

# Evidence classnotes, Spring 2005. Professor Lewis.

## Table of Contents

Course introduction.....	2
Rule 606(b).....	2
Relevance.....	3
Authentication.....	10
The best evidence rule (1001–1004).....	14
Specialized relevance rules (407–411).....	15
Character evidence.....	18
Character evidence exceptions.....	22
Habit (406).....	23
Impeachment.....	24
Character evidence review.....	26
The rape shield.....	27
Competency.....	28
Hearsay.....	29
Non-hearsay uses.....	29
Hearsay exceptions.....	31

## Monday, January 10

### *Course introduction*

- CALI problems will appear on the final exam
- Recommended/expected class meeting preparation
  1. Read the assigned materials
  2. Attempt to do the problems in the reading
- Final exam
  - It will be problem-oriented
  - It will be open-book; bring:
    - The casebook
    - The rules supplement

Both of these may have marginal notes wherever there is blank space

- The Rules
  - Many states use FRE or something very similar
    - A notable exception is California, which has an evidence code. Often, though, this code will reach the same result as FRE.
  - Policy: a great aid to understanding the rules

### *Rule 606(b)*

#### Text:

#### **[COMPETENCY OF JUROR AS WITNESS]**

**(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

#### *Tanner (p7)*

- What's at issue here? The admissibility of an affidavit from a juror.
  - So, we're not talking about testimony. (Is an affidavit testimonial? Maybe—but not in the strict sense.)
- When did the juror misconduct etc. occur? Well, it occurred both during deliberations *and* during trial.

- Aren't these two times different? So different that they demand a different outcome? (Lewis thinks they are—maybe.)
- Policy of 606(b): what are we concerned about?
  - Finality
  - Sanctity of the jury system
    - (Note how in the majority opinion here, the court says it's not sure the jury could survive, otherwise.)
- What about the argument that drugs are an “outside influence”? The court says that they're no more of an “outside influence” than viruses, poorly-prepared food, or lack of sleep (pp11–12).
- “Sausage” exceptions in 606(b):
  - Extraneous prejudicial information
  - Outside influences

Note that *non-jurors* can talk all they want. And that jurors themselves can talk all they want *before* the verdict is delivered.

## Tuesday, January 11

### Brother's Keeper video analysis

- Neighbor who came by, said that Bill hadn't been dead very long.
  - No foundation was laid for why we ought to believe the neighbor's opinion about the time of death.
  - So, he's not an expert. Rather, he's a lay witness. And time of death is something we consider to be beyond the knowledge of lay witnesses.
- Theory that Delbert was framed in order for the state to get the farm.
  - There's a possible relevance problem here. But the proponent of such evidence can argue that this shows the police's motive to get a false confession out of Delbert.
- Theory, by a neighbor, that Delbert didn't know what he was doing when he waived his *Miranda* rights.
  - This is a speculation problem. Proponent could get around this by having the neighbor instead testify about his *own* previous encounters with Delbert's absent-mindedness.
- Neighbor who says Delbert was using a technique that's used to get cow's up in the morning.
  - Speculation problem.
- Neighbor who says Delbert is a kind and gentle person.
  - This is character evidence. See the 404(a)(1) “mercy rule.”

### **Relevance**

- Relevance versus materiality

- Relevance: this is about probative value—the “tendency to make . . . more probable or less probable” (401).
- Materiality: note that this *word* doesn't appear in the rules—but the concept does (“ . . . consequence to the determination . . .” (401)).
- Rule 401
  - Text: **DEFINITION OF “RELEVANT EVIDENCE.”** “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probably than it would be without the evidence.
  - The rule itself, note, purports to require only *minimal* relevance; it says “*any* tendency,” not “substantial” tendency, or “persuasive” tendency, e.g.
    - The policy of requiring only minimal relevance is an instance of a broader, general policy of the rules—liberal admissibility.
- Circumstantial evidence: it's not inherently inferior to direct evidence. Rather, it's only as good as the source of the evidence. E.g., eyewitnesses lie, eyewitnesses make mistakes.

Problem 1.1 (p21): “a brick is not a wall.”

Problem 1.2 (p22): this tends to show the witness's *bias*.

