EVIDENCE: I. RELEVANCY

What is Evidence?

- Evidence is proof of a fact. It is used to resolve disputed questions of fact.
- We use evidence to maintain a rational system of dispute resolution. Without evidence, you revert to decisions based on credibility, chance, or superstition.
- Evidence Law tells you what you *can't* use to prove a fact. They are rules of exclusion.

General Relevancy

Rule 401: Evidence is relevant if:

a) It has any tendency to make a fact more or less probable than it would be without the evidence; and
b) The fact is of consequence in determining the action.

Rule 402: Relevant evidence is admissible unless any of the following provides otherwise:

- The United States Constitution
- A federal statute
- These rules; or
- Other rules prescribed by the Supreme Court pursuant to statutory authority.

Irrelevant evidence is not admissible.

General notes:

- Applies to **every** piece of evidence presented.
- Irrelevant evidence is never admissible. **However,** relevant evidence is presumptively admissible, unless the law specifically says otherwise.
- "Relevancy is not an inherent characteristic of any item of evidence, but exists only as a relation between an item of evidence and a matter properly provable in the case."
- Relevant evidence is both **probative** and **material**

1. Relevant evidence is **probative** [401(a)]

- Probativeness: "any tendency to make a fact more or less probable than it would be without the evidence."
- This is a low bar: "any tendency" is sufficient
    - You can consider human nature and common sense when deciding this.
- The evidence does not have to make the case, or even to prove the fact. It only has to *help* prove the fact. It need only add one brick to the wall.
    - Evidence is probative if the jury could *possibly* draw a probative inference from the evidence, even if the inference isn't strong or correct. (Problem 1.1; 25).
    - Evidence offered to impeach is **always relevant**. (Problem 1.2; 26).
    - Evidence that a defendant voluntarily took a polygraph test after the technician told him her methods have a high degree of success is **probative** of truthfulness because it suggests that he would not have taken the test if he would have to lie. (Problem 1.3; 26-27).

    - Evidence confirming stories that the victim told to the defendant about how he committed outlandish and gruesome acts of violence against other people—but that the defendant never witnessed—are **probative** of her fear that he would hurt her, and thus relevant to her self-defense claim. (*United States v. James* (9th Cir.).
        - They make it more likely that: 1. He actually told her the stories, and 2. That the stories were true. This bolsters her credibility and therefore makes it more likely that she is telling the truth about her fear.
        - **But,** dissenting judge thinks this is not an abuse of discretion because it is a close case, and "well within the realm of what is ordinary."
    - **Similarly**, evidence disproving stories that the defendant said he heard about the victim's past violent acts is **probative** of the illegitimacy of his fear when he can't point to the stories' genesis, because they show that somewhere between the fact and the testimony, someone lied, and it might be him. (*Knapp v. State* (Ind.)).
    - Evidence that a police shooting victim's violin case was full of cash—and not a sawed-off shotgun—is **probative** to disprove the officer's claim that he shot in self-defense because the victim "raised" the case to his shoulder, because it makes it less likely that the victim actually raised the case to his shoulder (Problem 1.6)
- In order for evidence to be non-probative, it must add no weight to a material fact.

2. Relevant evidence is **material** [401(b)]
- Materiality: The fact is "of consequence in determining the action"
- The fact has to *matter*. What facts matter is determined by the applicable law.
- If the fact does not matter, the evidence is immaterial, and is thus irrelevant.
    - Evidence that the defendant did not know her prior conviction was a felony is **not material** when the statute has no knowledge requirement vis-à-vis the felony. (Problem 1.4; 27-28)
    - Evidence that someone was so drunk they could not form a "knowingly" *mens rea* is **not material** when a statute bars voluntary intoxication as a defense, since the statute takes those facts out of consideration. (Problem 1.5; 28-29; *Montana v. Egelhoff*)
- A fact does not have to be in dispute to be material.

Rule 403: The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

General notes:
- Applies to **every** piece of relevant evidence **except** for evidence of a *crimen falsi* conviction offered under 602(a)(2).
- Geared toward making sure evidence is probative *enough* to outweigh any danger in admitting the evidence.
- Three components: (1). Discretionary exclusion; (2). Weighing test; and (3). Types of danger.

1. Discretionary Exclusion
   - "The court may exclude relevant evidence . . ."
   - The court is not required to exclude evidence, even if the weighing test is met
     - **However,** at a certain point, evidence becomes *so* prejudicial that an appellate court will reverse for abuse of discretion if the trial judge excludes it.
     - Not codified in the rule, but it's a common-law supervisory power.
   - If they are at equipoise, or if the danger merely outweighs the probative value of the evidence, the judge **must** admit the evidence.
     - The discretion only kicks in if the weighing test is met.

2. Weighing test
   - ". . . if its probative value is substantially outweighed by . . ." (PV << PE)
   - Mechanics
     - **First,** you must assess the probative value of the evidence
     - **Second,** you must assess the danger of the evidence.
   - The rule doesn't indicate what "substantially outweighed" means, but it probably means significantly. The judge has to make this decision based on the facts of the particular case
   - When deciding whether to exclude evidence, the court should consider:
     - The probable effectiveness of a limiting instruction under Rule 105.
     - The availability of other, less dangerous evidence

3. Types of Danger
   - ". . . a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."
   - Types of danger that can outweigh probative value:
     - Unfair prejudice
       - "An undue tendency to suggest decision on an improper basis, commonly, but not necessarily, an emotional one."
       - Any evidence that would dislodge the jury from its role as a rational fact-finder.
       - All evidence offered against you is prejudicial. The rule only concerns unfair prejudice.
     - Confusing the issues
     - Misleading the jury
     - Undue delay
     - Wasting time
     - Needlessly presenting cumulative evidence.
   - Surprise is generally **not** a danger envisioned under 403. Usually, the remedy for surprise is a continuance, not the exclusion of the evidence.

Applying Rule 403

- Evidence from *State v. James* is **probably inadmissible** under 403 because its only probative value was to prove her mental state (removed by several degrees), and the prejudice involved was massive: it suggested (strongly) that he was a bad man and thus the jury might just decide that it was a wash and let her off. (*State v. James* (9th Cir.)) (Kleinfield, J., dissenting) (affirming exclusion)
- In a prosecution for possessing an automatic weapon, a photo of the gun with several knives and other assault-style guns in the background is **probably inadmissible** to prove that the gun was not dirty, worn, or defective, because (1) The probative value of the photo—that the owner took care of the gun—is minimal, since you could call a gun expert instead of admitting the photo, and (2) the prejudicial effect is massive, since the jury is likely to infer guilt from the presence of the other guns alone. (Problem 1.8; 48).
- Narrative Integrity Rule: When highly prejudicial evidence is part of the narrative of the case, it is **admissible** because the government's need to present a rich narrative and be credible to a jury outweighs the prejudice of the evidence. (*Old Chief v. United States*)
    - **For Example,** the defendant cannot offer to stipulate to an essential element of the crime and therefore keep out the grisly details of that part of the crime (since the stipulation would otherwise be an alternative source of proof that would destroy the probative value of the grisly details). (*Old Chief*)
    - **For Example,** grisly photos of the murder victim's body, face, and finger are **admissible** because they are probative of the fact and cause of death—and are thus part of the narrative (*State v. Bocharski* (Ariz.)) (affirming admission).
    - **But,** in a prosecution for being a felon in possession and assault with a deadly weapon, the details of a prior conviction for assault with a deadly weapon—necessary to prove the possession charge—are **inadmissible** if the defendant offers to stipulate the conviction, since the details of that crime are not part of the narrative of the present crime. (*Old Chief*) (reversing admission)
    - **But,** photos of the inside of a victim's head with the contents removed that were only probative of facts not in controversy are **inadmissible** because they didn't add anything at all to the narrative, and could only inflame the jury. (*Bocharski*) (affirming, harmless error).
- Creative Admission/Exclusion: Judges often will often use stipulations creatively—and will be creative in general—when trying to resolve tension between highly probative evidence that also happens to be highly prejudicial. Judges prefer not to exclude inflammatory evidence wholesale if they can admit an edited version of the evidence that maximizes probative value and minimizes prejudice.
    - Prosecutor wants to offer evidence that shortly after a bank robbery in New York, the defendant was arrested in Georgia, gave officers a false name, had a trunk full of weapons, and escaped from the jail. (*United States v. Jackson* (E.D.N.Y)
        - Highly probative—consciousness of guilt; gov't needed corroboration
        - Highly prejudicial—jury may think he's on a crime spree
        - Solution: Have the defendant to stipulate to his location, the timing, and his use of the false name in exchange for barring any information about the arrest.

- In a prosecution for embezzlement, the State wants to offer evidence of a long video showing a $2.1 Million birthday party the defendant threw for his wife, half of which the defendant billed as a business expense. (Tyco; 49)
  - Highly probative—shows how the defendant embezzled the money
  - Also highly prejudicial—there was a replica of the David peeing out vodka. The jury would probably prejudge him just for being an ass.
  - Solution: Judge edits the tape to exclude the most salacious parts, but leaves enough so that the jury can get a sense of what he did without getting pissed off.
- In a prosecution for murder, the defendant—an African-American—wants to offer a taped interview with the prosecution's chief witness where the witness used the N-word 41 times. (O.J. Simpson; 57-58)
  - Highly probative—relevant to impeach the witness who claimed he had not used a racial slur in the last 10 years, which makes it more likely that the defendant was framed by an officer who was a racist and a perjurer
  - Also highly prejudicial and repetitive—The jury may just acquit a guilty person out of rage to teach racist cops a lesson.
  - Solution: Judge allows the defense to play 2 instances of it for the jury, and to tell them it was said 39 more times in the interview, but excludes the rest. (Note: I think this is lenient—part of the power of the testimony is that it was used so many times. I think you get to 10 or 15 uses before you trigger 403 exclusion. The use of the words is way more probative than the prejudice generated by 10 or 15 uses.)

Specialized Relevance Rules

Rules 407-411 (See Chart on 96-97)

- Particular instances of dangerous evidence; *The Rules have done the 403 analysis for you.*

Rule 407: "When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- Negligence;
- Culpable conduct;
- A defect in a product or its design; or
- A need for a warning or instruction

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures."

General Notes

- Bars evidence that after an injury, the defendant decided to make something safer.
- Traditional Justification: "The rule rejects the notion that because the world gets wiser as it gets older, therefore it was foolish before." It's not a confession of negligence, but just an act of covering your ass. It has probative value, but the danger of an exaggerated inference is much greater.
- Better justification: Social policy of "encouraging people to take, or at least not discourage people from taking, steps in furtherance of added safety"

The Rule only bars evidence of subsequent remedial measures to prove (1) Negligence; (2) Culpable conduct; (3) Manufacturing/Design defects; or (4). Evidence is not barred when offered for *any other purpose*, including:

- Impeachment
- Ownership (if disputed)
- Control (if disputed)
- Feasibility of precautionary measures (if disputed)

Nuances

- It only applies to changes made *after* the occurrence that produced the damages giving rise to the current cause of action. Remedial measures taken after the manufacture of the product but *before* the present injury **are not barred** by Rule 407.
- Rule 403 can *still* operate to exclude the evidence if there is enough risk that a jury will use the evidence for an impermissible purpose (e.g., a plaintiff offers evidence to prove ownership, but the jury is likely to use it to infer negligence.)
- The court **must** exclude evidence if it is offered for an impermissible purpose. The court **may** admit the evidence if offered for any other purpose, subject to the rest of the Rules
- Repairs to the dangerous condition that are made by *third parties* are not generally barred by Rule 407, but seldom have enough probative force to get past 403.

