with a civic duty—equivalent to business duty to report. Jx that admit let it in on that kind of theory—obligation to report accurately.
 - (i) Some problem as with cop—sure, that's what doctor thinks. But shouldn't you still be able to cross-examine?
- viii) What if it had been inculpatory? CONFRONTATION:
 - (1) Most business records will be called non-testimonial and be exempt.
 - (2) BUT some bus records are testimonial (i.e. policeman recording what he saw) → in some cases are going to have to bring recordkeeper in to testify in order to meet confrontation.

I. MISCELLANEOUS EXCEPTIONS

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

1) INTRODUCTION

- a) Virtually every evidence code has a catch-all exception.
 - i) E.g., if especially reliable, or would be unjust not to let it in, etc.
- b) Fed. R. Evid. 807 requirements:
 - i) Material fact;
 - ii) More probative than other available evidence;
 - iii) General purpose of rules and interests of justice will be served;
- c) Critique:
 - i) Erodes the whole point of having rules → “near miss.”
 - ii) If can't fit it into rule, then can't fit it in. Can't just slip into the catch-all.
- d) Most judges like the catch-all
 - i) Can escape the hard analytic work. Intuitive, gut sense of reliability; rather than hard and fast rules.
 - ii) Some think just need general set of principles about reliability, and then let judges apply them across the board.
- e) How to determine if statement is trustworthy?
 - i) Idaho v. Wright rule: Must ONLY look to intrinsic reliability of the statement itself. Evidence is supposed to stand on its own. Don't look at other independent evidence.

2) Robinson v. Shapiro (2d Cir. 1981), p. 774 – catch-all vs. present sense impression

- a) Wrongful death action against Shapiro's apartment building. Robinson = subcontractor (chimney specialist). Needs to access roof to fix chimney. Superintendent of building (Rendo) does not allow to walk through apartment and climb through window. Instead, they must climb up stairs; pull yourself up on gate; hoist self onto roof. Guys do it all day. But then terrible weather, snowing. Last man out; Iron gate comes loose, falls on him, kills him.
- b) Theory: Super at fault. He refused to allow fence/gate to come down b/c didn't want dog to escape (dog on roof). When asked whether they could come through his apartment and climb through window, said, “No, I don't want to get my rugs dirty.”
- c) How to prove that superintendent actually said those things?
 - i) Superintendent is unavailable at trial.
 - (1) If could testify, no problem. Would bind the employer through vicarious liability/admission.
 - ii) Robinson is dead. No one else witnessed the statements.
 - iii) Co-worker. Robinson repeated Rendo's statement to co-worker.
- d) Hearsay breakdown:
 - (1) Layer 1: Rendo says to Robinson, “You can't use my apartment.” → admission.
 - (2) Layer 2: Robinson tells co-worker. → what hearsay exception is this?? Best option: Present Sense impression?
 - (3) Layer 3: Co-worker testifies. → first-person testimony.
- e) RESULT: Judge doesn't buy the present sense impression argument. But admits it under residual exception. Finds no more nor less reliable than other hearsay.
 - i) Judge's analysis:
 - (1) Memory: Roughly contemporaneous – no chance of loss of memory.

- (2) Veracity: No reason to lie – wouldn't want men to do it the harder way.
- (3) Ambiguity: Only worry – ambiguity – did he get it right? Big ambiguity problem. We can cross the co-worker. But no way to cross Robinson about what Rendo really said. Big ambiguity problem—how do we know that Rendo didn't just say, "You can't use my apartment unless you take your shoes off."
- ii) Judge is right in saying: this is no more nor less reliable than evidence admissible under other exceptions. Danger: Don't fight hard to make sure the Robinson layer fits in anywhere. Why fight, if you have a catch-all?
- f) What if this were criminal? CONFRONTATION:
 - (1) First layer: Rendo → admission → admissible in criminal case.
 - (a) BUT: Still have to prove the admission was made. Need the second layer.
 - (2) Second layer: Robinson → try present sense impression.
 - (a) If he were describing something that Rendo were doing, would be classic present sense impression. Shouldn't make any difference that he's describing something Rendo is saying
 - (b) BUT: CONFRONTATION CLAUSE
 - (i) Can't cross-examine Robinson.
 - (ii) Testimonial?
 - 1. Yes: Robinson telling story to co-workers.
 - 2. No: Robinson using in directing his co-workers where to go.
 - (c) If non-testimonial, the only way to keep the evidence out would be how hard you will push on present sense impression.

3) **Idaho v. Wright**

- a) Facts:
 - i) Sexual abuse of young girl. Allegation: Two sisters were abused. Older child's conviction stands. Question: Whether younger child's conviction stands. In some ways, court is off the hook, b/c know the defendants are going to jail anyway. 2.5 yr old girl talking to pediatrician. Pediatrician questions her. Elicits statements from little girl consistent w/ having been abused by parent she's living with.
 - ii) Little girl can't testify. Prosecution tries to call little girl as witness (as 3 yr old). It's clear can't convey info to jury. So excused. Note: incompetent as witness ≠ incompetent as declarant.
 - iii) P calls pediatrician. Wants to repeat the little girl's statements.
- b) Evidentiary issue:
 - i) Court uses catch-all.
 - ii) But could use physical condition exception, b/c can go backwards for treatment. Plus, need to know this info b/c of age, need psych treatment too.
 - (1) BUT: that model doesn't work here. Depends on the patient seeking treatment, and so no motive to lie. But 2.5 yr old child won't have that kind of considered assessment of need for veracity to obtain treatment. Prof thinks that won't work.
 - iii) So instead, drop down, use catch all. B/c such strong corroboration. Strong indicia of reliability:
 - (1) Physical evidence of abuse.
 - (2) Sister has been abused by the same person.
 - (3) Statements are consistent with the abuse.
 - (4) No motive to make up story.
 - (5) No reason child of this age would make stories up.

These first three compare statement to independent evidence. Court does not allow.
- c) Confrontation Clause:
 - i) Analyzed under Ohio v. Roberts:
 - (1) Catch-all is not firmly rooted hearsay exception.
 - (2) Statement must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.
 - (a) E.g., a statement under duress would *not* be inherently reliable, even if other evidence tended to show it was true.
 - (b) Otherwise, would be bootstrapping on the trustworthiness of other evidence at trial.
 - (c) Other evidence goes to the harmless error analysis, not the reliability analysis.

- ii) **HOLDING: Incriminating statements to physician did not possess sufficient particularized guarantees of trustworthiness. Inadmissible.**
- d) How would this come out under Crawford?
 - (1) Under Crawford, this statement is barred. Undoubtedly testimonial: narrative about past event that happened, being used as basis for penal liability on defendant. Classic testimonial statement.
 - (2) This is the BEST case to see the difference b/w Crawford rule and Ohio v. Roberts rule. Tortured analysis re whether indicia of reliability sufficient. Good example of how Crawford is more protective in narrow area of testimonial statements.
- e) Note: This case supplies the rule for determining reliability of catch-all hearsay generally.
 - i) Idaho v. Wright is still good law re: use of catch-all exception in criminal cases and generally. Still cited for this issue.
 - ii) In a catch-all situation, how do you decide whether to look at other corroborating evidence to determine if particular statement is reliable?
 - iii) Rule: Must ONLY look to intrinsic reliability of the statement itself.
 - iv) I.e., In deciding whether catch-all can be used, evidence is supposed to stand on its own. Don't look at other independent evidence.

J. CONSTITUTIONAL CONSIDERATIONS

1) RULES

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him

- a) Ohio v. Roberts → OLD TEST!
 - (1) Unavailability (except for co-conspirators, Inadi);
 - (2) Adequate indicia of reliability, demonstrated by:
 - (a) Firmly established hearsay exception; AND (Bourjaily changes to an “or”)
 - (b) Individualized indicia of reliability (intrinsic to the statement, Idaho v. Wright).
- b) Crawford v. Washington → CURRENT TEST
 - (1) RULE:
 - (a) If statement is testimonial → absolute right to cross-examination.
 - (i) Cross-examination requires ONE BITE. Prior cross or deferred cross suffice.
 - 1. Preliminary hearing maybe counts. See Cal. v. Green (decided on evidence issue).
 - 2. Memory-lapse witness? For yes, see Owens (decided on evidence issue).
 - 3. Mere opportunity enough? Cf. prior reported testimony motive cases.
 - (b) If statement is non-testimonial → admissible (6A doesn't apply).
 - (2) Only exceptions:
 - (a) Dying declarations (see FN in Crawford): consciousness of impending death; id'ing killer.
 - (b) Forfeiture by Wrongdoing (Giles): (1) witness absent; (2) b/c of D's wrongdoing; (3) D had specific intent to silence the witness.
 - (3) Does NOT require unavailability.
 - (a) E.g., non-testimonial or prior-crossed statements admissible, even if W could come in and testify.
- c) Davis v. Washington → MEANING OF TESTIMONIAL
 - (1) Davis: NON-TESTIMONIAL:
 - (a) 911 call. Circumstances objectively indicating primary purpose is to enable police to meet ongoing emergency, speaking about events as they were actually happening rather than describing past events.
 - (2) Hammond: TESTIMONIAL:
 - (a) Police questioning at home. Circumstances objectively indicate there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.
 - (3) Crawford: TESTIMONIAL:
 - (a) Stationhouse interrogation to gather information about husband's stabbing.