Problem 1.3 (p22): this tends to show innocent state of mind.

- However, note the aspects of conditional relevance here—i.e., there are foundational bases required.
  - What's the standard of proof for these foundation bases?
    - It's not minimal relevance, like with 401.
    - This is 104(b): the question is whether the evidence is sufficient for a finding by a reasonable juror (see *Cox* (p32)). The Court says this means that a preponderance is required—because of the gatekeeper role of the judge as set out in 104.

### Thursday, January 13

Problem 1.4 (p23): the question here is the materiality of “knowing.” So, we need to know whether the mens rea for this 18 U.S.C. § 922(g)(1) crime is “knowing” or higher.

Problem 1.5 (p23): same idea here as in Problem 1.4 (p23).

*James* (p25)

Problem 1.6 (p30): as in *James*, the fact that there was no gun de-corroborates the idea that the suspect would have raised his violin case in such a way.

- Rule 403 (the “probative, but prejudicial” rule)
  - Text: **EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.** Although relevant,

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

- What do we mean here by “prejudice”?
  - It's obviously something more than “this tends to convict my client.”
  - What's the concern?
    - E.g., in *Bocharski* (p40), what does  $\Delta$  have to articulate?
      - That admission of the evidence would incite the jury to passion (“let's convict someone!”... and who's convenient?).
      - That admission of the evidence distorts the jurors' “regret matrix” (Lewis's term), thus affecting their willingness to convict on less than a reasonable doubt.
    - *James* (p44): the prejudice argument here is that the jury might *feel*, on the basis of the evidence in question, that the victim deserved to be killed.
      - Lewis says—shouldn't we be concerned, mostly if not only, with the prejudice against the  $\Delta$ ?!
  - N.b.: prejudicial potential must *substantially* outweigh probativeness.
  - (See Lewis's law review article on the constitutionality of 403: 64 Wash. L. Rev. 289; also look for Stevens, J., comments on this, somewhere.)

## **Tuesday, January 18**

- *Brother's Keeper*: semen found on the victim's body.
  - Relevance? It goes to a description of what was going on at the time of the killing.
    - However, note that the prosecutor hasn't tested to find out who's semen it was. But, that doesn't destroy the relevance, it just makes the evidence more ambiguous (and less probative).
  - Prejudice?  $\Delta$  would argue that the jurors might be disgusted by incestuous gay sex, and so their regret matrix might drop.

### Problem 1.8 (p43)

- $\Delta$  can argue that other guns, even if not  $\Delta$ 's, will make the jury emotional, and think that  $\Delta$  is a gun nut.
- The state can argue that the photo shows the clean exterior of the gun.
- $\Delta$  can respond to the state by saying that it should call the officer that seized the gun if it wants to present evidence on cleanliness.

### *Old Chief* (p66)

- The issue here: revealing the nature of  $\Delta$ 's previous crime versus the alternative

of simply stipulating the *fact only* of the prior conviction.

- The danger we're worried about is 404-discouraged propensity reasoning by the jury.
- *Itc.*, the Court departs from its prior rule that the prosecutor could ordinarily present whatever (relevant) evidence it wanted—it didn't have to pick the least prejudicial.
  - Why not here?
    - 403 balancing: a stipulation is an alternative that doesn't carry the risk of prejudice.
    - The fact of the prior conviction, which is all the state is really authorized by the rules to present, does not implicate the state's need to use narrative to build the moral force of its arguments.

#### Problem 1.9 (p53)

- The  $\Delta$  here has an explanation for why he fled. *But*, he can't give that explanation without revealing that he's previously been convicted.
- The state can argue, however, that the prior was for unarmed robbery—a nonviolent crime. And that, now,  $\Delta$ 's charged with murder. So, the state would argue, there's not as much risk of propensity reasoning.
- The state can also argue that the prior conviction is from 15 years ago—this also lessens the propensity reasoning risk.

#### *Myers* (p48)

- One problem, leading to inadmissibility, is the ambiguity of the evidence in question here—the officer's testimony is inconsistent. We usually leave that kind of thing to cross-examination, though.
- But, there's also *two* incidents here.  $\Delta$  could have been fleeing due to the *other* one. So, the jury would be forced to speculate (too much).
  - Plus, another flight was from a *plainclothes* officer.