Examples:

- Lawsuit against a wolf owner. Evidence that the owner had chained the wolf up after it attacked a neighbor's beagle is **inadmissible** if offered by the beagle's owners but **admissible** if offered by neighbors whose kid was jumped by the wolf after the incident with the beagle. (Problem 2.1; 99-100)
- Product-liability lawsuit against a wood chipper manufacturer. The court excludes evidence that the manufacturer lengthened the in-feed chutes after the accident at issue, but the defendants' counsel elicits evidence that the Army Corps has 30 machines "just like" the ones in this case and the employer still has the same machines—even though both organizations have machines with lengthened chutes. Evidence that they lengthened the chutes after the accident is now **admissible** to show that the defendant is misleading the jury. Not enumerated, but seems like a permissible purpose. (Problem 2.2; 110-11).
- Same lawsuit. When the defendant's president says that the shorter chute "is the safest length that you could possibly put on the machine," evidence that they lengthened the chutes after the accident is **admissible** to impeach and to show the feasibility of precautionary measures, with a limiting instruction.
    - **But**, in a design defect case, the Court will have to be careful to make sure the jury can disentangle feasibility with the actual design defect itself, since feasibility is part of a design defect claim.

Rule 411: "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, or proving agency, ownership, or control."

General Notes:

- Traditional Justification: The relationship between insurance and liability is a tenuous one at best, and so it is always be outweighed by the danger of unfair prejudice.
- More impressive justification: Evidence of insurance will induce the jury to decide on the basis of who best can pay for the loss, not necessarily on the basis of *actual* liability.
- Same principle of permissible purposes: **All** purposes are permissible except those barred.

Examples:

- Personal injury lawsuit where the plaintiff falls down the stairs at defendant's house. She gives a tape-recorded statement to the defendant's insurance adjustor that she had been in the house a dozen times before. When the plaintiff disputes these statements, and when the defendant offers the recording to impeach, evidence that the recording was made by defendant's insurance adjustor is **inadmissible** because the probative value of the permissible purpose (empolment = bias) is outweighed by the danger the jury will base the verdict on the insurance policy. (Problem 2.5; 130)
- Medical Malpractice lawsuit. Evidence that the defendant and his expert witness are covered by the same malpractice insurer is **inadmissible** because the probative value of the permissible purpose (mutual insurer = bias) is outweighed by the chance that the jury will base the verdict on the insurance policy. (Problem 26; 131)
- Prosecution for failure to report child abuse against a daycare center owner. Evidence that the owner had liability insurance is **probably admissible** to show that she had no motive to conceal abuse, since she is offering it to negate wrongfulness, not establish it. (Problem 2.7; 132)
    - Not sure whether 411's prohibition on using insurance "to prove whether the person acted negligently or otherwise wrongfully" applies.
    - The letter of the rule says yes: "whether" is indiscriminate
    - The Spirit of the rule says no: No money verdict; and she's using it defensively

Rule 105: "If the court admits evidence that is admissible . . . for a purpose—but not . . . for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."

General notes

- These instructions may be ineffective in some cases, because they ask a jury to be far more dispassionate than can reasonably be expected of human beings. The judge has to make this judgment when ruling under Rule 403.
- Also, it seems odd to think that you can prevent people from thinking something by telling them not to think about it. Human psychology suggests that the opposite will happen.

EVIDENCE OUTLINE: II. CHARACTER EVIDENCE & IMPEACHMENT

Preliminary Questions in General

Rule 104:
(a). Preliminary Questions In General: The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
(b). Relevance that depends on a fact: When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that proof be introduced later.

General Notes

- Applies whenever the existence of a fact is a prerequisite for (1) a witness to be qualified (2) a privilege exists, or (3) evidence to be relevant/admissible.
- The Rules—except for the rules on privilege—do not apply to the decision about whether that *initial* fact exists, and so the court can consider hearsay when making this decision.
- Examples include past acts (necessary to make 404(b) evidence relevant), or the existence of a conspiracy (necessary to make 801(d)(2)(E) evidence admissible)

Distinction between 104(a) and 104(b)

- Rule 104(b) governs facts necessary to make evidence *relevant*. Rule 104(a) governs everything else. If the resolution of a preliminary question might lead you to decide that the evidence is irrelevant, you use 104(b).
- Under 104(a), the **judge** decides the preliminary question. Under 104(b), the **jury** decides the preliminary question.
- 104(a) Standard: Judge decides, by a preponderance of the evidence, the fact's existence.
- 104(b) Standard: Judge decides whether a reasonable jury could find, by a preponderance of the evidence, that the fact existed. (*United States v. Huddleston*)
    - This a lower standard than a preponderance of the evidence.

Rule 104(b) Details

- In any cases involving past acts—regardless of whether offered to prove propensity—the existence of the conditional fact is necessary to make the evidence relevant.
    - The character inference is the only relevant aspect of the evidence, and you must have the past act to generate the character inference.
    - **Thus,** you *always* use 104(b) to resolve the existence of the past fact.
- If the judge decides to send the evidence to the jury, it will instruct it that they can only consider the evidence if it first makes the preliminary finding. The judge can exclude the evidence under 403 if it thinks the jury will be too confused by these mental gymnastics.
- A defendant's past acquittal of a crime does not automatically defeat the existence of a conditional fact based on the underlying act. It could still be found by a preponderance of the evidence (Problem 3.13; 206)
- When a prosecutor wants to introduce evidence that the defendant had previously sold stolen TVs in order to prove knowledge in a prosecution for selling stolen cassette tapes, the evidence **must** allow a jury to find that the TVs were *actually* stolen. (*Huddleston*).

Impeachment

Rule 602: A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

General Notes:

- Applies to all evidence, including hearsay declarants.
- What does "personal knowledge" mean?
    - Personal observation, "I was there," "I saw it for myself"
    - Sensory experience
- The judge must be satisfied that "the speaker is [not] giving expression to suspicion or conjecture, and [instead] to known facts. . . . there must be a legitimate inference that there was the opportunity for [actual] knowledge." (*Shepard v. United States*)
- This is a highly restrictive view of personal knowledge
- The preliminary question of personal knowledge is governed by 104(b)
- **For Example,** when a wife sick in bed says, without any apparent reason beyond suspicion, "My husband has poisoned me" the judge must exclude the evidence, even if it could otherwise come in as a dying declaration.
    - "Homicide may not be imputed to a defendant on the basis of mere suspicions, though they may be the suspicions of the dying."

Rule 607: Any party, including the party that called the witness, may attack the witness's credibility.

This eliminates the common law rule that a party could not impeach their own witness.

- Things can change; a party may need to call a less credible witness in order to make its case (parties do not get to choose who their eyewitnesses are).

Methods of Impeachment

- 1. Character Impeachment: Offering evidence of a witness's propensity for truthfulness or dishonesty (608; 609)
    - Rule 404(a)(3) permits evidence of character when used to prove propensity for honesty or dishonesty under 607, 608, and 609.
- 2. Non-Character Impeachment: Showing that the witness is biased, made a past inconsistent statement, or is testifying in contradiction of other evidence
    - This is **not** propensity evidence.
    - Evidence that a person, who is generally truthful, is lying on this particular occasion for some reason.
- 3. Showing Inaccuracy: Showing that the witness's (1) perception; (2) memory; or (3) narrative accuracy is flawed.
    - The person is not lying, but is just incorrect about the fact.
    - Perception: What did the witness perceive at the time?
    - Narrative: The witness perceived it correctly, but their story *now* is not accurate.
    - Memory: The witness just can't remember the fact

The Character Evidence Rule

Rule 404:
(a) Character Evidence
- (1) Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
- (2) The following exceptions apply in a criminal case:
  - (a) A defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
  - (b) Subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
    - (i) Offer evidence to rebut it; and
    - (ii) Offer evidence of the defendant's same trait.
  - (c) In a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.
- (3) Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts
- (1) Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character
- (2) This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. . . . [fair notice procedures omitted].

General Notes:

- Applies to every piece of evidence presented
- Rule 404 **only** bars evidence used to create the following inference (*propensity evidence*):
  - (1) The defendant did something in the past
  - (2) This past act suggests that the defendant has a certain character.
  - (3) The defendant's character suggests that he or she acted consistent with their character in the present case.
- *All* evidence suggests character traits. Rule 404 doesn't care about that. Rule 404 says you can't use *propensity evidence*: Evidence that proves # 3 by way of # 2.
- It's relevant under Rule 401, but we exclude it for policy reasons.
- The Rules bar propensity evidence because "[t]he natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." (Wigmore).
- Instead, "The defendant starts his life afresh when he stands before the jury, a prisoner at the bar." (*People v. Zackowitz* (1930) (Opinion of Cardozo, J.).
- **For Example,** in a murder prosecution, evidence that the defendant had three guns in his apartment when he shot the victim is inadmissible when the State expressly uses it to suggest that the defendant had "murderous character" (*Zackowitz*)

Common Non-Propensity Inferences

General Notes

- There are exceptions to Rule 404 that permit you to offer propensity evidence—to use character as evidence of guilt—but those come later. Rule 404(b) **is not** an exception.
- If you **are not** using evidence to prove propensity, then it **is not barred** by Rule 404.
- Thus, Rule 404(b) is mostly redundant. It simply lists *common* ways, but not all ways, you can use character evidence without going through the propensity box.
    - Knowledge/Special Skill
    - Opportunity
    - Intent
    - Preparation
    - Plan
    - Motive
    - Identity/*Modus Operandi*
    - Absence of Mistake/Lack of Accident
- **However**, you have to go through Rule 403 to ensure that the use is not substantially outweighed by the danger that the jury will go use the propensity box all by themselves.

Knowledge or special skill

- Permissible inference: The defendant has special knowledge, which makes it more likely that this act was committed by the defendant.
- Prosecution for stealing by hacking into a computer company's shipping system twice and placing a shipment to a non-existent place. Evidence that the defendant pleaded guilty to the second incident is **probably admissible** to prove that the defendant knew how to break the company's encryption codes, subject to Rule 403. (Problem 3.1)
- Prosecution for murder by shooting someone from 2000m away. Evidence that the defendant is one of the top 10 shooters in the nation is **admissible** to prove that could make the shot, because his skill is not as prejudicial as a past bad act. (Quiz Question)
- Prosecution for dealing marijuana. Evidence that the defendant had a past conviction for dealing drugs is **inadmissible** to prove knowledge because it doesn't take much special knowledge to deal marijuana, and the jury is likely to use it to infer guilt (Problem 3.2)
    - **But,** may be admissible if it takes special skill to deal a particular drug.
- Lawsuit for negligent injury as a result of a train crash. Evidence that the brakeman had a reputation for being an alcoholic is **probably admissible** to prove the railroad's knowledge of his drunkenness. (Problem 3.3)

Motive

- Permissible Inference: The defendant had the motive to commit the act, which makes it more likely that this act was committed by the defendant.
- Prosecution for murdering an FBI agent. Evidence that the defendant had a warrant out for fleeing after arraignment on an unrelated attempted murder charge is **probably inadmissible** to prove motive (not wanting to go to jail) because there is a large danger that the jury will infer that because he fled from an attempted murder charge, he's guilty.
    - **But,** the judge might admit it if the parties stipulated to leave out the part about attempted murder and just say that the warrant was for a serious crime.