- (4) Factors:
 - (a) **Who:** to government agent vs. private party.
 - (b) **When:** narrating past events vs. describing present events.
 - (c) **How:** assertive statements vs. operative/functional statements.
 - (d) **Why:** to meet an ongoing emergency vs. to relay information.
- (5) Generally, Prof thinks will track assertive/narrative vs. non-assertive/operative line.
- (6) **ONLY APPLIES TO HEARSAY!** Non-hearsay is non-testimonial, b/c not for truth.
 - (a) Hearsay exceptions that will usually be non-testimonial:
 - (i) Co-conspirator statements;
 - (ii) Excited utterances;
 - (b) Hearsay that will usually be testimonial:
 - (i) Declarations against interest;
 - (ii) present sense impressions;
 - (iii) prior consistent/inconsistent statements;
 - (iv) prior reported testimony (if not subjected to cross-examination);
 - (v) statements of physical or mental condition.

2) CASES

a) Crawford v. Washington (U.S. 2004) – testimonial

- (1) D accused of killing man, after victim allegedly assaulted wife. D's claim: self-defense. Question whether victim was reaching for weapon. D gets on stand to tell the self-defense story.
- (2) Wife invokes spousal privilege – doesn't testify at trial.
 - (a) Theory of allowing target spouse to invoke: 5th Am. Theory – marriage is a single juridical entity w/ two heads – one head can stop the other head from testifying against it.
 - (b) Other jxs: Want functional privilege—testifying must claim; marriage must be sufficiently viable that spouse wants to claim it.
- (3) Both D and D's wife were interrogated at stationhouse.
 - (a) D's statement: Admission – admissible. I think I saw something, not sure, was afraid.
 - (b) Wife's statement: Her narrative does not include a weapon. P wants to use her story to rebut D's testimony that there were reasonable grounds to believe there was a weapon. But b/c D blocks from taking stand, can't be cross-examined.
- (4) Hearsay analysis:
 - (i) Washington's theory for admissibility: Declaration against penal interest.
 - 1. Note: Probably wrong. Threat of criminal sanctions too attenuated. No awareness.
- (5) Confrontation: Washington says satisfies Ohio v. Roberts
 - (i) Traditional hearsay exception (declaration against interest) +
 - (ii) Individualized indicia of trustworthiness (fundamentally interlocking stories).
- (6) SCOTUS abandons Roberts. This case shows how bad the rule had become.
- (7) **NEW RULE:**
 - (i) **Testimonial Statements MUST be cross-examined.** Period.
 - (ii) If testimony might put someone in jail, MUST cross-examine. Forget about hearsay exceptions. But beware of Scalia bearing gifts! Limits to "testimonial" evidence. If testimonial, protection is absolute. But if non-testimonial, wholly outside scope of 6th Am.
- (8) Creates new question: What is testimonial.
 - (i) Prof thinks this testimonial/non-testimonial line resurrects the direct vs. implied assertions distinction of hearsay. Now, if only implied, satisfies hearsay AND no confrontation problem. E.g., 911 call. Or Bookie joint hypo.
- (9) Crawford simultaneously deepens and narrows Confrontation Clause analysis.
 - (i) Displaces Roberts balancing test → creates absolute protection.
 - (ii) But narrows → limits to testimonial only.
- (10) One exception to Crawford absolute rule:
 - (i) Dying declarations. (in FN in Crawford). Can't fit into Scalia's universe. Just reconciles it as historical anomaly that existed at time of founding. Must have intended to include exception.

b) **Davis v. Washington (U.S. 2007) – non-testimonial**

- (1) Girlfriend calls 911; says boyfriend threatening her; phone cuts out. 911 operator calls back, gets story, then finds out his name, including middle initial.
- (2) Police arrive 4 minutes later. Boyfriend is gone.
- (3) D charged with felony violation of protective order. Girlfriend refuses to testify.
- (4) Prosecution wants to introduce recording of 911 call (that's the only evidence they have):
 - (i) Declarant: victim
 - (ii) Witness: 911 recording
 - (iii) Proponent: prosecution
 - (iv) Statement: boyfriend is in the house, pushing me around.
 - (v) Purpose: for the truth (to show he was in the house, acting aggressively).
- (5) Hearsay exception:
 - (i) Excited utterance or present sense impression.
 - (ii) Note: Girlfriend not testifying. But no indication she's unavailable. No matter- no requirement of unavailability.
- (6) Confrontation Clause:
 - (i) Here, she's talking to state official (in Coleman, it was just her mother). This official is engaged in thoughtful interrogation of the victim (even asked for middle initial).
 - (ii) D's Argument: Must be testimonial where government is engaged in interrogation, and then government wants to introduce for prosecution.
 - (iii) P's Response: Purpose was to respond to emergency. Finding out if armed, etc., to protect victim.
 - (iv) HOLDING:
 1. First half is emergency, functional.
 - a. Analogy: Statements to doctor for treatment – not intending to provide a narrative – intending to ask for help.
 2. Second half of phone call becomes testimonial—when she gets calmer, and spells his name, etc.

c) **Hammon v. Indiana (U.S. 2007) – testimonial**

- (1) Also DV case. Police arrive. Separate husband and wife: husband in kitchen, wife in living room. Ask wife what's going on. There's glass around. She finally tells them—he threw down the furnace, etc. At trial, wife won't testify. Want to introduce her statements to police.
- (2) Hearsay exception?
 - (a) Probably not excited utterance. But probably present sense.
- (3) Confrontation?
 - (a) Emergency is over. No longer info needed to allow police to respond. This is the police eliciting information about what happened not so they can respond to it, but so they can decide whether it was criminal or not.
- (4) Real problem is the absence of the woman on the stand.
 - (a) For confrontation, shouldn't you require unavailability? How do we feel about having an absent witness in criminal case without any explanation of her absence?
- (5) Now: forfeiture argument: if D has engaged in course of conduct designed to terrify the V, then argument D has forfeited confrontation clause rights.

d) **Giles v. California (U.S. 2008) – forfeiture by wrongdoing**

- (1) Homicide. Boyfriend kills ex-girlfriend. Defense: self-defense. To rebut, P wants to introduce prior statements by V to police responding to DV call a few weeks ago.
- (2) Confrontation:
 - (a) Testimonial: Court assumes w/o deciding that statements are testimonial (P didn't argue this).
 - (b) Cross-examination: No cross-examination! No cross at the time, and V is dead now!
- (3) Exception: Forfeiture by Wrongdoing. D forfeits his right to confrontation if:
 - (a) D has prevented V from testifying;
 - (b) Through wrongdoing;
 - (c) With specific intent to prevent her testimony

3) APPLICATION TO PRIOR CASES

a) Crawford

- (1) Declaration against penal interest. Self-defense argument re stabbing for rape of wife. Wife in interrogation says roughly same thing as husband, except she doesn't mention any weapon in victim's hand. P tries to use.
- (2) This is the paradigm that Scalia uses to define testimonial.
 - (i) Wife narrating to police in police station what happened after it's over.
- (3) Absolute right to cross-examination.
 - (i) When analogize re whether something testimonial or not, START with Crawford facts.

b) Davis

- (1) Clear paradigm of NON-testimonial.
- (2) 911 call asking for help – not testimonial b/c taking place at very moment event is taking place; not effort to describe the event; effort to ask for help.
- (3) No confrontation clause problem.
- (4) Question: What if 911 operator couldn't testify, but she took notes during her shift, and filed them at the end of her shift?
 - (i) Prof thinks notes could come in as business record.
 - (ii) And statement to operator could come in as excited utterance.