At any rate, evidence of flight is usually admitted.

#### *Collins* (p54)

- What did the state do wrong here?
  - It made up the odds.
  - It's argument had a mathematical flaw.
  - It presented no evidence that the events here were independent events.
  - It foisted this math evidence on a jury and counsel who don't understand math.
  - It's math evidence did not—(and could not?)—factor in the possibility that a witness was mistaken or lying.
- What distinguishes DNA or fingerprint evidence from this kind of thing?
  - For one thing, DNA/print evidence doesn't rely on a witness!
  - For another, DNA/print evidence is backed up by long studies and big sample pools.

So, we *do* let math evidence in—but only when it is *demonstrably* reliable.

*Jackson* (p64)

- What does the false ID do? It might show a guilty conscience.
- Likewise, the fact that the  $\Delta$  was in Georgia suggests that he was fleeing, which in turn suggests a guilty conscience.
  - However,  $\Delta$ , when in Georgia, was caught by police for *another* crime. Since that's prejudicial, the court invites an *Old Chief*-style stipulation.

### Thursday, January 20

Problem 1.10 (p53): the relevant questions here is: Would the jury have to speculate? Or would it be able to use reason?

- Rule 103: preserving error
  - Text: RULINGS ON EVIDENCE
    - **(a) Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
      - **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
      - **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
    - **(b) Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
    - **(c) Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
    - **(d) Plain error.** Nothin in this rule precludes taking notice of plain errors affecting substantial rightst lthough they were not brought to the attention of the court.
  - Erroneously *admitted* evidence (103(a)(1)):

- You have to “timely” object.
  - What's “timely”? Basically, as soon as is reasonable.
    - Why do we have a “timely” requirement in the first place? To give the other side chance to correct the error.
    - So, don't ever fail to object—even if the question has been asked and answered already. (If it *has* been asked and answered, use a motion to strike—we like to think that jurors do what we tell them to.)
    - (There's an Idaho case where an objection made two days later was not untimely under the circumstances.)
- Erroneously *excluded* evidence (103(a)(2)):
  - If it's documentary evidence:
    - You have to offer it.
    - You have to have it made.

And that's all—with that, it's in the record for an appellate court.

- If it's testimonial evidence:
  - You should make an offer of proof to demonstrate the substance of the evidence.
    - What does an offer of proof look like? You can do either:
      - A Q&A.
      - Or a summary, by counsel. This is less than ideal for record purposes—so, if the evidence is crucial, do a Q&A offer of proof.
- You have to be specific about the grounds of your objection (unless the grounds are obvious “from the context.”)
  - Note that an appeals court may refuse to hear you on the error if your claim on appeal is different from the grounds you stated at trial.
- Rule 611: mode/order of interrogation
  - Text: **MODE AND ORDER OF INTERROGATION AND PRESENTATION**
    - **(a) Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
    - **(b) Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
    - **(c) Leading questions.** Leading questions should not be used on the direct examination of witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be



- permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.
- Why are leading questions allowed on cross but not on direct?
    - Well, first of all, n.b. the various exceptions where leading questions *are* allowed on direct:
      - Hostility
      - Children
      - Adverse parties
      - Witnesses identified with adverse parties:
        - Spouses
        - Relatives
        - Employees
        - Attorneys
    - So, we assume on direct that the witness is friendly and cooperative. And so in that case we don't want the witness just speaking for the attorney—we want the witness to speak for himself.
  - What makes a question “leading”?
    - When an attorney provides the pertinent information for the answer *in the question itself*. That is, there's some suggestion of *the answer* in the question. (Not just the kind of answer—an attorney is allowed, even on direct, to direct a witness to the type of information he wants.)
  - Fallbacks for avoiding asking a leading question:
    - Use “W” words (reporter's questions).
    - Pretend you *don't* know what the witness is going to say.
  - Scope of cross-examination:
    - Ordinarily, the scope of cross is limited to the scope of direct.
      - Why? Because otherwise it could/would screw up the other side's presentation of evidence—and so distract the jury from the other side's “movie.”
    - When would a judge allow cross to go beyond the scope of direct?
      - When it's in the interests of the witness's convenience, is one possibility.
    - If cross is allowed to go beyond the scope of direct, it has to be done “as if” it was direct—no leading questions allowed, unless there's an exception.
  - Rule 615: sequestration of witnesses
    - Text: **EXCLUSION OF WITNESSES.** At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person