Identity/*Modus Operandi*

- Permissible inference: The past act and the present act are so distinctive and idiosyncratic that "this could not be anyone else's crime."
- *United States v. Trenkler*: Bomb explodes underneath a car and kills two police officers. The defendant had built a similar bomb before. Past bomb offered as proof of M.O.
    - Similarities are: Homemade, radio-activated, remote-controlled, donut-shaped magnets, under cars, AA batteries, 6v & 9v. batteries, soldering, slide switches, toggles, Trenkler had a connection to both cars, used others to get the parts from Radio Shack
    - Differences: One used dynamite—other used flash explosives; one was deadly—the other probably couldn't have killed someone; one was wrapped in duct tape—the other was in a wooden box; receiver was a different make in both bombs; one had a double throw switch—other had a single throw switch;
    - This could go both ways, and so the First Circuit affirms the admission of the evidence under the abuse of discretion standard.

Absence of mistake/lack of accident

- Permissible Inference: The past act involved an intentional act, and so when the defendant commits a similar act now, it is not likely to be a mistake or accident
- **For Example,** when a defendant is charged with murdering his wife, and the defendant claims he was cleaning his gun when it accidentally backfired, the state **probably can** offer evidence that his previous wife was killed in exactly the same way.
- **But,** when a person claims that he reflexively threw a dog because it bit him, the state **cannot** offer evidence that he previously beat a stray dog to death, because this inference requires that there be an accident the first time.
    - Required because the inference depends upon the assumption that if there was an accident the first time, a reasonable person would compensate and not let it happen again.

Other Inferences:

- When a defendant goes through a bunch of corporate structure gymnastics to hide the fact that he was the ultimate owner of a yacht, the "owner" takes out insurance on the boat, and the defendant scuttles it, the State **can** offer evidence that he had lost three boats in the past in order to explain why he hid his ownership. (*United States v. DeGeorge*)
    - The permissible purpose here is to explain the weird behavior to the jury
    - While the three previously lost boats were *also* instances of insurance fraud, the Court bars the prosecutor from saying that he collected insurance payments or discussing the details of those events because it's too prejudicial.

Exceptions to the Character Evidence Rule

Catalog of Exceptions. Evidence of the following is admissible as propensity evidence:

- (1) A criminal defendant's relevant character [404(a)(2)(A)]
- (2) A crime victim's relevant character [404(a)(2)(B)]
- (3) A victim's trait for peacefulness in a homicide case [404(a)(2)(C)]
- (4) A rape victim's character, in certain cases [412(b)]
- (5) A defendant's past sexual misconduct in a sex crimes case [413-15]
- (6) Anyone's habit or routine practice [406]
- (7) Opinions or Reputations about a witness's character for being a liar [608(a)]
- (8) A felony conviction offered to show that the witness is a liar [609(a)(1)(A)]
- (9) A felony conviction offered to show that the defendant is a liar [609(a)(1)(B)]
- (10) A *crimen falsi* conviction offered to show that anyone is a liar [609(a)(2)]

Exception #1: Evidence of a criminal defendant's relevant propensity [404(a)(2)(A)]

General Notes:

- Only applies in criminal cases
- A defendant can **always** offer evidence of his or her relevant propensity in order to defend themselves.
    - Defendant's Requirements. The trait must:
        - (1) be the defendant's; and
        - (2) be relevant to the case under 401.
    - **For Example,** a defendant might offer evidence of their honesty in a fraud case, or peacefulness in a homicide case.
- **But,** if this evidence is admitted, then the prosecutor can offer propensity evidence in rebuttal. The courts typically liberally admit evidence once this happens.
    - Prosecutor's Requirements:
        - (1) The defendant's evidence must be admitted;
        - (2) The trait must be the defendant's; and
        - (3) The trait must rebut the defendant's propensity evidence.
    - **For Example,** a prosecutor might offer evidence of deceit in the fraud case, or violence in the homicide case.

Exception # 2: Evidence of a victim's relevant propensity [404(a)(2)(B)]

General Notes:

- Only applies in criminal cases
- Subject to the rape shield rule (exception 4), the defendant can offer evidence of an alleged victim's relevant propensity.
    - Defendant's Requirements:
        - (1) The trait is the victim's;
        - (2) The trait is relevant to the case through 401; and
        - (3) The evidence does not violate 412.

- **But,** like Exception 1, this opens the door for the prosecutor to offer evidence in rebuttal
    - Prosecutor's Requirements:
        - (1) The defendant's evidence is admitted;
        - (2) The trait is either:
            - (a) The victim's, offered in rebuttal; or
            - (b) The defendant's identical trait.

Exception # 3: A victim's trait for peacefulness in a homicide case. [404(a)(2)(C)]

General Notes

- Only applies in **criminal homicide** cases.
- If the defendant, in any way, by propensity evidence or otherwise, suggests that the victim was the first aggressor, the prosecutor may respond with propensity evidence.
- Prosecutor's Requirements:
    - (1) The defendant argued that the victim was the first aggressor;
    - (2) The trait is the victim's propensity for peacefulness;
    - (3) The trait is offered to rebut the defendant's argument in (1).

Exception # 4: A rape victim's character [412(b)]

Rule 412

(a) Prohibited Uses: The following evidence is not admissible in a civil or criminal proceeding involving alleged misconduct:
    (1) Evidence offered to prove that a victim engaged in other sexual behavior; and
    (2) Evidence offered to prove a victim's sexual predisposition

(b) Exceptions
    (1) *Criminal Cases.* The court may admit the following evidence in a criminal case:
        (A) Evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence.
        (B) Evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor
        (C) Evidence whose exclusion would violate the defendant's constitutional rights.
    (2) *Civil Cases*. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

General Notes

- Applies to all cases
- Sexual predisposition = propensity
- Rule 412 restates Rule 404's ban on propensity evidence, just with a specific focus on sexual assault cases, because sexist courts misconstrued the law.

- Rationale is that once a woman makes a rape accusation, her propensity to have indiscriminate sex is irrelevant—"promiscuous" women are no more likely to lie about rape than "conservative" women. A false rape accusation is an act of *dishonesty*, not *inchastity*, and so the character issue is *honesty* under 608/609, not sexual history.

Permissible Non-Propensity evidence

- Applies in Criminal Cases only
- 412(b)(1)(A): Evidence that the victim had sex with another person, but **only** to show that the defendant **was not** the source of the injury/semen/evidence at issue.
    - This is not propensity evidence.
- 412(b)(1)(B): Evidence that the victim's sexual history with the defendant, if offered to prove that the defendant reasonably *thought* she gave consent, or if offered by the State.
    - Not propensity evidence—it's proving the defendant's perception, not the victim's credibility.

Permissible Propensity Evidence:

- In Criminal Cases:
    - Propensity evidence of sexual disposition is **only** admissible under if it would violate the defendant's constitutional rights.
    - It seems a little silly to put this in the Rules—of *course* you can't exclude evidence that is constitutionally required.
- In Civil Cases:
    - The court *may* admit non-reputation-based propensity evidence if its probative value outweighs the danger of (1) harm to any victim; and (2) unfair prejudice to any party. (Reverse 403)
        - The burden is on the party seeking exclusion.
    - The court *may* admit reputation-based propensity evidence if the test above is met, **and** if the victim has placed her character in controversy
        - **For Example,** reputation might be admissible if the victim fights consent with a no-sex-before-marriage vow, or if she claims her reputation was damaged by the rape.

Exception # 5: Evidence of a defendant's past sexual misconduct in sex crimes cases [413-15]

413(a): "In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant."

414(a): "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant."

415(a): "In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rule 413 and 414.

General Notes

- Applies in all cases
- This is straight-up propensity evidence.
- Rationale:
    - We hate sex offenders; courts had been inventing illogical routes around the propensity box anyway.
    - There is some scientific evidence that child molesters do have this propensity
    - Solves the severe evidentiary problem when you have a traumatized rape victim or child victim who can't testify in open court.
    - Helps corroborate victims who might otherwise not be credible to a jury
- The rule makes it okay to offer this evidence, but it probably doesn't make it okay for a jury to convict based **solely** on the prior act. A judge might therefore exclude evidence under 403 if it is really graphic and almost identical to the present offense.

Exception #6: Habit or Routine Practice [406]

Rule 406: "Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness."

General Notes

- Applies in all cases
- This is a specific form of propensity evidence, but it is far more limited than general propensity. It "involves a repetitive pattern of conduct and therefore predicable and predictive conduct." It is therefore more reliable and less dangerous, so we allow it.
- There is no solid line between habit and character evidence. But the more specific and the more regular the behavior is, it is more likely to be a habit.
- It is also (generally) less likely that a jury will punish a person for their bad *habits*, as opposed to bad *propensities* (or being a bad person).
    - Bad propensities suggest an evil heart; bad habits just show lack of self-control

Defining "Habit" in more detail

- Habit: "A person's regular practice of meeting a particular kind of situation with a particular kind of conduct" (ACN 54)
    - The touchstone of a habit is "**regularity**, and hence predictability." It doesn't have to be invariable, but it should be close.
    - E.g., buckling a seat belt, sitting in a particular seat on a bus
    - **For Example,** a defendant **may** be able to prove a mechanic's habit of using a heating coil to heat Freon cans beyond their safe temperature, so long as it can show *specificity* and *regularity* in the habit. (*Halloran v. Vir. Chems., Inc.*)
    - **For Example,** an estate **may** be able to show that an allergist caused the plaintiff's death by prescribing him antihistamines in response to certain symptoms, by showing that he did that with eight other patients who presented the same symptoms. (Problem 3.19)
- Habit questions on the exam will be triggered by "almost always" "virtually always," etc.
- Habits can also be bad or good—and you can offer them for either purpose without regard to sequence.
- Still has to satisfy Rule 403, if the judge thinks the jury is likely to infer propensity from the evidence of habit. Most habits are driven by a propensity, and if the jury is likely to go through the propensity box, the judge could exclude it.
- Regular drinking could present a problem
    - Alcoholism is a propensity, not a habit
    - Regular drinking is a habit—technically—but the advisory committee notes say that 406 does not permit it as evidence of habit. However, courts occasionally admit evidence of habitual drinking, usually when the habit is precisely defined.
    - **For Example,** a habit of going to a certain bar on a certain day is fair game.