c) California v. Green

- (1) Kid busted for drugs. Cops push him. He gives up his supplier. Then make mistake and sentence him. Then he surprises at trial by saying can't remember anything.
- (2) Two possible statements;
 - (a) Preliminary hearing (when he fingers the guy)
 - (b) Police station statements.
- (3) Evidence:
 - (a) Declaration against interest (police station) (**note: not if federal rules, b/c 3rd party**)
 - (b) Prior recorded testimony (preliminary hearing).
- (4) Confrontation:
 - (a) Unquestionably testimonial—clearly narration.
 - (b) But: one bite at cross-examination at preliminary hearing. OK.
 - (c) Doesn't change under Crawford. But if didn't have preliminary hearing, i.e., only had the admission to the cop, then this would be classic testimonial statement w/o cross, and would violate confrontation. Supplier wouldn't be able to cross, couldn't use.
 - (d) **Big issue: Is preliminary hearing truly effective cross-examination?**
 - (e) And if only had the police station statement, would one bite be satisfied by kid being present, even though total memory loss? No answer on this.

d) Tome

- (1) Statements to baby-sitter, mom, social worker, doctor re sexual abuse by father.
- (2) Evidence:
 - (a) SCOTUS - Prior consistent statement – Court requires statement be pre-motive to fabricate.
 - (b) On remand, 10th Cir. – statements of past physical condition to physician.
- (3) Confrontation:
 - (a) Testimonial:
 - (i) This seems pretty clearly testimonial. Narration about past events.
 - (ii) But: Analogy to 911 → seeking treatment, not trying to tell a story? Hard.
 - (b) Cross-examination:
 - (i) Pretty weak. Had to take the girl off the stand. No real substantive answers.

e) Owen

- (1) Prison guard w/ amnesia b/c hit by iron pipe during the riot.
- (2) Moment of lucidity in hospital – picks out assailant in picture.
- (3) At trial, can't remember what happened. But remembers picking someone out at hospital.
- (4) Police testify as to WHO he ID'ed at the hospital.
- (5) Evidence:
 - (i) Prior consistent statement (note: can be “consistent” with memory loss).

- (6) Confrontation analysis:
 - (i) This MUST be testimonial.
 - (ii) Question: Was this adequate cross? Appears the answer is yes (under evidence analysis) (though Prof thinks wrong). Cross-examining someone with no memory at all – nothing you can do.
- f) Ohio v. Roberts
 - (1) Prior reported testimony.
 - (2) Girlfriend takes stand at preliminary hearing.
 - (3) Confrontation analysis:
 - (a) Clearly narrative.
 - (b) But already had one bite. Court thinks preliminary hearing was enough (even though not labeled cross at time, b/c own witness).
- g) Bourjaily
 - (1) Co-conspirator statements. My friend will come in his car. D turns out to be guy with the car.
 - (2) Confrontation:
 - (a) NOT testimonial. In fact, hard to come up with any co-conspirator statement that will be testimonial.
 - (i) Except: if under cover cop infiltrates; make statement to him thinking he's co-conspirator; possibly could be narrating something in past.
 - (b) No bite. But OK, b/c not testimonial.
- h) Williamson v. United States
 - (1) Heroin in car. Kid first lies. Then finally says boss was driving ahead of him.
 - (2) Evidence:
 - (a) Excludes. Court narrows declaration against interest to only first-person inculpation. Inculpatory third person while in police custody is not really declaration against penal interest – really trying to curry favor. If you say “We both did it,” that doesn't count. So court stops at evidence level.
 - (3) Confrontation:
 - (a) Clearly testimonial. Backward-looking narration to cop.
 - (b) No bite.
 - (4) Even if had come in as matter of evidence, would have been blocked by confrontation.
- i) Idaho v. Wright
 - (1) Statements to doctor about prior sexual contact made by young girl. Doctor asked leading questions (“Does he touch you with his pee-pee?”).
 - (2) Evidence:
 - (a) Catch-all exception.
 - (3) Confrontation:
 - (a) Excluded as lacking reliability under Roberts test.
 - (b) Testimonial? Closer to 911 call? Or closer to backward-looking narrative to cop?
- j) White v. Illinois (U.S. 1992), p. 796 **only case whose result changes under Crawford.**
 - (1) Excited utterance. Child in bedroom. Babysitter hears scream. D leaves bedroom. Child says to babysitter “He touched me in bad places.”
 - (2) Child not testifying at trial (b/c psych harmful). State attempted to call, but she left twice w/o testifying. No finding of unavailability.
 - (3) Try to have baby-sitter testify instead. (Also: mother, police officer, nurse, doctor.)
 - (4) Evidence:
 - (a) Spontaneous declaration. (and for doctor: statement seeking medical treatment.)
 - (5) Confrontation:
 - (a) Court admits under Roberts.
 - (i) Does not require unavailability.
 - (ii) Satisfies firmly rooted hearsay exception.
 - (b) Under Crawford:
 - (i) Prof thinks testimonial. Depends on how close to the incident. If immediately after, then looks more like 911 call. But if backward-looking narrative, probably testimonial. (Most people think so.)
 - (ii) This indicates that narrative doesn't have to be to a cop.

- (6) This is the only outcome that Crawford changes. All the others were nontestimonial, or there was one bite, or the evidence rules kept it out anyway.

III. CIRCUMSTANTIAL EVIDENCE

A. RAW PROBABILITY

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

1) Theory

- a) Circumstantial Evidence
 - i) Circumstantial evidence = increases the probability that something occurred without having direct evidence that it actually did occur
 - ii) Direct evidence = actually related to or caused by the event in question
 - iii) Differences:
 - (1) Circumstantial evidence can *pre-exist* the event (allows to predict future); direct cannot.
 - (2) Circumstantial evidence exists *even if event never happened*; direct does not.
 - iv) The most important circumstantial evidence: PEOPLE'S PAST!!!
 - (a) Not direct evidence of crime.
 - (b) But can be *very* probative!!!
- b) Statistics = mathematical modeling of probabilities
 - i) Statistics are paradigm of circumstantial evidence.
 - (1) Statistics should be admissible like any other evidence
 - (a) Relevant and probative.
 - (b) Often more so than "direct" evidence, e.g., eye-witness testimony.
 - (2) All evidence is probabilistic.
 - (3) But use of statistics is limited.
 - ii) Why resistance?
 - (1) Free will
 - (a) Belief of ourselves as individuals with free will. No one wants to think we are fatalistic beings following our statistical paths.
 - (2) Fear of misuse of stereotype
 - (a) Some stereotypes are unsubstantiated, e.g., women can't be executors of estates.
 - (b) Other stereotypes are substantiated, e.g., black people don't live as long.

- (c) Even when substantiated, and not being used out of bias, prejudice, or desire to subordinate, troubling. SCOTUS has struck down, e.g., 401(k) that made women pay in more.
- iii) Use of statistics
 - (1) Statistical circumstantial evidence is NEVER allowed to satisfy production burden. Smith.
 - (a) But, if there are strong policy reasons (e.g., to smoke out hard-to-access evidence), could use statistics to create presumption. E.g., Title VII cases (presume intent).
 - (b) Discrimination cases
 - 1. E.g., Title VII: If can prove there is a very small statistical chance of workplace demographics absent discrimination → enough for prima facie case.
 - 2. This goes to intent, which otherwise is very hard to gain access to.
 - (2) Statistical analysis of direct evidence is allowed. Rolls.
 - (a) E.g., DNA tests on blood on pants. Rolls. Here, blood is direct evidence, and statistics are only telling us the probative weight of the blood. Rolls.
 - (b) Mass torts
 - 1. Use statistics to prove causal relationship b/w product and the death.
 - 2. Also: used to create substantive liability, not just evidence for jury – liability proportional to market share.
 - 3. Similar to DNA evidence → trying to demonstrate probative nature of direct evidence that already exists (e.g., that were exposed to chemicals).
 - (3) Prof: We allow statistics to make predictions about future, but not to reconstruct reality of past.
 - (i) To predict future (e.g., recidivism at sentencing) (no direct evidence is possible).
 - (ii) To reconstruct past (e.g., which bus hit you) (we exclude).
 - (4) Even though statistics are probative, we exclude them for policy reasons. Our system protects values beyond mere truth-seeking.
 - (5) In most cases, courts expect direct, individualized, anecdotal evidence to accompany statistics.
 - (6) Generally, statistics are most helpful for showing separation from the norm.
 - (i) E.g., Burdine employment discrimination.
 - (7) Can argue that statistics should shift the production burden, or create presumption.**
 - (a) E.g., Title VII cases. Can make same argument for Smith v. Rapid Transit – would force bus company to rebut the charge by producing direct evidence. If goal is to find the truth, shifting burden will help smoke out the truth.
- c) Examples
 - i) Hypo 1: Busses (based on Smith v. Rapid Transit):
 - (a) If 80% red busses, 20% blue busses, all you know is P was hit by bus. Is that enough to go to jury?
 - (b) Prof thinks yes. In fact, if % is big enough, maybe even directed verdict. But judges will exclude.
 - ii) Hypo2: Drunk
 - (a) If P is drunk, thinks the bus was blue. The probability that P was correct in his assessment of blueness is probably less than the 80% in Hypo 1.
 - (b) But judge will let it in, let the jury decide. (So long as evidence isn't so bad that no reasonable person could ever believe it.)
 - iii) Racial profiling
 - (a) Statistical likelihood based on factors: (1) paying cash; (2) one way; (3) no reservation; (4) to/from "source" city; (5) black. Even if can prove mathematical likelihood: can you do it?
 - iv) Death penalty
 - (a) Show black murder of white statistically much more likely to get death penalty → SCOTUS rejected → have to prove something wrong with your own case.
 - v) Gatekeeper hypo:

- (a) 1,000 people in stands at stadium. Know that only 200 tickets were sold. Now, cops randomly stop person A on the way out. 80% chance that A didn't pay for her ticket.
- (b) If they could, the promoters could collect money from EVERYONE, because for everyone, it's 80% likely that they didn't pay.
- (c) But what about if they sold 900 tickets? Only 10% likely that A didn't pay – what can you do?