- authorized by statute to be present.
- We don't want witnesses “tuning” their stories.
- N.b., the Idaho victims' rights provision, in the Idaho constitution, which says that victims have a right to be present at all criminal justice proceedings.
  - Which trumps? (This hasn't been decided. [YES IT HAS—SEE 1/24 NOTES])
    - (There's an argument that the “victim” is only an “alleged” victim until conviction.
- Note, too, the exceptions—e.g., for lead investigators, and expert witnesses.

### Monday, January 24

- Re: sequestration of witnesses versus victims' rights provisions:
  - Judges say they just have the victim testify first—this gets around the (potential) legal issue.
  - Even so, the Idaho Supreme Court has actually spoken on this: see *State v. Gertsch*, 137 Idaho 387, 395 (2002).

### *Authentication*

- Hypo: how would you prove that a can of “Green Giant” peas was actually manufactured by the Green Giant company?
  - This is a real case, actually. And in reaction to it, a rule was added, 902(7): trade inscriptions are self-authenticating.
- Treat authentication as a form of conditional relevance.
  - E.g.: a baggie containing a white substance.
    - The state would have to show:
      - That this was *the* bag that the Δ had.
      - The the bag hasn't been tampered with since the Δ had it.

#### The state's burden?

- Under 104(b), it would be preponderance of the evidence.
  - Even so, when the state rests, it still has to prove its *case* beyond a reasonable doubt. So, in *possession* cases, at least, the actual burden is reasonable doubt (since the authentication is effectively proof of a material element of the crime).
- Chain of custody:
  - You'll want to get testimony from each and every person who dealt with the evidence.
  - But... can the arresting officer *really* testify that it's *the* bag? Well, he can if the bag was *marked* by police and was *sealed*.

- Then, the officer might say that he gave the marked, sealed bag to the evidence custodian.
- And so then you call the evidence custodian; and then whoever's next (e.g., the toxicologist, who will testify both about the chain of custody and about the test results); and then whoever's next; and so on.
- A gap in the chain of custody isn't necessarily fatal. It depends on the situation.
  - For instance, there was one case involving 238 bales of pot. One link in the chain was missing. But, the court held that under the circumstances the jury could reasonably conclude that it was the same 238 bales.
- Rule 901(b)(4): the “it looks real to me” rule (Lewis's description)
  - Text: **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances [are examples of authentication].
  - This is basically a self-authentication rule (*cf.* 902): no witness is required.
    - Could this solve the Green Giant problem, described above? It depends on the circumstances—e.g., it might *not* if Green Giant has been having trouble with counterfeit cans.
- Usually, authentication is an issue with physical evidence, but occasionally *testimony* must be authenticated.
  - E.g., a phone call from a person who didn't identify himself during the call.
    - Try 901(b)(5) (“Voice identification”).
      - How familiar with the voice does the authenticating witness have to be? Not very! Look at the rule. (However, note that even if the witness is familiar enough to authenticate, she still might not be familiar enough to convince the jury of the reliability of her authentication.)

#### Problem 10.1 (p699)

- What methods could authenticate this handwriting evidence?
  - (First of all, look for handwriting exemplars, from the bank, e.g.)
  - Get an expert: 901(b)(3) (“Comparison by trier or expert witness”).
    - (However, even though you can do this, Lewis is not convinced that an expert can really do this kind of comparison accurately.)
  - Go to the jury: 901(a).
  - Get a familiar nonexpert: 901(b)(2) (“Nonexpert opinion on handwriting”).
    - (Can you *really* do this?, Lewis asks.)
  - There might be some 901(b)(4) “self”-authentication possibilities—consider the circumstances, always, to see if you can use 901(b)(4) (“Distinctive characteristics and the like”).

#### *Stelmokas* (p700)

- Here, we have proof of the II's case made with documents—documents authenticated by expert witnesses, who testified about where the documents were found in order to show the grounds of their expert authority.