Exception # 7: Opinion or Reputation testimony regarding character for truthfulness. [608]

Rule 608:

(a) Reputation or Opinion Evidence: A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct: Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) The witness; or

(2) Another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

General Notes:

- Applies to all cases
- Parties can attack *any* witness's character for truthfulness—claiming that they are a liar—by offering (1) evidence about their reputation, or (2) opinions about their veracity
    - You **cannot** support your witness's truthfulness until the other party attacks it.
    - You **cannot** attack a defendant's character for truthfulness unless he or she testifies. Their character for truthfulness is not at issue otherwise.
- Examples:
    - Evidence that a police officer had a reputation as a liar among defense attorneys was **inadmissible** to attack his character for truthfulness, since the community was not broad enough to provide a foundation for reputation evidence (*United States v. Whitmore*)
    - Reputation and opinion testimony from an officer's acquaintance is **inadmissible** to attack the officer's character for truthfulness when the acquaintance doesn't live in the community anymore (*Whitmore*)
        - Both of these rulings are questionable for Pucillo—the judge would probably admit the evidence and let the other party attack its crappy basis.
    - Evidence (on cross) that the officer was behind on child support or that the officer failed to report his license suspension to a supervisor under a mandatory reporting policy was **admissible** to attack the officer's character for truthfulness
        - Being behind on child support is not really an act of dishonesty—more just being recalcitrant, lazy, or poor—but whatever.
        - Failing to report a license suspension under a mandatory policy is an implicit representation that you can drive.
- In the Tyco case, assuming the defendant testifies that the allegedly unauthorized bonuses and loans were actually authorized, the prosecutor:
    - **Can** offer evidence (on cross of the defendant) that he (1) lied to get out of jury duty; (2) lied to get a new driver's license; and (3) lied to help his boss's daughter get into business school. (Problem 4.2)

Note on Exceptions 8, 9, & 10:

Rule 609(b):
Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) Its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. (inadmissible unless PV >> PE)
(2) The proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

The *latest* release date for the conviction is what counts. So if you are on parole for crime X, violate your parole, and go *back* to jail, your release date after you got sent back is what counts. (*United States v. Brewer* (1978)).

Exception # 8: A felony conviction offered to show that a witness is a liar. [609(a)(1)(A)]

Rule 609:
(a): In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction.

(1) For a crime that, in the convicting jurisdiction, was punishable by death or imprisonment for more than one year, the evidence:

(A) Must be admitted, subject to Rule 403, in a civil case, or in a criminal case in which the witness is not a defendant. (admissible unless PV << PE)

* * *

General Notes

- Applies to all civil cases, and in criminal cases if the witness is not the defendant
- There is a longstanding societal assumption that all felonies involve some amount of dishonesty. It used to be so strong that if you were a felon, you could not testify. Now we just allow it to be used for impeachment.
- Elements:
  - (1) Must be offered to attack character for truthfulness;
  - (2) Must be a conviction; and
  - (3) The conviction must have been *punishable* by death or imprisonment for more than one year;
- If the evidence satisfies Rule 403, it **must** come in. The judge has 403 discretion, but no discretion under 609 itself.

Exception # 9: A felony conviction offered to show a criminal defendant is a liar [609(a)(1)(B)]

Rule 609:
(a): In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction.

(1) For a crime that, in the convicting jurisdiction, was punishable by death or imprisonment for more than one year, the evidence:

* * *

(B) Must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and (inadmissible unless PV > PE)

* * *

General Notes:

- Only applies in criminal cases
- You can only impeach a defendant this way if the defendant testifies.
  - The rule exists to allow the defendant to testify if they want, without fear that every conviction will presumptively come in under 609(a)(1)(A) and the liberal 403 standard.
  - The jury gets suspicious if you *can* testify, but you don't.
- If the evidence satisfies the elements of the rule, it **must** come in.

- Elements:
    - (1) Must be offered to attack character for truthfulness;
    - (2) Must be a conviction;
    - (3) The conviction must have been *punishable* by death or imprisonment for more than one year; and
    - (4) The probative value of the evidence must outweigh its prejudicial effect to that defendant.

609(a)(1)(B) Weighing test

- More stringent than Rule 403.
- 5-part test from *Gordon v. United States*:
    - 1. The nature of the crimes
        - Acts of violence are generally not very probative of truthfulness, since they can result from stimuli that have nothing to do with truthfulness, and can only suggest to the jury that he's a bad person.
        - The more dishonest the crimes are, the more likely they are to be admitted.
    - 2. The time of conviction and the witness's subsequent history
        - Has the defendant been rehabilitated? Has he relapsed into old behavior? Has the defendant been clean for a long time since the conviction?
        - Relapsing into similar behavior weighs *in favor* of admission.
    - 3. The similarity between the past crime and the charged crime
        - The more similar they are, the more likely it is that the jury will go through the propensity box.
        - Similarity thus weighs against admission.
    - 4. Importance of the defendant's testimony (i.e., the prejudice to the defendant if he *cannot* testify)
    - 5. The centrality of the credibility issue (i.e., how dispositive is fact of the defendant's truthfulness/untruthfulness?)
        - 4-5 usually cancel each other out in every case, since as the credibility issue becomes more important, the defendant's testimony becomes equally more important.
- The probative value at issue here is the convictions' value in assessing the defendant's truthfulness, nothing else. **Thus,** even if a judge excludes evidence of a prior drug dealing conviction under Rule 404 on the grounds that PV << PE, the evidence **is not automatically inadmissible** under the more stringent 609(a)(1)(B) test (PV > PE), because the probative value at issue is *different* under each rule. (Problem 4.4)
- **Thus,** when the defendant has prior convictions for (1) kidnapping; (2) rape; (3) aggravated assault; and (4) assault with a deadly weapon, and he is charged with kidnapping, the kidnapping is excluded, but the others come in. (*United States v. Brewer*)

Exception # 10: A *crimen falsi* conviction offered to show that anyone is a liar [609(a)(2)]

Rule 609:
(a): In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction.

* * *

2. For any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness admitting—a dishonest act or false statement.

General Notes:

- Applies to all cases
- This evidence **is not** subject to Rule 403. It comes in automatically if 609(b)'s time limit rules don't bar it.
    - This evidence is **so** probative that it is never outweighed by unfair prejudice.
- In order for 609(a)(2) to apply, the elements of the crime must require "a dishonest act or false statement."
    - **For Example,** Perjury, false pretenses, criminal fraud, embezzlement, or false statements to a law enforcement officer
    - You look to the elements of the statute first. If that doesn't help, look at the indictment, plea colloquy, jury instructions, or statement of admitted facts.
    - The fact that the defendant used deceit to commit a murder (or some other crime) doesn't bring it within 609(a)(2)—it has to be *inherent* in the crime.

Methods of Proof

Methods of Proof Generally

Rule 611
(a) The Court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
(1) Make those procedures effective for determining the truth;
(2) Avoid wasting time
(3) Protect witnesses from harassment or undue embarrassment
(b) Cross examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
(c) Leading questions should not be used on direct examination except as necessary to develop the witness' testimony. Ordinarily, the court should allow leading questions:
(1) On cross-examination; and
(2) When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

General Notes:

- A leading question provides the answer in the substance of the question. It's a statement in interrogative form: you're asking for confirmation of the statement you just made.
- You can't use leading questions on direct because you can't suggest answers to your own witness.
    - **However**, in order to develop certain testimony (e.g., a child who is uncomfortable), it may be ok.
    - The court makes this judgment on a case-by-case basis.
- You **can** use leading questions on cross
- You **can** use leading questions when *you* call someone who is hostile to (1) you; or (2) the case you are making. If you are questioning a witness and they are being deliberately evasive, you may be able to transition to leading questions.
    - E.g., the plaintiff calls a defendant or the defendant's family during their case in chief
- Case-in-chief: the portion of a trial where the party must provide evidence to create a *prima facie* case for their claims by meeting their burden of proof.

Methods of Proving 404(a)(2) Character

Rule 405 (Pucillo's version)
(a) By Reputation or Opinion: When evidence of a person's character or character trait is admissible under Rule 404(a)(2) to prove that on a particular occasion the person acted in accordance with the character or trait, it may be proved only by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
(b) By Specific Instances of Conduct: When evidence of a person's character or character trait is not offered to prove that on a particular occasion the person acted in accordance with that character or trait, it may also be proved by relevant specific instances of the person's conduct.

General Notes:

- This applies **only** when propensity evidence is allowed under 404(a)(2).
- On direct, propensity evidence can only be offered using reputation or opinion evidence.
- On cross, propensity evidence can be offered by specific instances of conduct.

Mechanics of proving specific instances of conduct

- If a witness testifies about the good/bad character of themselves or another person in the trial, the adverse party can ask them questions like "Have you ever heard. . ." (reputation) or "Did you know. . ." (opinion) that the defendant did some specific act that is contrary to their statements of his character.
    - The adverse party only has to have a good faith belief that the specific act happened. **But,** if they know that it **didn't** happen, they can't ask the question.
- Regardless of the witness's answer to these question, it is still damaging:
    - (1) If the witness admits to knowing about the act, they look like a liar, because they knew about the bad thing the person did and still testified that the person had a reputation for the opposite character (reputation) or thought that the person had the opposite character (opinion).

(2) If the witness does not admit to knowing about the act, they look uniformed and unreliable, since they are not in the loop (reputation) or are not basing their opinion on all the data (opinion).

- These statements **are not** offered to prove that the acts actually occurred, and the parties cannot reference them in their arguments as proof of such. They are **only** able to test the validity of the witness's reputation or opinion testimony. (*Michelson v. United States*)
    - It doesn't matter that it didn't happen—word will get around, and it *will* affect reputation, regardless of whether it's true or not. And if a witness doesn't know about it, it undermines their credibility.
    - Even so, the defendant can't really complain, since he opened the propensity box.
- This cuts both ways: The defense can bring up negative things about the victim with the state's character witness, who says that the she is a saint. But the state can bring up good things about the victim with the defendant's character witness' who says that she is a liar.
- **For Example,** in a trial for bribing an IRS agent where the defendant offers a number of character witnesses, the state **may** ask the character witnesses on cross if they had heard that the defendant was arrested for stolen goods, even though the defendant claims he was falsely arrested. (*Michelson*)
- **For Example,** in a trial for shooting and paralyzing the victim, the defendant claims self-defense. If the victim sees the defendant's brother and shouts to his friends, "there's his brother, I want you to remember his face," the defendant can **only** elicit this incident through this sequence of events (Problem 3.16):
    - (1) Defendant calls a character witness, saying the victim has a violent reputation;
    - (2) State responds by calling a character witness, who testifies that the victim has a propensity for peacefulness;
    - (3) On cross of the state's witness in #3, the defendant asks about the incident.