2) CASES

a) Smith v. Rapid Transit, Inc. (MA 1945) p. 51

- i) Negligent bus causes passenger car to swerve and crash. Negligence is clear. Only question: whose bus? Only evidence against D is circumstantial: only 2 bus lines, and D's is the only one on that street at that time.
- ii) HOLDING: Not enough to satisfy production burden → directed verdict for D.
 - (1) Requirement of individual, non-statistical evidence.
- iii) Prof thinks that most Amer judges go this way → raw probability alone never going to be enough to satisfy production burden.
- iv) What if don't argue about whether evidence can come in, but alter burden or create a presumption
 - (1) Create Thayer presumption that if are the only co with license to run a bus on this street and an accident occurred on that street then presumed to have been your bus
 - (i) This shifts risk from plaintiff to bus co
 - (ii) They can always rebut this with evidence that it was not there co
 - (2) Evidence law not just about the truth → is designed to influence behavior
 - (i) If create this presumption than bus co has more incentive to be more careful, if leave it the way it is they are never going to lose and have no incentive to be careful
 - (ii) Creating this rule would force bus co to present trace evid (records, bus driver's testimony) to rebut presumption, if no presumption than can win with silence → if goal of system to reconstruct truth than presumption going to do better job of doing that
 - (iii) Always make argument about production/persuasion/presumption → judges listen

b) Hypo: Colored Bus + Credibility

- i) 85% blue cabs, 15% green cabs. Witness's ability to distinguish: 80% accurate, 20% incorrect.
- ii) If W says cab was green, what is likelihood cab was really green?
 - (1) Base rate = background data (i.e., cab colors) → $P(\text{cab is green}) = .15$.
 - (2) Indicator = witness reliability → $P(W \text{ is correct}) = .80$.
- iii) Calculations:
 - (1) $P(\text{cab is green AND witness identifies it as green}) = (.15)(.80) = .12$
 - (2) $P(\text{cab is blue BUT witness erroneously identifies it as green}) = (.85)(.20) = .17$
- iv) Upshot:
 - (1) More likely that the cab is blue and the witness is wrong! The probability that the cab is green, given that the witness says it is green, is $.12/ (.12+.17) = .41$, i.e. 41%! (Less than half.)

c) State v. Rolls (ME 1978) p. 61

- i) Facts: Guy is alleged to have committed sexual offense, police arrest him near scene of crime. At station, see blood on his pants that is still wet. Tests reveal that blood cannot be his, and *can* be the girl's. Only 5% of population possesses this exact blood type combination.
- ii) Ct affirms convictions and says that reasonable jury could find D committed this offense based on direct evidence together with statistical evidence.
- iii) How is this different from Smith?
 - (1) Here, this is actually direct evidence → blood on the jeans
 - (a) Are using stat evidence to interpret probative value of direct evidence.

- (2) Smith → totally circumstantial evidence (i.e., the bus schedule).
- (a) Note: Smith protects some values. If reverse Smith, determinism might take over. Would focus attention on character of D rather than his acts.

B. EVIDENCE OF PRIOR WRONGDOING

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) **Character evidence generally.**--Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) **Character of accused.**--In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) **Character of alleged victim.**--In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) **Character of witness.**--Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **Other Crimes, Wrongs, or Acts.**--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 405. Methods of Proving Character

(a) Reputation or opinion.

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct.

In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

- (1) any conduct proscribed by chapter 109A of title 18, United States Code;
- (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
- (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
- (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

- (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
- (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- (d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--
 - (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
 - (2) any conduct proscribed by chapter 110 of title 18, United States Code;
 - (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
 - (4) contact between the genitals or anus of the defendant and any part of the body of a child;
 - (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
 - (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

- (a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.
- (b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

Rule 608. Evidence of Character and Conduct of Witness

- (a) Opinion and reputation evidence of character.

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- (b) Specific instances of conduct.

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic

evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.--For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.--Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

1) MODEL

a) **Zackowitz Rule (codified in Rule 404(a)):**

i) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.

b) **Rationale:**

i) Not about truth-seeking: Propensity evidence is admittedly probative (almost *too* probative).

ii) Policies:

(1) **Prejudice:** Propensity tends to prejudice fact-finder. Will excessively weight character evidence:

(a) To bear more strongly on the present charge; or

(b) To take the proof as justifying condemnation generally, irrespective of guilt of present charge.

(2) **Free will:** Propensity evidence locks defendant into past. American ideal: Every person is born anew when they come to court.

- (3) Diversion: Rather than answer the specific charge, D will have to defend against the more general and sweeping attack of his character generally, i.e., man of “murderous heart.”
- c) Defendant’s Risk: Defendant in a criminal case has three choices:
- i) **Lowest Risk – Passivity (only baseline “MIMIC risk”):**
- (1) D: Don’t testify, remain passive, don’t raise affirmative arguments, hunch down and hide.
 - (2) P may *not* introduce evidence for purpose of showing propensity. Zackowitz.
 - (3) Must rely on MIMIC exceptions to get evidence of prior acts in (need not be crime!):
 - (a) **Motive** – unfavorable event in past giving the D a reason for acting
 - (i) But see *Accardo*, where court holds that evidence of prior bad acts meant to prove motive to lie could not be admitted, where motive was not an element of a false claims prosecution
 - (b) **Identity** – to prove D’s identity (note: must be in doubt!)
 - (c) **Absence of Mistake** – negate allegation that D didn’t know what he was doing (e.g., counterfeiting charges)
 - (d) **Intent** – e.g., if armed and ready, provides circumstantial evidence of intent
 - (i) Includes opportunity, capacity. May include possession of tools to commit crime (e.g., burglar tools); but the tool must have some special capability to commit that crime! Idea: Wouldn’t have tools if didn’t intend to use them.
 1. See *Montalvo*, where pros wanted to admit heroin-encrusted knife to prove intent, but really knife alone would be meaningless and the strength of the evidence was really the heroin on the blade, which is only relevant for *past* acts.
 - (e) **Common course of conduct** – hardest exception
 - (i) Show a common scheme or plan embracing the commission of two or more crimes so related to each other that proof other one tends to establish the other. (Zackowitz, dissent).
 - (ii) Here, past crimes are offered to show part of fruition of a plan → in most jxs, need an overarching theory/story to stitch all of the unrelated acts together.
 - (4) D’s procedural rights
 - (a) Pre-trial notice of use of MIMIC:
 - (i) D is entitled to pretrial notice of prosecution’s plan to use MIMIC exception, and to pretrial hearing, w/o jury, on extent of MIMIC evidence.
 - (ii) Helps D’s lawyer determine how aggressive of a strategy to adopt.
 - (b) “Curative” charge:
 - (i) D is entitled to a curative jury charge at the moment that the evidence is introduced. If don’t do immediately, will be almost impossible to purge as character evidence form the jury’s mind.
 - (ii) E.g., “This is coming in for a very special purpose. Don’t consider for anything beyond that.”
 - (5) P’s goal: Adhere to principle of Zackowitz. Then find some other plausible purpose for the evidence, to smuggle it in so the jury can hear it!
- ii) **Testimonial Risk – Try to fight:**
- (1) D takes the stand and testifies and/or asserts aggressive affirmative defenses.
 - (a) D is now a witness, and governed by R. 609, instead of 404. Opens up to past convictions and uncontested prior bad acts.
 - (b) White v. State: Demonstrates difference b/w Level 1 and Level 2 risk. Judge allows past convictions under 609 that did not admit under 404(b) MIMIC.
 - (c) Note: Arrests never come in under 609. Not considered sufficiently probative.
 - (2) P may cross-examine, and use evidence of prior acts as **impeachment evidence**.
 - (i) Theory of questioning is credibility only.
 - (ii) Evidence generally cannot be used to satisfy production burden, b/c not affirmative evidence (but jury will get to hear it);
 - (iii) Past crimes relevant to credibility: generally, all violations of social norms will be deemed relevant.
 1. But it has to be a crime; arrests don’t come in on credibility!