- This is 901(b)(8) (“Ancient documents or data compilation”).
- You could argue for 901(b)(4) (“self”-authentication).
- The court rejects the Δ's argument that he was framed, because the court can't believe that somebody would have a motive to frame such a bit player.

Problem 10.2 (p704)

- The state will have to show that this is *the* note that was found in the front seat. To do this, it can have the seizing officer testify that he recognizes it.

Problem 10.3 (p705)

- Authenticating *incoming* phone calls:
  - Note that an *outgoing* phone call could be authenticated using 901(b)(6) (“Telephone conversations”).
  - But 901(b)(6) doesn't address incoming calls. And here, the caller could be misidentifying himself. So... ???

**Tuesday, January 25**

- (On incoming calls:) if the recipient has heard the person's voice at any time, then you can use 901(b)(5) (“Voice identification”) to get comparison testimony wrt. the voice.
- Tracing: if you do this you'll have to show the accuracy of the tracing method (using 901(b)(9) (“Process or system”)).
  - (This is an issue for computer-generated results of any kind, too.)
- For this problem (10.3 (p705)), we've got an incoming call. However, we have use of \*69—you'll have to use 901(b)(9) (“Process or system”) to show that \*69 produces reliable results.

*Lynes* (p706)

- The source of authentication here is the *circumstances*—use 901(b)(4) (“Distinctive characteristics and the like”).

Simpson trial: “Nicole”'s phone call (p708): the best argument for admission is voice recognition (901(b)(5)). This should work since the call's recipient heard the 911 tapes, which were presumable authenticated at trial.

- Photographs
  - *Simms v. Dixon* (p709)
    - The trial court said you have to have the photographer testify. That is wrong. All you need is someone to testify that the photograph is accurate.
  - What about a re-creation videotape? What would you have to show for admission?

- Same lighting
  - Time of year
  - Time of day
  - Lunar phase
  - Streetlights
  - Weather
- Same weather
- Same clothing and equipment
- Here, you might actually have to have the photographer testify (unlike in *Simms* (p709)). This is because of 901(b)(9) (“Process or system”): the photography has to have the same perspective as, e.g., the Δ driver, would have had.
  - Focal length
  - Film
  - Placement of camera
  - And so on...
- Note the possibility of digital forgery or photographs.
- *Wagner* (p712)
  - The state can't authenticate the videotape of the actual crime with:
    - The officer—because he was too far away.
    - The informant—because she skipped town.
  - So, the state had to show reliability of the process (901(b)(9)), and that the videotape wasn't tampered with.
  - However, because the informant skipped, the state still has a chain of custody problem:
    - The informant can't testify that *she* gave the crack rock to the officer.
    - So, the officer will have to testify:
      - That he frisked the informant.
      - That there wasn't anything in his cruiser that the informant could have gotten.

That way, the state can show *circumstantially* that there's no chain of custody problem.

- Day-in-the-life films: these are used in major personal injury cases, to get the jury to appreciate the magnitude of Π's injury.
  - What kind of foundation is needed to introduce these?

### Thursday, January 27

- Self-authentication (902)
  - This helps litigators avoid the expense of calling in witnesses, sometimes from long distances, just to testify about authenticity.

- There's also the important self-authentication rule here of “acknowledgement”—notarization.
  - What's the value of notarization? You create a document that comes into evidence *without* any authentication. (However, the other party can still try the document's “authenticity” to the jury, after the document has been admitted.)
- N.b.: 902(11) (“Certified domestic records of regularly conducted activity”) and 902(12) (“Certified foreign records or regularly conducted activity”)
  - Note the cross-reference to these rules in 803(6) (“Records of regularly conducted activity” hearsay exception).
    - But Idaho's 803(6) was never amended!! (Lewis is working on fixing this.)

### ***The best evidence rule (1001–1004)***

- “Best evidence” is a misnomer—the “best” evidence is *not* required by this rule.
  - Problem 10.5 (p718): this evidence is not barred by the rule. Here, they're trying to prove the observation of *Lamarre*—*not* the content of the transcript.
- The BER covers only a certain class of evidence: writings, recordings, and photographs (see 1002).
- The “xerox rule”
  - 1001(4) (definition of “duplicate”): this is broad enough to include:
    - Xeroxes
    - Carbon copies
    - Maybe, future technologies
  - 1003 (“Admissibility of duplicates”): this rule tells you when you can get a duplicate in. Note that they *can't* come in when the other side is contesting the authenticity of the original.