Rule 405(b) discussion

- It is extremely rare for character to be "an element of a charge, claim, or defense" (as referenced in the text of the original rule)
- Pucillo's rule is better: If you are not trying to prove action in accordance with a propensity, specific instances of conduct evidence is **always** admissible. 405(a) is only implicated when you have 404(a)(2) propensity evidence.
- **For Example,** in *United States v. James*, the defendant can testify on direct about the specific things the defendant had told her he did, because it is evidence of the bad acts to prove her *fear*, not evidence of the bad acts to prove his propensity. (Problem 3.17)
- **For Example,** evidence that the victim had a cocktail of drugs inside him that make him more violent does not implicate the character evidence rules because it is direct, physical evidence of his body composition *on this particular occasion*, not evidence of character that makes the jury *infer* what his conduct was on this particular occasion. (Problem 3.18)
- **For example**, if the plaintiff is trying to prove that they are an honest person in a slander suit, or a good person in a custody suit, they can bring up specific instances of conduct
    - The defendant in the slander suit or the other spouse in the custody suit would also offer general proof of the other party's contrary character using specific instances of conduct. This is also not barred by 404.
    - This is just offered to prove *propensity*, not action *in accordance with the propensity*.

Methods for proving character for untruthfulness

Rule 608:

* * *

(b) Specific Instances of Conduct: Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) The witness; or

(2) Another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

General Notes

- Applies to propensity evidence on the topic of truthfulness
- Operates almost identically to Rule 405, with special rules for extrinsic evidence

Extrinsic Evidence

- Evidence outside a witness's testimony. Evidence extrinsic *to the witness.* Under 608(b), if you ask about a witness's specific acts, you **must** accept their answer to the question. You can't try and disprove their statement by, for example, a public record.
- **However**, if the witness lies about a specific act during the trial, that's a statement under oath, and they could be prosecuted for perjury *later*, using the extrinsic evidence.

Examples:

- In the Tyco trial, if the defendant testifies, the prosecutor could ask about all the dishonest things he did, but if he says no, the prosecutor can't prove him wrong with extrinsic evidence. (Problem 4.2)
- In the Tyco trial, if the defendant **does not** testify, the prosecutor could ask the same specific questions about his specific instances of dishonesty if:
    - (1) The defendant offers evidence of truthfulness under 404(a)(2)(A) (which permits a defendant to offer *any* evidence of a relevant trait, even truthfulness before it has been attacked, because he's being accused of a crime of dishonesty) through another character witness; and
    - (2) On cross, the prosecutor could ask that witness about specific instances of the defendant's conduct, to test his or her knowledge.

Rehabilitating a witness

When you can rehabilitate with character evidence

- You can **only** rehabilitate a witness using character evidence if someone has attacked your witness and called them a liar.
    - You can **never** rehabilitate using character evidence just because someone has attacked the witness for bias or prejudice. (i.e., accusing the witness of cutting a deal with the government) (Problem 4.7)
    - You **may** be able to rehabilitate using character evidence if someone attacks the witness's narrative accuracy/memory. These attacks can sometimes be construed as an attack on character if it suggests that they lied intentionally and pervasively.
        - **However**, generally, you can't rehabilitate after this kind of impeachment because it's not really an attack on character.
    - **But,** when your witness has been asked a question about a dishonest act in the past, that suggests that the witness is a liar, and you can then rehabilitate him or her using character evidence.

Rehabilitating a witness with non-character evidence:

- You can **always** rehabilitate a witness using non-character evidence
- You can also **always** offer specific extrinsic evidence to rehabilitate a witness after non-character impeachment. The rules in 608(b) is limited to the character impeachment/rehabilitation context.
    - **For Example**, if evidence is admissible both as evidence of untruthful character *and* bias, a party can offer extrinsic evidence to prove up the bias, but not the untruthful character (*United States v. Abel*) (Witness A testifies helpfully for the defendant. Prosecutor asks Witness A whether he is part of a society with the defendant where they lie for each other. Prosecutor can prove up the bias with extrinsic evidence of membership)
    - **But,** if evidence is offered both as evidence of (1) M.O. (or another way around Rule 404) and (2) character for untruthfulness, and the Court finds that the evidence is inadmissible under (1), extrinsic evidence is inadmissible, because it's only relevancy is to the character question. (*United States v. Pisari*)

EVIDENCE NOTES: IV. HEARSAY

Know what *is* hearsay, what the rules say are *not* hearsay, and what the *exceptions* to the bar on hearsay are.

Do the hearsay quiz (on pages 403-406) (answers on 1081) to prepare for the exam.

Hearsay: In General

Rule 802: Hearsay is not admissible unless any of the following provides otherwise:
- A federal statute
- These rules, or
- Other rules prescribed by the supreme court

The problem with hearsay is that it's not made under all the protections of a trial. It's not under oath, in the presence of a jury, and subject to cross examination. It's presumptively unreliable.
- Rule 802 functions like Rule 402. Hearsay is inadmissible unless the rules say otherwise.
- Generally, you try to prove that a fact was true by offering an *assertion that the fact was true*. When this assertion is made out of court, we're not sure it's reliable. It's weak proof to say that something's true because someone else said so
- The truth-value of the statement not only depends on your four testimonial capacities (perception, memory | narration, sincerity), but on the testimonial capacities of the person who made the statement out of court (where those capacities are more suspect)

Rule 801
(a) Statement: "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
(b) Declarant: "Declarant" means the person who made the statement
(c) Hearsay: "Hearsay" means a statement that:
1. The declarant does not make while testifying at the current trial or hearing; and
2. A party offers in evidence to prove the truth of the matter asserted in the statement.

General Notes:
- See the Hearsay Flowchart on p. 383
- Hearsay is:
  - (1) A statement
  - (2) Made outside the current trial or hearing
  - (3) Offered to prove the truth of the matter in the statement
- Hearsay may be admissible:
  - (1) If it's *not hearsay* as defined by 801(c);
  - (2) If it's *excluded* from the hearsay rule under 801(d)
  - (3) If fits a *hearsay exception* under 803 or 804

To be hearsay, it *must* be a person's statement

- Statements made by a machine, without any human assistance or interpretation, are not statements, because they are not made by *a person*. (Problem 7.4)
- Verbal and written assertions are *always* statements, even if the person did not mean to communicate to someone else or even if they didn't have an audience (e.g., a diary).
- Implied Assertions: If someone says "You ought to give your dog a bath," that contains an *implied* statement that "your dog is dirty." Since they intended to communicate the implied fact, the first statement **is hearsay**. Many (but not all) questions are like this too.
- Indirect Assertions: When a party claims they are not offering a statement to prove the truth of the matter, it is **still hearsay** if the truth of the matter is a necessary link between the statement and the fact they claim to be trying to prove.
    - **For Example,** if a party offers a decedent's statement that "I just spent all morning planning my retirement home" to prove that she was not contemplating suicide, the statement is hearsay because the ultimate inference falls apart if she was not, in fact, planning her retirement home that morning.
- Conduct as Assertions: Conduct is only an assertion if the person *intends to communicate*. Often, people don't mean to communicate through their conduct.
    - The burden of proof is on the person claiming that the conduct is an assertion.
    - Focus on the person's sincerity, because "a man does not lie to himself."
        - (1). If the conduct *could not* be a lie, it's not an assertion.
        - (2). If it could, look and see if the person had an audience for his conduct. If so, it's probably and assertion.
    - **For Example,** if you testify that you thought it was raining because people had their umbrellas up, that observation is not hearsay: They're not trying to communicate that it was raining; they're just trying to stay dry.
    - **Compare** a ship captain who sets sail on a ship with his family after inspecting it (no assertion—no audience or motive to lie), **and** a politician who visits a nuclear reactor after telling the media that the reactor is safe (assertion—has an audience and a point to prove.)
    - **For Example,** an officer's act of taking aim at a shooter is not intended to communicate—he's just trying to defend himself.
- Silence: In general, your failure to discuss something is not hearsay unless you intend for the silence to mean something.
    - **For Example,** a wife's failure to tell her hairstylist about a boat her husband bought to kill her is not hearsay because you don't intend to communicate about something of which you have no knowledge.
    - **But,** if I ask you "is this person trustworthy?" you stare at me silently, that might be an assertion.

To be hearsay, the statement *must* be made outside the current trial or hearing

- All writings are hearsay.
- Even statements that the witness made outside the current hearing are hearsay, even though the witness is present and can be cross-examined. (Problem 7.3)

To be hearsay, the statement *must* be offered to "prove the truth of the matter asserted"

- There are several ways to offer evidence where you're not offering the statement to prove the fact asserted, because in these cases, *the truth value of the statement does not matter.* All you care about is that *someone made the statement*.
    - In these cases, you're only relying on one set of testimonial capacities—those of the witness under oath in court—and so there's no special reliability issues.
- (1) Effect on the Listener: To prove the impact of the statement on those who heard it
    - "We investigated the liquor store because neighbors complained that it was selling alcohol to minors." **Not hearsay.**
- (2) Legal Acts: To prove a legal right or duty triggered by—or an offense caused by—uttering the statement
    - E.g., slanderous statements, "I accept" at a negotiation, "I do" at a wedding ceremony, or "I'm going to kill you" (a threat).
    - They are legally operative words that operate *independently* of the speaker's intended meaning.
- (3) Impeachment: To impeach the declarant's later, in-court testimony.
    - The truth value of the statement is irrelevant because all you are trying to prove is that the witness has said one thing at one time and a different thing at trial, and thus can't be trusted.
- This is not an exhaustive list
- If the offering party is not offering the statement to prove the truth of the matter, the court should give a limiting instruction to make sure the jury doesn't use it as hearsay.

Rule 613: Witness's Prior Statement
(a): Showing or Disclosing the statement during examination: When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
(b): Extrinsic Evidence of a Prior Inconsistent Statement: Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under 801(d)(2).

General Notes

- 613 includes both oral and written statements used to impeach
- 613 does not apply to impeachment by evidence of prior inconsistent *conduct*, and the use of inconsistent statements to impeach a hearsay declaration is treated under Rule 806.
- Inconsistent statements offered to impeach **are not** offered to prove the truth of the matter, and are therefore not substantive evidence. If the only evidence is a hearsay statement used to impeach, the judge **must** grant a directed verdict (Problem 7.17)

Exclusions From the Hearsay Rule

801(d)
A statement that meets the following conditions is not hearsay:
(1) *A declarant-witness's prior statement*: The declarant testifies and is subject to cross-examination about a prior statement, and the statement
  (A) Is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
  (B) Is consistent with the declarant's testimony and is offered:
    (i) To rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
    (ii) To rehabilitate the declarant's credibility as a witness when attacked on another ground; or
  (C) Identifies a person as someone the declarant perceived earlier.
(2) *An opposing party's statement*: The statement is offered against an opposing party and:
  (A) Was made by the party in an individual or representative capacity;
  (B) Is one the party manifested that it adopted or believed to be true;
  (C) Was made by a person whom the party authorized to make a statement on the subject;
  (D) Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
  (E) Was made by the party's co-conspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or pattern in it under (E).

While they meet the definition of hearsay, these things are *legally excluded* from the definition.