2. Make argument to allow only past crimes that show *deceit*.
- (3) Certain defenses → Open up potential for P to rebut defense through past patterns of behavior that would otherwise be blocked by Zackowitz.
 - (a) Entrapment → essentially erases Zackowitz.
 - (i) P can defeat by proving propensity to commit the crime anyway → Propensity now becomes very relevant!
 - (b) Insanity → opens door to character evidence tending to show sanity
 - (i) See *Santarelli*: if D argues insanity, door is only opened to character evidence that tends to prove sanity (or at least a more culpable level of sanity). Prosecution in that case wanted to introduce evidence of “explosive personality disorder,” but the evidence sometimes showed calculation, not explosion.
 - iii) **Play the Character Card**
 - (1) D himself introduces propensity evidence to show evidence of good character!
 - (2) Opens the door entirely → Zackowitz is gone. Even rumors can come in.
 - (3) Prove character using R. 405 (opinion/reputation, or specific acts)
- d) **Victim’s Risk:**
 - i) Jurisdictions are split.
 - (1) Half: all bets are off, anything comes in → can assail V’s character
 - (a) Federal rules take this position (Rule 404(a)(2))
 - (b) Rationale: V’s liberty isn’t at stake! And past is probative for truth.
 - (2) Half: require reverse-MIMIC exception for victim.
 - (a) Remember: Always fair game to pillory the V to buttress state of mind for D!
 - (b) E.g., rape: past consensual sex → belief in consent.
 - (c) E.g., self-defense: past violence by V of which D was aware → fear.
 - ii) **Federal sexual assault rules:** Reverses Zackowitz
 - (1) Rules 412-15:
 - (a) 412: Relevance of victim’s past sexual behavior → generally inadmissible
 - (i) V’s past sexual behavior or predisposition generally inadmissible. Except
 1. where it is exculpatory (points finger to someone else);
 2. was sexual history with the D **or**
 3. where exclusion would violate constitutional rights of Δ
 - (b) 413: D’s Similar Crimes in Sexual Assault → admissible
 - (i) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
 - (ii) See *Mound*: Rule 413 does not violate due process; this evidence exceptionally probative.
 - (iii) Prior sexual bad acts that did not result in conviction inadmissible. *Mound*.
 - (iv) Note: R. 413 and 403 balancing tests are the same. Need not repeat. *Mound*.
 - (c) 414: D’s Similar Crimes in Child Molestation Cases → admissible
 - (d) 415: D’s Similar acts in *civil* cases involving child molestation → admissible
- e) **Witness’s Risk:**
 - i) **Rule 608 – Witness Character**
 - (1) Only character trait that’s relevant for a witness is truthfulness
 - (a) Can use standard character assassination on the truthfulness trait.
 - (2) You can only try to buttress the truthfulness of your witness *only* after she’s been impeached
 - ii) **Rule 609 – Witness’s Prior Crimes**
 - (1) Can impeach witness by evidence of prior crimes if:
 - (a) Crime of deceit (crime of which any element involved deceit, dishonesty)
 - (b) Other felonies as long as not more than 10 years old.
 - (2) Judge must perform another prejudice balancing test.
 - (3) Entitled to pre-trial hearing on use of 609 so that party can assess the risk of having witness testify
 - (4) Remember: arrests don’t come in; it has to be a crime!!!
 - (5) Note: States have very different rules. The three important distinctions are:
 - (a) Type of crime (deceit vs. violence);
 - (b) Seriousness of crime (felony v. misdemeanor);
 - (c) Timing (how long ago relevant)

All admissible

- iii) Plus 3 other options for impeaching witnesses not covered by the Rules:
 - (1) Bias and corruption
 - (a) E.g., Membership in gang, one of the tenets of which is the promise to lie in the courtroom.
 - (b) Issue: How far to extend? Atheists who don't care about oath? Question extent to which membership in a group can be used to impeach.
 - (2) Prior bad acts (more than convictions!)
 - (a) Can impeach W through prior bad acts if goes to W's trustworthiness.
 - (b) Must be UNCONTESTED, or requires strong proof showing to judge.
 - (c) Not clear whether only includes acts of deceit, or systemic violations of social norms (or criminal conduct) are also relevant to truth-telling.
 - (d) Cannot impeach a witness w/ arrests. Not probative. *Michelson*.
 - (3) Prior inconsistent statements
 - (a) As studied in hearsay.

2) **Rule 403 Balancing: Prejudice vs. Probative**

- a) Even if evidence is otherwise admissible, must ALWAYS weigh whether prejudicial effect outweighs probative value. If so → exclude. Operates as backstop, even on MIMIC.
- b) Benefits: Equity & Fairness.
- c) Drawback: Very subjective – horizontal equity problem – no two judges are the same.
- d) Do this balancing FIRST. (Criminal and civil.)

3) **First-Level Risk: Passivity and MIMIC**

- a) **People v. Zackowitz (NY 1930), p. 808 → sets the principle**
 - i) Propensity evidence: Arsenal of guns at home.
 - ii) Homicide (not contested). Issue: Mens rea – premeditation or heat of passion.
 - iii) Facts: Man insults D's wife. D goes home and gets gun. Fight. D shoots V.
 - iv) P's evidence: D had mini-arsenal of guns at home to show "desperate type of criminal."
 - v) Cardozo excludes. Purpose is clearly *propensity*.
 - (1) Theory: Someone w/ guns more likely to premeditate than someone w/o guns.
 - (2) Acknowledges probative. But law must consider "the peril to the innocent if character is accepted as probative of crime." Danger factfinder will overweight, either (1) allow to bear too strongly on current charge; or (2) convict irrespective of current charge.
 - (3) "Defendant starts his life afresh when he stands before a jury, a prisoner at the bar."
 - vi) Here, no MIMIC exceptions. Guns were left behind at home, so no connection to the actual crime. Merely to show "murderous propensity."
- b) **U.S. v. Accardo (7th Cir. 1962), p. 815 → effort to use as MOTIVE**
 - i) Propensity evidence: Occupation as gangster.
 - ii) Mobster files tax returns for 15 years; reports very significant gambling winnings. In 1955, IRS requires specify income source. In response, Accardo files 3 years claiming beer salesman: (1) Income from beer sales; (2) Deductions from using car for beer sales. P indicts for fraudulent deductions.
 - iii) Issue #1: Newspaper articles calling calling D a famous gangster
 - (1) RULE: Can't admit Zackowitz evidence through the back door in newspaper articles.
 - (2) If evidence is inadmissible, but comes to jury through alterantive route (e.g., newspapers), judge has very strong affirmative obligation to make sure juror not affected by them. Only way to do that: interrogate each one under oath about what they've read, heard, etc. This judge didn't even try to do that.
 - iv) Issue #2: D's prior tax returns (in which D calls *himself* a gangster!)
 - (1) P's theory: Offered as MOTIVE. Not to show his gangster past. But to show he created a fictitious occupation b/c couldn't do it the way he had done it for years.
 - (2) Circuit split: Majority (2/3) says NO; Minority of courts (1/3) says it's fine.
 - (3) Prof thinks admissible, but shows why MIMIC is huge exception!
- c) **U.S. v. Montalvo (2d Cir. 1959), p. 821 → effort to use as INTENT**
 - i) Propensity evidence: Penknife w/ heroin on it.

- ii) D1 picked up paper bag of heroin, police arrest D2 b/c think part of conspiracy. Search him, find penknife w/ heroin. Introduce knife and chemical reports of the heroin.
- iii) D's argument: This is propensity. Can't use evidence that cut heroin in past to prove connected w/ heroin now! Note: This heroin hadn't been cut yet (so heroin can't be directly from this crime).
- iv) Holding: Admits. INTENT, i.e., CAPACITY TO COMMIT THE OFFENSE. Like burglary tools. Need knife to cut heroin into small pieces. And Court suggests heroin on blade demonstrated the knife's suitability.
- v) Prof thinks this is wrong. Only the sharp knife goes to capacity. Either the knife is suitable or not. The heroin on the blade adds nothing to D's capacity – only to propensity.

d) **People v. Steele (Illinois 1961), p. 822 → relevant to element of crime**

- i) Consumer protection statute to prosecute drug dealers who can spot undercover officers and make phony buys. Crime: if you promise to sell someone heroin, and instead sell talcum powder, guilty of felony. Undercover officer testifies to prior drug purchases from D. Note: P wants to get this in so that jury knows he's a bad guy (doesn't just sell talcum powder!).
- ii) D's argument: This is propensity evidence at its worst. Not even trying to prove he did something bad. Using propensity to show that he ONCE did something bad, so better to lock him up now.
- iii) HOLDING: Admits. Statute requires element of deceit. Past transactions are relevant to set up the deceit; to show W had reasonable belief that it was going to be heroin.
- iv) Prof agrees w/ result. Problem is the criminal statute!