Problem 10.6 (p719): the girls here is like the guy in Problem 10.5—she was *there*. So, her testimony can come in.

### ***Lucasfilm*** (p723)

- Why is the evidence excluded here? Because it was destroyed in *bad faith* (1004(1)), the court finds.

## **Monday, January 31**

Video: The Verdict: a photocopy of the hospital admittance form from *before* a final change:

- Why should it come in? Well, what's the original? It's the one that was *not* changed. So, this photocopy is a duplicate of an original that *no longer exists* (if the nurse is to be believed). So, there's a dispute about the contents of the

original—and we let the jury decide about that.

### ***Specialized relevance rules (407–411)***

- These are special rules specifying when unfair prejudice outweighs relevance *as a matter of law*.
  - 407 (“Subsequent remedial measures”), 408 (“Compromise and offers to compromise”), 409 (“Payment of medical and similar expenses”), and 411 (“Liability insurance”) exclude evidence *only* when offered for a particular purpose, specified in the rule.
  - 410 (the plea bargain rule) excludes evidence *in all cases*, except...
- Rule 407
  - Text: **SUBSEQUENT REMEDIAL MEASURES.** When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the 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, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.
  - Policies: there are two basic ones here:
    1. Encouraging social good, from people correcting things that cause harm.
      - (But come on! Who acts with 407 in mind?!)
    2. Recognizing that this kind of evidence has very weak relevance, anyhow.

#### Problem 2.1 (p84)

- The beagle owner sues: then the evidence is not admissible (if offered to show negligence), because it was a measure taken *after* the event.
- The boy's parents sue: then the evidence comes in, because it was a measure taken before the event.

#### *Tuer* (p85)

- The issues etc. are really important, Lewis says, because the line of reasoning used here could effectively eliminate 407.
  - E.g.: Q: Was your protocol a safe one? A: Yes.
    - If Π can get later measures in just by asking this question, then there's not much of 407 left.
- Π asks, etc.: “Would it have been unsafe to restart Heparin?” The witness answers, “Yes.” Now, Π wants to impeach based on that.
  - The court doesn't let Π get away with that—because the witness's testimony was about the witness-doctor's opinion *at the time*.

- See fn.10—it matters *who* wants to get in the evidence that the Π wants to impeach. I.e., a party should not be allowed to open *their own* door.
  - (N.b. that there's an Idaho case that suggests you *can* open your own door. Lewis thinks this decision is wrong.)
- Rule 408
  - Text: **COMPROMISE AND OFFERS TO COMPROMISE.** Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or a witness, negating a contention of undue delay, or proving an efforts to obstruct a criminal investigation or prosecution.
  - The law loves settlement.

*Bankcard* (p97)

- You can't tell the jury *about* the settlement discussions, but you *can* tell it about comments made *during* the settlement discussions.
  - Specifically, here, you can tell that Π was *inviting* Δ to breach the contract during these discussions. So, it's basic fairness that explains this case.

Problem 2.3 (p100)

- What's Ramada's objection? “Evidence of conduct or statements made in compromise negotiations.” The report here is a “statement” made in the negotiations.
- But look also at the sentence after that one in 408: the rule doesn't require exclusion of any other evidence “otherwise discoverable.”
  - However, the report here is not “otherwise discoverable.” It's work product (probably). (“Otherwise discoverable” is things that weren't created for the purposes of settlement—and therefore not work product.)
- Rule 409: the “good samaritan rule”
  - Text: **PAYMENT OF MEDICAL AND SIMILAR EXPENSES.** Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.