- Whether the conditions in (A)-(E) are met is governed by Rule 104(a)'s preponderance-of-the-evidence standard. Hearsay is relevant, it's just inadmissible under 801 and 402.
- The Rules do not apply to 104(a) decisions, and so the hearsay statement itself must be considered, but **does not** itself satisfy 104(a).

<u>801(d)(1) Exclusions: A Declarant-Witness's Prior Statement</u>

Generally

- You can use past *inconsistent* statements to impeach because they are not offered to prove the truth of the matter.
- **However,** Rule 801(d)(1) allows you to introduce any prior statement *substantively*—to prove the truth of what it says—but only in some cases.
  - Some state courts allow *all* out-of-court statements by a currently testifying witness on the grounds that the jury can divine truth by the witness's demeanor.
- If the witness is asked about the past statement and says "yes I made it, and yes it's true," it is **not hearsay**, because the witness adopts it into her in-court testimony. The problem arises when the witness (1) Denies making the statement, or (2) Denies its truth
- The exceptions in 801(d)(1) apply **only if** the declarant:
  - (1) Testifies at the current trial or hearing, and
  - (2) Is subject to cross-examination about a prior statement.

801(d)(1)(A): Prior Inconsistent Statements

- Elements:
    - (1) The declarant testifies at the current trial or hearing and is subject to cross-examination about the prior statement (threshold question)
    - (2) The statement is inconsistent with the declarant's current testimony; and
    - (3) The statement was given under penalty of perjury at a trial, hearing, other proceeding, or in a deposition.
- In this situation, as with prior consistent statements under 801(d)(2)(B), the dangers that justify the hearsay rule are largely absent—the witness was, and is, under oath, is subject to cross-examination, and is subject to demeanor judgments by the jury.
- In many cases, the prior statement may be *more* reliable, since it was made closer to the event and was not as influenced by the litigation. It also protects parties who rely on a witness saying one thing if the witness changes his mind on the stand.
- Learned Hand thought all prior inconsistent out-of-court statements to come in if the witness testifies: "When the jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court."
- **For Example,** grand jury testimony is admissible under this exception.
- **But,** if the witness, at trial, can't remember what happened, there is disagreement about whether the past statement is "inconsistent" with their lack of memory.

801(d)(1)(B): Past Consistent Statements

- Elements:
    - (1) The declarant testifies at the current trial or hearing and is subject to cross-examination about the prior statement (threshold question)
    - (2) The witness is attacked—expressly or impliedly—for:
        - (a) Fabricating their testimony;
        - (b) Bias;
        - (c) Testifying based on some improper influence or motive; or
        - (b) On some other ground;
    - (3) The statement is consistent with the witness's testimony;
    - (4) The statement is offered after the attack on the witness; and
    - (5) If the statement is responding to an attack under (2)(a)-(c), the statement was made *before* the alleged improper influence arose (*Tome v. United States*)
- The point here is to allow the party accused of acting improperly to defend itself by saying that they've been telling the same story the whole time.
    - **For Example,** attacks include: "you've been bribed," "You're his mother," "You cut a deal with the government," or "you were threatened by the mafia."
- **However**, when responding to the attacks in (2)(a)-(c), the prior consistent statement must have been made *before* the alleged improper influence arose (*Tome v. United States*)
    - Statements made before the improper influence are immensely probative to dispel the improper motive; statements made after the improper influence are *tainted by* that improper influence and are therefore much less probative.
    - **Thus,** when a father accuses his child of testifying against him because she wanted to live with her mother, any consistent statements made after the relevant visit with her mother are inadmissible under 801(d)(1)(B).

- 801(d)(1)(B)(ii) is a new addition to the rule.
    - "to rehabilitate the declarant's credibility as a witness when attacked on another ground."
    - The previous text only applied if the witness was charged with (1) bias; (2) fabrication; or (3) improper motive. It did not apply to attacks on memory, narrative accuracy, or character for truthfulness.
    - Now, you can use the rule whenever the witness's credibility is attacked, and you can offer prior statements that are *completely unrelated* to the mode of impeachment.
        - **For Example,** if your witness is attacked for having faulty memory, you can offer a prior consistent statement having nothing to do with the subject matter your witness forgot.
    - For some incomprehensible reason, *Tome* does not apply here.

801(d)(1)(C): Identification

- Elements:
    - (1) The declarant testifies at the current trial or hearing and is subject to cross-examination about the prior statement (threshold question); and
    - (2) The statement identifies a person as someone the declarant perceived earlier.
- Justified because courtroom identifications are way more suggestive and less accurate than identifications in a police lineup.
- This rule comes up when witness identifies someone in a police lineup, or when a victim cannot remember who they identified because of physical trauma.
- The requirement that the declarant "be subject to cross-examination" is satisfied if the declarant remembers *making* the statement, but cannot remember the substance or justification for the statement. It is satisfied even if the declarant does not recognize the defendant at all. (*United States v. Owens*)
    - The requirement guarantees an *effective opportunity* to cross-examine, not an effective cross-examination in any way the party likes.
    - In these cases, the opportunity is effective enough because it permits the party to expose the weakness in the testimony/identification: The identification could have been suggestive while the declarant was in the hospital, and he could just be parroting what the government says at trial.

801(d)(2): Party-Opponent Statements

801(d)(2)(A): Party-Opponent's Statement

- When a lawyer signs her billable hour statements, an opposing party can offer those statements against her under 801(d)(2)(A). (Problem 7.11)
- A party **cannot** invoke the exception to admit his own statements, because they are not (1) being offered against him; or (2) being offered by an opposing party.
- "This is war:" Anything you say can and will be used against you in court.

801(d)(2)(B): Statements the party adopted or believed to be true

- When you act in such a way that ratifies the statement of another party, that statement becomes admissible against you.
- **For Example,** if someone says, "I don't have any crack, but you can buy some from my buddy," and you immediately get up and pull crack out from under a bench, you **probably** adopt the statement that "you can buy crack from my buddy" (Problem 7.13).

801(d)(2)(E): Co-conspirator's statements

- The statement of one conspirator is the statement of all, so they all come in.
- In order to admit a co-conspirator's statement:
    - (1) The statement must be offered against the members of the conspiracy;
    - (2) There must have been a conspiracy at the time the statement was made;
    - (3) The conspiracy must have included, at the time the statement was made:
        - (a) the declarant; and
        - (b) the defendant; and
    - (4) The statement was made during the course of, and in furtherance of, the conspiracy (*United States v. Bourjaily* (1987) (created the last 3 elements)
- There **does not** need to be a conspiracy charge for a conspirator's statement to meet the exception to the hearsay rule.
- Letting these in can be bad evidence in a criminal case—particularly since the hearsay statement itself can influence its own admissibility—there's a danger that conspirators-turned-government witnesses will just say whatever the government wants, and no one can contradict them, since the defendant's protestations are obviously suspect.
- A co-conspirator's confession to police implicating his companions is **not admissible** under this exception because it is not made in furtherance of the conspiracy. It is made in direct contradiction to the conspiracy's interests in remaining undetected.

Rule 805: "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."

This often comes up when a hospital record (a hearsay statement) contains a statement by the patient's wife (also a hearsay statement)

- This is overcome by the regularly kept business records exception [803(6)] and the statements for medical diagnosis or treatment exception [803(4)]
- Another example is a declaration against interest by person 2, contained in the dying declaration of person 1.

Rule 806: "When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination."

General Notes

- Applies to all admitted hearsay statements, except for 801(d)(1), and 801(d)(2)(A)-(B)
- Basically just means you can impeach a hearsay declarant, even though they're not there

Universal Exceptions to the Hearsay Rule

Rule 803: The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression: A statement describing or explaining an event or condition made while or immediately after the declarant perceived it.

(2) Excited Utterance: A statement relating to a startling event or condition, made while the declarant was under the stress or excitement it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition: A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

(4) Statement Made for Medical Diagnosis or Treatment: A statement that :

- (A) Is made for—and is reasonably pertinent to—medical diagnosis or treatment, and
- (B) Describes medical history; past or present symptoms or sensations; or their general cause.

(5) Recorded Recollection: A record that:

- (A) Is on a matter that the witness once knew about but now cannot recall well enough to testify fully and accurately;
- (B) Was made or adopted by the witness when the matter was fresh in the witness's memory; and
- (C) Accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning a person's character.

General Notes:

- Applies regardless of whether the witness is unavailable
- Assumption is that in some circumstances, hearsay is at least as reliable than a witness
- Rule 602 **still** applies. The declarant is **still** a witness. The exception to the hearsay rule does not except the hearsay statement from the personal knowledge requirement

803(1) Present Sense Impression (PSI)

- Elements:
  - (1) The statement must describe or explain;
  - (2) An event or condition; and
  - (2) The statement must have been made:
    - (a) While the declarant was perceiving the event/condition; or
    - (b) Immediately after the declarant perceived the event/condition.
- We assume that a statement made during or immediately after something happens is not fabricated; *contemporaneity* constrains falsehood.
- We also assume that the mind can process the event fast enough to be accurate.
- What does "immediate" mean?
  - The rationale of the rule tends to cause judges to restrict the time frame.
  - A few seconds (probably); minutes (maybe), hours (probably not)
  - But if the person was unable to make the statement immediately after (e.g., they're unconscious), the judge may bend the rule a little. Look at context.

803(2) Excited Utterances (EU)

- Elements:
  - (1) The statement must relate to;
  - (2) A startling event or condition;
  - (3) Made while the declarant was under the stress of excitement caused by the startling event or condition.
- We assume that people don't lie when they're in shock; *spontaneity* constrains falsehood.
  - **But,** you can impeach the declarant on the grounds that they were so delirious that they didn't accurately perceive what was happening (attack on perception)
  - Look for exclamation points on the exam!
- Nuances:
  - The declarant need not participate in the startling event
  - The stress of excitement can return (via, e.g., PTSD). The rule does not seem to require contiguity.
  - This is a *subjective* standard: The rule hinges on what the declarant finds startling.
  - Proof of the startling event is governed by Rule 104(a), and courts are starting to accept the hearsay statement itself as proof of the startling event.
- Key differences from 801(1) are (1) the scope of the statement; and (2) the scope of the timeframe
  - The stress of the event can last for longer than "immediately after" the event
  - It only needs to "relate to" the event, instead of describe or explain

PSI & EU Hypotheticals

- A woman is mauled to death by a dog. (Problem 7.29)
  - Evidence that the victim called her partner during lunchtime, and said "that dog just bit me" in an agitated tone is **admissible** as an EU
  - Evidence that during the same phone call, the victim said "I told those people, 'you need to control your dog.'" is **admissible**, while double hearsay, as:
    - First statement (to neighbor): Both a PSI and an EU; and
    - Second statement (to partner): An EU.