4) **Insanity**

a) **People v. Santarelli (NY Ct. App. 1980), p. 826 → rebuttal of insanity defense**

- i) D is mobster under a lot of pressure. He gets in a fight w/ his wife and when brother-in-law comes to make peace, he shoots him w/ a shotgun 5 times. D's defense: insanity b/c of paranoid delusions. P's rebuttal: Not insanity; just "explosive personality." Offers evidence of other irrational, violent acts in past.
- ii) Question: What level of risk when D pleads insanity (1 or 3)?
 - (1) Common Law Rule: At Level 3. D is making "character" relevant by claiming negates culpability. So all character can come in to rebut.
 - (2) If 1 → only MIMIC, none of this comes in.
- iii) HOLDING: Not 1 or 3. In between. P can rebut theory of insanity through past acts or patterns of behavior that are relevant to a theory that tends to show sanity (or more culpability than insanity).
 - (1) Here, any evidence of bad reactions to stress are admissible.
 - (2) But some of the evidence had no logical relationship to symptoms of "explosive personality" and so were wrongly admitted.
- iv) Problem: Rewards P for using a broad, amorphous theory of sanity, e.g., violent man theory.

5) **Mechanics**

a) **Huddleston v. United States, (U.S. 1988, Rehnquist) p. 861 → Jury decides fact of prior acts**

- i) D charged w/ selling stolen VHS tapes. He claims he didn't know they were stolen. Govt wants to enter evidence of prior sales of supposedly stolen goods to show that D knew tapes were stolen.
- ii) D argued that gov't should have to prove the past bad act happened to the jury before it went to jury. (Every court required this. Question was only persuasion standard.)
- iii) SCOTUS rejects. JURY, not judge, determines if prior bad act actually happened.
 - (1) Court should decide if the past similar act is probative of a material issue other than character – whether it is being submitted for a proper purpose.
 - (2) Judge decides that production burden satisfied. But JURY decides if act really happened.
- iv) Very similar to Bourjaily
 - (1) Old rule: Judge had to make antecedent determination decide if conspiracy.
 - (2) Changed: Jury decides whether conspiracy existed.
- v) Acquittals?
 - (1) Most jxs say if acquitted on prior bad act, can't use.
 - (2) But some say acquitted just means there was reasonable doubt. We can still find by preponderance.

(3) SC has held that govt can even bring in prior acts that Ds were acquitted of if relevant.

b) People v. Castillo (NY Ct App 1979), p. 868 → D's right to severance

- i) Issue of severance. D always wants to sever. P never wants to sever. When jury is confronted with multiple crimes, cumulative effect is greater than any one of the offenses.
- ii) D was charged w/ committed two different crimes on two different days. Jury found him guilty of both. On appeal, court said it was too unclear whether D had committed the first crime. The prosecutor had repeatedly tied the two events together so D claimed he could not just be resentenced but second crime needed to be retried.
 1. Trial judge had given instruction that if jury found D guilty of the first crime, they could use that to infer intent to commit the second crime. (MIMIC)
 2. Court here rejects this theory. There was not enough evidence of the first past act to allow it to be used to prove the second one. The jury probably saw this as prior course of criminality or even propensity to commit crime and it would unduly prejudice them against D on second count.
 3. Prof: This is classic Zackowitz. Want to sever trial to make sure jury is only hearing evidence of THIS particular crime. Can get around Zackowitz if you show common course of conduct. (This is justification for RICO trials.)
- 4. RULE: Severance rules depend on the practical impact of the evidence.**
5. D's argument: Crimes should be of such a character that they could come in under MIMIC if there were separate trials. Otherwise, D is put at disadvantage.
6. P's argument: Efficiency.
7. No clear rule. Courts will balance unfairness to D vs. efficiency.

6) Sexual Offenses

a) United States v. Mound (8th 1998), Supp. 608 → sexual bad acts not admissible

- i) Rule: 413 admits prior sexual convictions, but not prior sexual acts.
- ii) D charged w/ sexual offenses against minors. Charge: sex offenses against 10-yr-old girl. Prior conviction for abusing 12-yr-old. Prior bad act of abusing 16-yr-old. P wanted to bring in these prior episodes.
- iii) Court allows conviction to come in under 413.
 - (1) Did not come in under 404 – not a MIMIC. If plain old Zackowitz, would be excluded.
 - (2) But 413 allows – if act exhibits same trait for which on trial in sex crime context.
 - (a) One of first cases to explicitly reject the DP argument of Zackowitz in 413.
- iv) But excludes the prior bad act.
 - (1) If didn't ripen into conviction, not allowed.
- v) Further: 403 and 413 balancing tests are the same. Don't have to do it twice.
- vi) Rule 413 does not violate DP. This evidence is exceptionally probative.

C. CHARACTER EVIDENCE

1) Character Evidence for Ds

- a) If D "plays the character card," he takes on Level 3 risk.
 - i) Introduces the very character evidence that Zackowitz previously excluded for him.
 - ii) "The price a D must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson*.
- b) D tries to establish reasonable doubt by proving character trait that is inconsistent with the crime.
 - i) E.g., honesty, or peacefulness.
- c) Risk: P can impeach character witnesses by introducing any evidence of bad acts, rumors.
 - i) Only admissible for purpose of impeaching the character witness, but jury will probably consider for their truth.
 - ii) Only limits:
 - (a) Requires GF belief that the rumors are actually circulating. But rumors need not be well-grounded, b/c testimony not about D himself, but his reputation. *Michelson*.

- (b) Inquiry must be relevant to the asserted reputation trait (e.g., truthfulness, or being a law-abiding citizen). But need not be relevant to the crime charged.
- (c) Judge can screen out if unlikely to have affected D's reputation (e.g., too long ago, or not something that would result in "talk").
- iii) Note: Prior arrests are never admissible to impeach a witness. Do not undermine trustworthiness. BUT: prior arrests are relevant to character, b/c may "cloud one's reputation." *Michelson*.

2) Three Ways To Prove Character (for Ds, Vs, and Ws) (Rule 405):

- i) Reputation (Rule 405(a))
 - (a) Character witness acts as an "expert" about D's reputation in community. *Michelson*.
 - (i) Testimony is just **congealed hearsay** (sum of all the hearsay about D).
 - (ii) Witness *may not* testify about specific acts of D, or his own judgment of D.
 - (iii) Witness must *qualify* by showing acquaintance w/ D & the community.
 - (iv) Point: Ascertain the "general talk of people" about D. *Michelson*.
 - (b) Cross-examination utilizes **RUMORS**. (Backdoor way to get to jury.)
 - (i) Questions must take form: "Have you heard?" not "Do you know?"
 - (ii) Impeach witness by either showing:
 - 1. Witness doesn't know about the rumors → not qualified.
 - 2. Witness does not know about the rumors → his judgment stinks.
 - (iii) Requires GF belief that the rumors are actually circulating. But rumors need not be well-grounded, b/c testimony not about D himself, but his reputation. Inquiries must be relevant to the asserted reputation trait. *Michelson*.
- ii) Opinion (Rule 405(a))
 - (a) Character witness testifies only to his own opinion about D's character.
 - (b) Not quite as much exposure, b/c cross-examination can only relate to W's opinion (not to D's reputation generally). But cross-examination still relies on RUMORS.
 - (i) Questions take form of: "Would your opinion change if you knew X?"
 - (c) Most jxs now prefer opinion to reputation.
- iii) Specific Acts
 - (a) Present evidence of specific behaviors *consistent* w/ the character.
 - (b) Good because limits D's exposure on cross-examination.
 - (c) But most jxs will not use:
 - (i) Cynical reason: To punish D for playing character card.
 - (ii) Ostensible reason: To avoid collateral mini-trials on whether the specific events actually happened.
 - (d) Rule 405(b) → allows specific acts for narrow purpose
 - (i) Allows specific acts evidence only where relevant to showing a character trait is an "essential element of a charge, claim, or defense."

3) Defendant's Character

a) Michelson v. United States (U.S. 1948), p. 875 → D's reputation

- i) D charged w/ bribing federal agent. D claims it was extortion. D took Level 3 risk – played the character card. Called witnesses to testify to his reputation for "honesty and truthfulness," as tending to disprove that he committed bribery. P questioned witnesses about whether they had heard about 1 prior conviction for counterfeit watches, 1 prior proven bad act for lying about conviction in paperwork, and 1 prior arrest for dealing in stolen goods over 20 yrs. ago.
- ii) Note: Under Level 1 risk, none would come in. Under Level 2 risk, the prior conviction and prior bad act would come in b/c crimes/acts of deceit can be used to impeach.
- iii) Issue: Whether improper for P to inquire about arrest of D's character witnesses.
- iv) HOLDING: Proper. While arrests are not relevant to trustworthiness (and thus cannot be used to impeach) they are relevant to a person's reputation in the community.
- v) General practice of using reputation character evidence:
 - (1) Witness must qualify by showing acquaintance to D and the relevant community.
 - (2) Witness may only testify to congealed hearsay, i.e., the general talk about D. May not testify about specific acts by D, or her own personal opinion of D.

- (3) P can impeach with questions that start “Have you heard?” not “Did you know?”
- (4) Inquiry is permissible into any event that may be relevant to the asserted reputation trait, and that would probably result in “some comment among acquaintances.”
- (5) Whether the rumor is true or false is irrelevant, so long as actually circulating.
- (6) Judge may exclude if does not seem like something people would have talked about, or if so long ago, no one remembers. (But where Ws said they knew him 30 yrs, it’s OK.)
- (7) Impeachment is relevant to show (1) poor assessment of reputation (if have heard the rumors) or (2) not qualified (if haven’t heard the rumors).
- vi) “The price a D must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.”

4) Victim’s Character

a) Burgeon v. State (Nev. 1986), p. 891 → V’s violent character (require reverse MIMIC)

- (1) D claims self-defense. Believed V was pointing gun at him, when shot him.
- (2) D tried to use evidence of V’s violent character as evidence for the truth, i.e., was probably the aggressor who pulled a gun on him. Tries to prove by:
 - (a) Specific acts of violence
 - (b) Reputation for violence (by father)
- (3) Court imposes a reverse-MIMIC requirement for the specific acts. Only relevant if D *knew* about V’s prior acts.
- (4) However, under the state’s evidence code, V’s character can be proved by reputation.
- (5) Prof: Currently rules across states regarding V’s character are ad hoc. Prof is unsure whether there should be Zackowitz protections for V. Options:
 - (a) Separate rules for separate crimes? (e.g., sex crimes)
 - (b) Separate rules for Ds, Vs, Ws?
 - (c) General rule that could harmonize rules across Ds, Vs, Ws?

b) White v. State (MD Ct App 1991), p. 895 → rape shield laws protect V’s character

- 1. Rape shield case where D wanted to call a witness who would testify that victim had previously offered to have sex in exchange for drugs.
- 2. Rape shield law similar to R. 412: prohibits evidence about V’s sexual character being introduced, except for (1) past sexual conduct w/ D; (2) specific sex acts that point finger at someone else (e.g., semen, or bruise); (3) to show V had ulterior motive in accusing D; or (4) if P plays V’s character card first. D claimed exception under #3 – motive.
- 3. HOLDING: D did not meet any of the exceptions in the MD rape shield law. To get around rape shield the evidence of past sexual conduct must contain a direct link to the facts at issue in a particular case.
- 4. Rape shield laws are important to prevent Ds from shifting focus to victim’s character and encourage women to report rape.

5) Rules for civil cases:

a) MIMIC is always allowed (Rule 404).

b) True character evidence is completely barred (unless “analogous” to criminal).

- i) Critique: Crazy. Makes it *harder* to use prior acts when the stakes are lower!! Propensity evidence should be more admissible in civil context. Always apply the 403 balance.
- ii) Prof would not require any evidence rules in civil trials by judges.
 - (1) Remember judge must always make explicit fact-finding re whether admitting evidence or not, even though he makes both determinations, in order to preserve appeal.

c) Exception for civil cases “analogous” to criminal:

- i) Some jxs have drawn unwritten analogy and allowed propensity rules from criminal cases to apply to civil cases that are “analogous,” i.e., the nature of the underlying behavior is the type that would be a crime. E.g., *Crumpton*. (Prof doesn’t understand this rule.)
 - (a) In cases resembling violent crimes, e.g., battery, V’s past comes in, D is shielded.
 - (b) In cases resembling sex crimes, e.g., rape, flips – D’s past comes in, V is shielded.

- d) Two back-doors to “character-like” evidence in civil cases:
- i) Prior Similar Acts
 - (a) More relaxed civil analogue of common course of conduct in criminal context.
 - (b) Most jxs place restriction: Must show overarching explanation that explains the prior similar acts. I.e., must show a motive to link the prior acts.
 - (c) E.g., Dallas Railway: Story that driver in a hurry, to connect the three separate acts of pulling away too soon. Otherwise prior 3 acts can’t come in.
 - ii) Habit and Custom – Rule 406
 - (a) Textually, available in both civil and criminal. But rarely used in criminal.
 - (i) But note: If Zackowitz is not Constitutional requirement, then 406 is an invitation in the criminal context. E.g., habitual offenders?
 - (ii) Prof thinks sex offender rules 413-415 are based on this “habit” idea.
 - (b) Rule 406: “Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”
 - (c) Courts have construed very narrowly:
 - (i) Genuine, habitual behavior; systematic, automatic, stimulus/response.
 - (ii) Idea: so habitual removes volitional aspect.
 - (iii) Must make a showing of proof that truly a habit before admissible.
 - (iv) Note: Not clear if “custom” goes beyond “habit.”
 - (d) Question: When do prior acts ripen into habit? 4 traffic tix? 5 assaults?

6) Character Evidence in Civil Context

- a) Crumpton v. Confederation Life Ins. (5th 1982), p. 907 → character evidence
- (1) Issue: Accidental death w/in meaning of life insurance policy?
 - (2) Insurance co was disputing that decedent died by accident b/c he raped a woman and could have anticipated that she might injure or kill him as a result. The decedent’s beneficiary, his daughter, put in character evidence showing that he was not of violent nature.
 - (3) Court held admission of character evidence was okay. It was at issue in the case and could have come in against him in a criminal case.
 - (4) Prof: If it were criminal, 412 and 413-15 would govern the past (b/c rape). But Prof doesn’t know what should be admissible in civil. Probably everything.

7) Prior Similar Acts

- a) Dallas Railway v. Farnsworth (TX SC 1950), p. 914 → overarching story
1. Trolley cars had an overhang. If passengers didn’t get out of way would get clipped.
 2. Issue: Negligence by operator in starting too soon (or contributory negligence by P).
 3. P testified that at the 3 prior stops, operator had started too soon.
 4. Rule: If isolated events (“other occasions”), irrelevant → inadmissible.
 5. But: If you can link the prior acts together such that they are “connected in some special way, indicating a relevancy beyond mere similarity in certain particulars” → admissible.
 6. Here, the overarching story was that the acts all tended to show the operator’s state of mind—that he was in a hurry, or nervous – which was probative as to whether D failed to give P opportunity to clear the overhang.
 7. Prof: Need a narrative that shows motive to link the acts together.
- b) Johnson v. Elk Lake School District (3d 2002), p. Supp. 612
- (1) Student alleged sexual abuse by guidance counselor. Student wanted to bring in evidence that on another occasion D had inappropriately touched a teacher.
 - (2) Court did not allow evidence in, even in face of Fed R. that allows prior sexual abuse to specifically come in. Here the prior act was not similar enough.

- (3) Court found that these kinds of past acts should be allowed only when they are sufficiently similar to the alleged act. This is when the propensity argument is strongest. When past acts are not similar, they are much less probative.
- (4) Should also look to closeness in time of the prior acts to the current one, the frequency of the prior acts, the presence or lack of intervening events and the need for evidence beyond testimony of D and victim.

c) HYPOS

- i) 4A claim against cop – relevance of past violations
 - (a) 4A, § 1983 excessive force damages action against police officer.
 - (b) In employment record, 2 prior disciplinary actions for excessive force.
 - (c) If this were criminal case, barred by Zackowitz, unless MIMIC.
 - (d) MIMIC argument: relevant for motive – b/c so many cases involve minority Ds – pattern of behavior toward minorities – tends to prove racist state of mind.
 1. Prof: I have made this argument. But is it fair?
 - (e) B/c civil, could come in as prior similar acts, if identify motive.
- ii) Suppression Hearing
 - (a) Probable Cause determination.
 - (b) Evidence: 2 times in last year, same cop lost suppression hearings for not having PC.
 - (c) Tends to prove that this cop arrests w/o PC a lot.
 - (d) Courts fragment on admissibility of this kind of evidence.
- iii) Auto Accident
 - (a) Relevance of driving records? For Victim and D?
 - (b) E.g., 3 speeding tix in last year; and issue here is whether he was speeding.
 - (c) Or, this is 4th accident this year?
- iv) Testers in civil rights litigation
 - (1) Only way to effectively enforce open housing laws is to send people as testers to rent apartments. Can lead to criminal and civil actions.
 - (2) And will be largely based on how they acted in past toward testers.
 - (3) Always: goes to motive.
 - (4) Prof: How is this different? If institutionalized testers in this context, then why uncomfortable in other civil contexts?