    - Evidence that when the victim got home after this incident, she told her partner "as I was walking by, the dog lunged at me. I put my hand out, and the dog bit me. . . . Thank God I had my sports watch on" is **potentially admissible,** depending on the timeframe and her level of stress at the time.
    - Evidence that during the attack that killed the victim, a third neighbor called 911, and during the phone call, told the operator that the dog was running loose in the hallway and attacking both the owner and the victim is **admissible** as a quintessential example of a PSI and an EU (Problem 7.30).
- When police respond to a domestic violence call, evidence that the wife told them, in tears, (1) that her husband pushed her head into the wall; and (2) responds to questions about her knees by saying that she scraped them in the fall, is **admissible** as an EU, and maybe a PSI if the officers responded fast enough. (Problem 7.31)

<u>803(3): Then-existing mental, emotional, or physical condition</u>

- Elements:
    - (1) A statement of the declarant's:
    - (2) Then-existing:
        - (a) State of mind (e.g., motive, intent, or plan);
        - (b) Emotional condition (e.g., mental feeling);
        - (c) Sensory condition (e.g., pain);
        - (d) Physical condition (e.g., bodily health); and
    - (3) The statement is **not**:
        - (a) A statement of memory or belief; and
        - (b) Offered to prove the fact of the thing remembered or believed.
- We allow them in because a statement of present feeling or condition is not likely to be fabricated; *spontaneity* constrains falsehood.
- The rule permits you to use an 803(3) statement to prove that the declarant did what he stated an intent to do. (*Mut. Life Ins. Co. v. Hillmon* (1932)).
- Two significant (and related) limitations of the exceptions:
    - (1) You **cannot** use the exception to prove something that happened *in the past*, such as a plan, a memory, or a belief. The exception is present and forward-looking only. (*Shepard v. United States*)
    - (2) You **cannot** use the exception to prove the future conduct of another person. In order to do that, you would have to remember something they told you, and memory is barred by the rule. (*Shepard*; criticism of *Hillmon*)
    - "Declarations of intention, casting light upon the future have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored." (*Shepard*)
- **Thus,** if an 803(3) statement contains statements of another person's intent, the court should strike those statements before admitting it.
- **For Example,** a person's statement in letters to his mother and fiancé that he was planning to go on a trip to Kansas is **admissible** to prove that he did, in fact, go (*Hillmon*)

- **For Example,** a victim's statements to his friends in a restaurant that he was going to pick up a pound of marijuana from the defendant in the parking lot is **admissible** to prove that he did not disappear from the parking lot voluntarily (Problem 7.33).
    - **But,** the statement is **inadmissible** to prove that the defendant was there, and thus the Court should strike all references to the defendant before admitting it.
- **For Example,** the decedent's statement that "my husband poisoned me" is **inadmissible** under 803(3) because it concerns a past act by someone else, and any contention that it is offered to prove that she did not have suicidal intent, or to prove a physical condition is "a filament to fine" to be distinguished by a jury, and so is barred by 403 (*Shepard*)

<u>803(4) Statements made for medical diagnosis or treatment</u>

- Elements
    - (1) A statement
    - (2) Made for medical diagnosis or treatment
    - (3) That is reasonably pertinent to medical diagnosis or treatment, and
    - (4) Describes:
        - (a) Medical history
        - (b) Past or present symptoms or sensations
        - (c) The inception of those symptoms or sensations, or
        - (d) The general cause of those symptoms or sensations.
- We assume these statements are reliable because people have a strong incentive to tell the truth when they are sick; *self-preservation* constrains falsehood.
    - All our concerns about the unreliability of memory and past statements that underlie 803(3) are thrown out if it's a statement for medical diagnosis.
- **However**, there is a distinction between <u>fault</u> and <u>fact:</u> Fault is ordinarily inadmissible; fact is always admissible.
    - **For Example,** "a patient's statement that he was struck by a car would qualify, but not his statement that the car was driven through a red light." (ACN)
    - **For Example,** you can say that someone tried to blow my knee out, but not that a particular person did it (the particular person is not relevant to the diagnosis)
    - **But,** if the doctor needs to know about the person's identity for medical reasons (to stop the spread of disease; to keep an elderly person or a child from returning to an abuser, etc), fault may be admissible (Problem 7.34)
- The statements need not have been made to a physician, and so statements to family members, EMTs, or even family members would be admissible.
    - The common law barred statements made to doctors solely for the purpose of litigation, but the Rules **admit** these statements though the expert opinion regime
- Evidence that an old man called his lawyer after his caretaker pushed him down, told him about the incident, and asked him if he could fire the caretaker without getting sued is **inadmissible** under this exception, because he was seeking legal advice, not medical care
    - **But,** the same statements made to a doctor are **admissible**.
- Evidence that a husband pointed to a wrapper from the local deli and said to his wife "I think I ate some bad meat, you'd better get me a doctor" is **admissible** when the wife testifies to those statements, because they were made to her in order to permit her to get medical treatment. The fault is **probably admissible** because the doctor might want to know the source of the illness. (Problem 7.37)

- The same evidence is also **admissible** when testified to by the urgent care nurse (for the same reasons), even though it's double-hearsay, because both the husband's and the wife's statements meet the requirements of 803(4). The wife's statement is probably a PSI and an EU as well.
- Wife's testimony that the doctor said "this has all the signs of arsenic poisoning—we need to hospitalize immediately" is **probably inadmissible** because it is a statement *of* medical diagnosis, not *for* medical diagnosis, and the reliability constraints on the latter do not apply to the latter.
    - **But,** most courts will **admit** the doctor's notes, particularly if there's a good chance that another doctor will see it (since those statements *are* made for diagnosis and treatment)
- This exception **might** allow Mrs. Shepard's statement that "I've been poisoned," but **probably not** the statement that she'd been poisoned by her husband.

803(5): Recorded Recollection

- Elements:
    - (1) The statement is a record;
    - (2) The record is on a matter that:
        - (a) The witness once knew about, and
        - (b) Now cannot recall it well enough to testify fully and accurately;
    - (3) The record was made/adopted when the matter was fresh in the witness' memory; and
    - (4) The record accurately reflects the witness's knowledge
- We assume that recorded statements are much more reliable than a witness's memory; *recording* constrains forgetfulness.
- Is (kind of) an unavailability rule, but practically, you need the witness present at the trial. Otherwise you can't really get the foundation necessary to satisfy the rule.
- A witness who reviews a report prepared by someone else and finds that it is accurate *adopts* the report. This exception also covers things like dictation, multiple authors, etc.
    - What is important is not *who* made the record, but the record's accuracy.
- This exception **only** applies if you are unable to refresh their memory. If you can refresh their memory, you must get the testimony from the witness.
    - You can use *anything* to refresh a witness's memory
- If the exception is satisfied, the witness can read the record into evidence, but you can **only** offer the record as an exhibit if you are an adverse party.
- When a witness wrote down a license plate number that a neighbor shouted to her, the writing is **admissible** and can be read into evidence when the witness testifies that she forgot the number, and the writing does not refresh her memory. (Problem 7.38)
- When a witness wrote down a license plate number that a neighbor shouted to her, the writing is **inadmissible** when the neighbor's memory is refreshed by the writing and can recite the plate number from memory.

803(21) Reputation Concerning Character

- In order to testify about someone's reputation, you *have* to rely on hearsay—reputation is, by definition, second-hand opinion. We permit it because it's an old rule, and we think that the gossip process purges (most) falsehood.

Exceptions to the Hearsay Rule When the Declarant is Unavailable.

Rule 804:
(a) Criteria for Being Unavailable: A declarant is considered to be unavailable as a witness if the declarant:

(1) Is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies,
(2) Refuses to testify about the subject matter despite a court order to do so;
(3) Testifies to not remembering the subject matter;
(4) Cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
(5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
    (A) The declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
    (B) The declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

This subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

General Notes:

- These matter because they *only apply when the declarant is unavailable*. If they are unavailable, then the exceptions in the rule do not apply.

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

(1) **Former Testimony**. Testimony that:
   (A) Was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
   (B) Is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or re-direct examination.

(2) **Statement Under Belief of Imminent Death. (Dying declarations)** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) **Statement Against Interest**. A statement that:
   (A) A reasonable person in the declarant's position would have been made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
   (B) Is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) **Statement of Personal or Family History.** A statement about:
   (A) The declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
   (B) Another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) **[omitted]**

(6) **Statement Offered Against a Party that wrongfully caused the declarant's availability.** A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

804(b)(1): Former Testimony

- Elements:
  - (1) The declarant is unavailable;
  - (2) The testimony was given at any trial, hearing, or lawful deposition; and
  - (3) The testimony is now offered against a party who had, or (in a civil case) whose predecessor in interest had, at the prior trial, hearing, or deposition:
    - (a) An opportunity to cross/direct/redirect the witness; and
    - (b) A similar motive to develop the witness's testimony
- Mirrors 801(d)(1)
- We allow it because it just lacks a live witness; *need* outweighs reliability concerns

- More detail on element (3)(b): Opportunity & Similar Motive
    - What is important is that the party **had** the motive and opportunity—not that they exercised that opportunity
    - Rule: The motive need not be identical, but the party's *fundamental objective* must be the same in both the past and present proceeding
        - The intensity of the motivation need not be the same, just the objective.
    - **For Example,** the state cannot offer grand jury testimony under this rule, because the defendant can't attend a grand jury hearing.
    - **For Example,** if a victim in a civil drunk-driving trial testifies and was cross-examined by the defendant, that testimony is **admissible** in a subsequent DUI prosecution arising from the same facts, because his motive is similar enough. The fact that the stakes are higher does not change this—the lawyer should know the prosecution is coming. (Problem 7.23)
    - **But,** testimony at a *Miranda* suppression hearing is **inadmissible** at a subsequent trial under this rule because the motive is too dissimilar: the sole concern in the suppression hearing was the *circumstances* of the statements, not their *substance*. The lawyer has no motive to challenge the substance of the statements during the suppression hearing. (*United States v. Duenas*)
- *United States v. Duenas*
    - The motive need not be identical, but it must be similar. It is inherently a factual inquiry, and is based on the similarity of the underlying issues and on the context of the questioning. *What was the party's "fundamental objective" at the prior hearing?* This fundamental objective is what must be similar
        - The intensity of the motivation need not be similar, just the motivation

804(b)(2): Dying Declarations

- Elements
    - (1) The declarant is unavailable
    - (2) The case must be:
        - (a) A prosecution for homicide; or
        - (b) A civil case;
    - (2) The declarant made the statement while believing his death to be imminent.
    - (3) The statement was about the cause or circumstances of the declarant's death.
- We assume the statements are reliable because the speaker is dying; *conscience* constrains falsehood.
    - "They breathe truth that breathe their words in pain." (Shakespeare)
    - There are powerful psychological pressures that generally make people tell the truth in these situations. People like to clear their consciences. Not everyone tells the truth when dying, but enough people do that we are willing to rely on it.
    - This is particularly true in homicide cases, since "dead men tell no tales."
    - Usually there's also some form of trauma
- The declarant **must subjectively believe** that they are dying, and dying "imminently."
    - "There must be a settled hopeless expectation that death is near at hand, and what is said must be spoken in the hush of its impending presence." (*Shepard*)