8) Habit and Custom (Rule 406)

a) Halloran v. Virginia Chemicals (NY Ct App 1977), p. 921

- (1) P was an injured mechanic. P claimed D was negligent in manufacturing can of refrigerant. D claimed P was negligent in opening the can and wanted to introduce evidence of occasions where P had opened it negligently in the past.
- (2) HELD: Reversal for new trial.
- (3) Evidence that one has demonstrated a consistent response under given circumstances has generally been admissible since common law.
- (4) Can only use conduct where you are only player – you are in control of whole situation. Otherwise no predictive value.
- (5) Also must be evidence of more than one instance.

IV. EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

1) Rules

a) Two kinds of testimony:

(1) Lay testimony

- (a) Based on observation, fact. Gives the raw data.
- (b) Not supposed to opine. Jury's job is to develop opinions.
- (c) Problem: Line b/w fact and opinion is fuzzy. Every opinion is an implied assertion of fact. Often all opinions are just a shorthand for a longer statement of fact.
- (d) Rule 701 allows limited opinions, e.g., "he looked drunk."

(2) Expert testimony

- (a) Job is to give opinion. Not to give data on which jury bases its opinion, but to help jury reach its opinion by giving her own opinion, using her own special knowledge, which goes beyond the jury's ordinary ken. Expert acts as an interpreter of data where jury could not interpret on their own.
- (b) Expert testimony most important in satisfying production burden.
 - (i) In most cases, if P gets to the jury, will win (more sympathetic) (or settle).
 - (ii) Admissibility of expert is really about getting to "B."
- (c) Issue: Determining reliability of experts. How do we know when an expert is good? How can a judge distinguish b/w quacks and doctors?

b) Frye Test

- (1) Superseded by Daubert, though still dominant in many ways.
- (2) **TEST: Is it generally accepted in the larger scientific community?**
- (3) Scientific technique underlying opinion must be "generally accepted as reliable in the relevant scientific community." Daubert (citing Frye).
- (4) This deflects the substantive determination to the more qualified society.

c) Daubert test:

- (1) Applies both to scientific and "technology" experts. See Kumho Tire (tire tread).
- (2) Under 702, judge must ensure expert's testimony is both relevant and reliable, i.e., scientific. Four "flexible" factors to determine if the underlying reasoning or methodology is "scientific":
 - (a) Falsifiability – can it be tested?
 - (b) Peer review – publication in a peer-reviewed journal
 - (c) What's the error rate? – I.e., how sure are you of the model?
 - (d) General acceptability in scientific community (Frye)
 - (i) Known technique that has been able to attract only minimal support w/in community may properly be viewed w/ skepticism. Daubert.
- (3) Remember to still apply 403 balancing!
- (4) Standard of review is abuse of discretion (Joiner), so this ends up being a huge delegation of power to district court judges.

d) In civil cases:

- (1) Scientific evidence may be reaching unacceptable level of arbitrariness.
- (2) Huge variation among trial judges.
 - (a) Decision whether to admit the testimony is often outcome-determinative;
 - (b) And receives huge deference. Joiner (abuse of discretion).
- (3) There is a movement to channel the decisions to the circuit courts to get more uniformity. But that will require SCOTUS overruling Joiner.

e) In criminal cases:

- (1) Use of expert testimony in criminal cases is largely uncharted territory, be able to theorize from civil cases. Almost no scholarship in this area.
- (2) Examples: DNA, illicit drugs, drug dealer jargon, meaning of terrorist cell, "acceptable accounting procedures" in a white-collar crime case.
- (3) Special concerns: Confrontation Clause and forum in which liberty is at stake.

- (4) Considerations: When do you accept opinion w/o the underlying data; Or the opinion w/o the science?

2) Cases

a) Daubert v. Merrell Dow Pharmaceuticals, Inc. (U.S. 1993), p. 962

- i) Benedictin birth defect case.
- ii) Manufacturers argued: no proof of causation. Therefore, demanded SJ or directed verdict for D – no question of fact on causation issue. D’s evidence: epidemiological evidence universally established that no connection b/w benedictin and birth defects. No epidemiologists can prove there is causation. If no one can prove, then no reasonable juror could find more likely than not that caused.
- iii) P’s proffer of evidence: 8 very reputable experts
 - (1) Acknowledge epidemiological studies don’t support.
 - (2) But base opinion on three techniques:
 - (a) Experiments - drop benedictin into test tube – created malformation.
 - (b) Analyzed molecular structure – structure is similar to other drugs that cause cancer.
 - (c) Re-analysis of epidemiological studies –re-jiggered them and find causation.
- iv) Trial judge excludes under *Frye*.
 - (1) First two are not generally accepted in scientific community – scientific community generally relies on statistical epidemiological studies.
 - (2) Third thing: you’ve re-jiggered epidemiological studies – claimed statistical analysis not right; but you can’t do that. Can’t claim data means something different from what everyone thinks it means, absent PEER REVIEW and PUBLICATION.
 - (3) If had submitted for peer review and publication, and had been debated in community, then might be okay. Problem: New techniques and new method of analysis. Not yet generally accepted in community.
- v) SCOTUS: Blackmun writes opinion. Considered himself a doctor’s lawyer/scientist’s lawyer.
 - (1) First thing: Eliminates Frye test. Says Fed. R. Evid. 701 and 702 had already superseded.
 - (2) **Replaces with Daubert Test (essence of “what is science”): flexible factors:**
 - (a) (1) Falsifiable
 - (b) (2) Peer Review – transparency of thought process; can others criticize;
 - (c) (3) Error Rate – how sure are you? – Prof not sure what this adds to the test – wouldn’t use anyway if high error rate.
 - (d) (4) General acceptability in relevant scientific community – this is the Frye test, coming in through backdoor!
 - (3) These are just flexible factors.
 - (4) Not surprisingly, Factor #4 has swallowed the other three. B/c as generalist judge, no expertise in assessing the other factors. (Except peer review—this is used).
 - (a) Want to know if general scientific community has accepted in some way.
- vi) Daubert was a huge delegation of power to district judges
 - (1) They act as gatekeeper of experts. With huge ramifications – often outcome-determinative. After Reagan appointments, entrusting this power to district judges became very controversial. More skeptical approach to the science. Some skewing b/w P and D sympathies. Movement to heighten standard of review in appellate courts.

b) General Electric v. Joiner

- i) SCOTUS comes down in favor of district courts.
- ii) “Abuse of discretion” standard – essentially, will almost always uphold the district court’s decision. VERY RARE that decision to exclude would be reversed. A little more likely that a decision to admit would be reversed.
- iii) Arguments: Discretion v. Uniformity
 - (1) Discretion: District judge has better feel for the record, on the ground.
 - (2) Counter: Uniformity. 900 different district judges – better to at least have circuit do it.
 - (3) Right now, discretion has won.

c) Kumho Tire v. Carmichael

- i) Tire blow-out. P calls someone who worked for 10 years in factory. Can you tell what caused the blow-out? Often, yes. Can you tell what happened here? Yes. Can only come apart in two ways:
 - (1) Either, under-inflated → in which case, driver's fault.
 - (2) Otherwise, manufacturing problem.
- ii) Further, can tell by examining tire that it was not under-inflated. Only remaining explanation: product failure.
- iii) P trying to use this to satisfy production burden. Need to reach B that reasonable juror could find more likely than not caused by product failure.
- iv) Court excludes testimony.
 - (1) Not falsifiable. No experimentation.
 - (2) Not published.
 - (3) No idea what your review rate is.
 - (4) Don't know what school of tire science you belong to—you're just a tire factory employer.
- v) 11th Cir.
 - (1) Daubert only applies to science. This isn't science. This is applied technology. This is just a guy giving opinion based on his personal observation.
- vi) SCOTUS:
 - (1) Reinstates trial court. Daubert applies to both science and technology.
- vii) Will lead to great disuniformity.
 - (1) Prof thinks of 800 district judges in U.S., half will let in, half will exclude.
 - (2) And with standard of review, we just let them decide.
 - (3) Is there any other better way?