    - The rule says "imminent," not "certain," so even if a doctor says you haven't a shot in hell at making it, if your death is not imminent, your statement is **probably inadmissible**. (Problem 7.28)
    - When you are conscious that all hope was not lost when you make a statement, that statement **cannot** be a dying declaration. (*Shepard*)
    - **However**, the declarant does not have to die. They just have to genuinely *believe* their death to be imminent. But this circumstance would usually only arise in a civil action, since you have to be prosecuting homicide in a criminal case.
        - But, in a mass murder prosecution, a victim who did *not* die could be the source of a dying declaration if there were other victims who did die (thus satisfying the murder prosecution requirement)
- The statement **must** be about the cause or circumstances of death. It must have to do with why you're dying.
    - This goes hand-in-hand with the requirement that a dying declaration can only be used in a homicide prosecution (in the criminal context)
    - It doesn't have to involve the cause (it can involve, for example, statements that a person did *not* shoot him). "Circumstances" is broader than "cause"
- You **can** impeach an unavailable declarant in these cases by arguing that he was delirious or cognitively impaired from the trauma of the stabbing, shooting or other wounding (caused by hypoxia in the brain, which is caused by the massive bleeding)

<u>804(b)(3): Statement against interest</u>

- Elements
    - (1) The declarant is unavailable;
    - (2) A reasonable person in the declarant's position;
    - (3) Would have made the statement **only if** the person believed it to be true because, when made, it (either):
        - (a) Was contrary to the declarant's <u>proprietary or pecuniary interest,</u>
        - (b) Had a tendency to <u>invalidate a declarant's claim against someone</u>, or
        - (c) Exposes the declarant to <u>civil or criminal liability</u>; and
    - (4) When offered **in a criminal case** as a statement that tends to expose the **declarant** to criminal liability, the statement must be supported by corroborating circumstances that clearly indicate the statement's trustworthiness.
- People don't say damaging things unless they're true; *self-interest* constrains falsehood.
- The statement is measured by what an **objective, reasonable person** would think.
    - Proprietary = ownership interest; Pecuniary = monetary interest
    - The rule is likely looking for *extrinsic* circumstances to show this, and not anything within the statement itself. Not the same as 801(d)(2)
    - Statements that shift blame **are not** statements against interest.
- The privilege against self-incrimination often triggers this exception because the declarant doesn't want to incriminate themselves.
- Part (b) exists to keep defense witnesses from creating reasonable doubt by testifying that an unavailable witness confessed to the crime the defendant is charged with.
- **For Example,** police are investigating a robbery and know a man and a woman were acting as a team. When they arrive at the man's house on a tip, the man's mother immediately yells at him "Bobby, did you rob that truck? Don't lie to me," and the

declarant responds, "Ask Meredith, it was her idea," his statement is **probably admissible** (Problem 7.24):
    - It **could** be a statement against interest because it appears to implicate himself in a conspiracy; and the tip and the police's knowledge of the conspiracy members' genders provide the corroborating circumstances required by (b).
    - It **might not** be a statement against interest, because he appears also to be shifting blame to Merideth. But it would be odd to say that if you weren't a conspirator (you'd probably say "no mom! I didn't do it!")
- When statements against interest appear in a narrative with neutral, exculpatory, or blame-shifting statements, the court **must** admit **only** the inculpatory portions of the narrative (*Williamson v. United States*)
    - One of the most persuasive ways to lie is to mix up truth with falsehood. Context can only come in when absolutely necessary.
    - **But,** some judges think that you admit contextual statements as well. The entire story is against the defendant's interest. (Kennedy, J., dissenting).
    - **For Example,** when the defendant tells police a story that inculpates the defendant and largely exculpates himself, that story is **inadmissible** context for a second, inculpatory story unless, on remand, the government can show that the first story is truly inculpatory. (*Williamson*)
    - **For Example,** when the defendant wants to testify that he lit a restaurant on fire because another person told him to, but put "less gas" in than he planned to do because there were kids on the second floor his statement is generally **admissible**, but his claim that he committed arson-for-hire is **inadmissible**. (Problem 7.25)
        - Being asked to commit a crime is not itself a criminal act, and being a part of a arson-for-hire conspiracy (probably) doesn't inculpate you much more than the arson itself.
        - The decision about the children shows a mitigating circumstance, and the declarant might make it to save his ass even if it wasn't true, but he still burned the restaurant anyway, so it probably comes in.
    - **For Example,** when the declarant tells his sister that he committed a bank robbery with the defendant, that he shot the guard in the leg, and that the defendant shot the guard in the neck, and when he asks for lemon juice because "if you wash your hands with lemon juice they can't tell you shot a gun," all the statements are **admissible**.
        - The lemon juice statement is against his interest because there's no reason he would want to keep people from knowing he shot a gun unless it would implicate him in a crime.
        - The acknowledgement of the robbery will come in, and the implication of the defendant might come in because he's confessing to his sister, not trying to shift blame.
        - His statement that he shot the guard in the foot would come in
        - His statement that the defendant shot the guard in the neck might come in because it would probably make him guilty of murder under *Pinkerton* or the natural and probable consequences doctrine.

804(b)(6): Statement offered against a party who wrongfully cause a witness's unavailability

- Elements:
  - (1) The witness must be unavailable;
  - (2) The witness was going to be offered against you;
  - (3) You wrongfully;
  - (4) Caused or acquiesced in causing the witness's unavailability; and
  - (5) You intended to make the witness unavailable.
- We don't want you to benefit from wrongdoing; *justice* outweighs unreliability
  - E.g., kidnapping, threatening, bribing, or murdering a potential witness.
  - The rule is a "prophylactic . . . to deal with the abhorrent behavior which strikes at the heart of the system of justice itself." (ACN). It's similar to Rule 37 admission or dismissal sanctions.
- Your act of causing them to be unavailable **must** be wrongful
  - **For example,** claiming privilege to prevent your spouse from testifying, or (technically) causing someone to be deported by reporting them to the INS.
  - **But,** the INS example seems strained and not analogous to the privilege example, and it feels like you shouldn't be able to benefit from that.
- You **must** intend for the witness to end up being unavailable
  - **However,** you need not intend to make the witness unavailable for the particular trial in which the hearsay statement is offered. If you meet the elements of the exception for *any* proceeding, their hearsay testimony is admissible in *all* other proceedings. (*United States v. Gray*)
  - **For Example,** when a wife murders her husband, intending to make him unavailable after he sues her for attempted murder/battery, and then the government later brings criminal mail fraud charges against her, the husband's hearsay statements are **admissible** in the mail fraud trial. (*Gray*).
  - The exception applies "whenever the defendant's wrongdoing was intended to, and did, render the declarant unavailable as a witness against the defendant, without regard to the nature of the charges at the trial in which the declarant's statements are offered."

The Confrontation Clause

"*[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .*" U.S. Const. amend. VI

General notes

- Whether it was meant to or not, the clause works as a constitutional hearsay rule
- Old Rule: Hearsay statements do not violate the confrontation clause if they:
  - (1) Fall within a firmly rooted hearsay exception, or
  - (2) Bear particularized guarantees of trustworthiness. (*Ohio v. Roberts*)
- *Roberts* effectively constitutionalized the FRE and denied the defendant the ability to cross-examine awitness
- Scalia finally got rid of the *Roberts* rule in *Crawford v. Washington*, which broadened the Clause's reach and started causing all sorts of problems for prosecutors.

Evidence violates *Crawford* when:

- (1) It is hearsay;
- (2) It is offered in a criminal case;
- (3) It is offered by the State against the defendant;
- (4) The defendant had no prior opportunity and similar motive to cross-examine the declarant;
- (5) The declarant is now unavailable;
- (6) The hearsay is testimonial; and
- (7) The defendant has not forfeited their confrontation right.

If one of these elements is missing, you **do not** have a confrontation clause violation.

Element 1: Hearsay

- Hearsay is defined by 801(c): The Constitution doesn't care about exclusions under 801(d). They are still hearsay.
- The Confrontation Clause is only worried about hearsay—if the declarant is present and testifying, the defendant gets to confront them.
- The Clause is **only** triggered **after** you satisfy an exception to the hearsay rules. If the evidence is barred by 801, you don't get to the Confrontation Clause.

Element 2 & 3: Offered by the State against the defendant in a criminal case

- The Clause only protects criminal defendants from the State. Nothing else.

Element 4: Prior opportunity for cross-examination

- Similar to the 801(d)(1)(A) requirement for prior inconsistent testimony.

Element 5: Unavailability

- Generally 804(a) is a good guide to confrontation cases, since both are based on the same Common law traditions.
- If the claim is based on a lack of memory, you're available for purposes of the confrontation clause if you remember making the statement, even if you don't remember the content of the statement (*Cf. United States v. Owens*)

Element 6: Testimonial Hearsay

- Testimonial Hearsay: Hearsay that were made with the purpose of being offered at trial to prove the defendant's guilt. Statements gathered as evidence. (*Crawford*)
- Examples include:
    - Statements made as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."
    - Formalized statements (affidavits, depositions, prior testimony)
    - Custodial examinations
    - "Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

    - Grand jury testimony
- Things that **are not** testimonial statements:
    - Casual and offhand remarks
    - Co-conspirator statements
    - Business records "created for the purpose of the administration of an entity's affairs and not for the purpose of establishing some fact for trial."
- Justified because the right to confrontation doesn't guarantee the right to reliable evidence, it guarantees the right to *test reliability in a certain way*.
- **For Example,** when a woman is afraid her husband will poison her and gives a note to her neighbor with instructions to go to the police if she turns up dead, and the note says that she suspects her husband has poisoned her, that statement is **inadmissible** as testimonial hearsay. (Problem 8.4)
- Distinction between "testimonial hearsay" and "statements in aid of resolving an ongoing emergency."
    - "Statements are **non-testimonial** when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are **testimonial** when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington*)
    - **For Example,** when a DV victim calls 911 and tells the operator that her boyfriend is jumping on her and beating her, that statement is **non-testimonial** because it was a plea for help, not given for the purpose of prosecution. (*Davis*)
    - **For Example,** when police respond to a call that a man had arrived at a gas station with a gunshot wound, ask him who shot him and where, and the declarant tells them but keeps asking for an ambulance, the statements are **non-testimonial** because police could believe there was a live shooter, it involved a gun, not fists, and the declarant intended it as a plea for police help (*Michigan v. Bryant*)
    - **However,** when police respond to a DV call, find the wife safe on the porch, and have her make a statement while the husband is detained in the house, that statement is **testimonial** because it was made after the emergency was over and the declarant was safe, and because it was describing past events, not a present emergency. (*Hammon v. Indiana*)

<u>Element 7</u>: Forfeiture by wrongdoing (Similar to 804(b)(6))

- You forfeit when you:
    - (1) cause the declarant's unavailability;
    - (2) for the purpose of keeping them from testifying (*Giles*).
- The government must prove this by a preponderance of the evidence
- There's a good argument that whenever you kill someone, you forfeit your confrontation right, because at least implicitly, you know that the dead person won't testify against you.
- There **also** is a good argument to be made that you forfeit your confrontation right when you invoke a privilege that makes the witness in issue unavailable, even if the invocation isn't wrongful. You have the right to confront the witness, not make the government's case harder, and if you can make the witness available, you should have to do so.