- What *doesn't* 409 say? That *apologies* and other statements (e.g., admissions) in the context of a promise to pay are excluded. So, they are *not* excluded.
- (N.b. that IRE 409 is considerably broader than its federal counterpart.)
- Rule 411
  - Text: **LIABILITY INSURANCE.** Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.
  - So, insurance information is excluded *only* on the issue of negligence.
    - This is because 411 doesn't want the jury reasoning that "no insurance means more careful."
    - N.b. the Arizona research, described in the casebook, showing that insurance discussions by the jury hurt  $\Pi$  more! (The jury thinks  $\Pi$  is double-dipping.) So,  $\Pi$  might want a cautionary instruction on this (and there is pattern language in IDJI, n.b.).

*McCoy* (p106)

- This is another case of a party ( $\Delta$  here) trying to use 411 as a sword rather than a shield.

Problem 2.4 (p109)

- $\Pi$  wants to show bias—that the insurance adjuster is an insurance adjuster (!!!). Is she right???

## Tuesday, February 1

- (Problem 2.4:) This might come out differently if the statement was written, rather than tape recorded. Because you're looking for bias—with a tape, there's no risk of selective editing, as there is with a written statement. So, you'd be balancing a weak risk of bias against a large risk of prejudicing the jury (with the mention of insurance).

Problem 2.5 (p110)

- $\Delta$  argues (or wants to, at least) that she lacks any motive to conceal, since she's insured.
- $\Delta$  can also argue that this is a *criminal* case—and thus it has constitutional overtones ( $\Delta$ 's right to present a defense).
- So, the "wrongfully" language in 411 isn't important here in light of the overarching policies of 411.

### Problem 2.7 (p117)

- 410 doesn't apply here if it's read *literally*, since 410 works only on evidence that is *against* Δ.
  - However, the policies underlying 410 are to encourage plea bargains—and to exclude this evidence would chill the *state's* motivations to bargain.
- Is this a good case for trying to use this evidence? Well, it's not as good a case as *Biaggi* (p117). *Biaggi* is stronger because the Δ there was offered immunity; the court there ruled that Δ had a right to use the evidence (i.e., it was not an abuse of discretion-based reversal).

### ***Character evidence***

- Character evidence: evidence of what kind of a person Δ is, to show that Δ acted consistently with his character, on a particular occasion.
- There are two kinds of character evidence:
  1. Direct: testimony by witness about her opinion of the individual's reputation.
  2. Indirect: proof of an individual's past conduct that (arguably) demonstrates character.

Usually, it's evidence of *bad* character that's involved. However, rule 404 applies equally to bad *and* good character evidence.

Rule 404 also applies equally to criminal and civil cases. In a civil case, for instance, an auto personal injury Δ might want to show his clean driving record (past good conduct)—but 404 would probably apply to exclude that evidence.

- There are two uses of character evidence:
  1. Character for truthfulness (Rules 608 (“Evidence of character and conduct of witness”) and 609 (“Impeachment by evidence of conviction of crime”)).
    - Note that anyone who testifies puts their character for truthfulness in question.
  2. All other character traits (Rules 404 (“Character evidence not admissible to prove conduct; exceptions; other crimes”) and 405 (“Methods of providing character”)).
- Note the flowchart in the casebook (p140) and the idea of the “propensity box”; Lewis likes both of these.
  - The propensity box: rule 404 is kind of like the specialized relevance rules (407, 408, 409, and 411): it only blocks *one kind* of character evidence—evidence that requires the jury to infer present conduct from past patterns of conduct.
- Why?? Why don't we allow past character evidence?
  - Prejudice
    - (Note first, that nobody's claiming that this evidence is not *relevant*.)
    - While past conduct may be a predictor or present conduct, it's an ambiguous and unreliable predictor—and juries often rely to heavily on

- it.
- Risk that the jury will punish  $\Delta$  for the wrong reasons—namely, for past misconduct that went unpunished.
- Risk that the jury's “regret matrix” will be diminished—“maybe he didn't do it, but still...”

*Zackowitz* (p126)

- KIPPOMIA: the pnemonic device for remembering the issues on which character evidence *can* be used (see 404(b)):
  - Knowledge
  - Identity
  - Preparation
  - Plan
  - Opportunity
  - Motive
  - Absence of mistake or accident

Problem 3.1 (p144)

- The state here wants to show evidence of a conviction for an act that occurred *after* the event in question in this case.
- $\Delta$  can use 404 to argue for exclusion, since the evidence tends to show that  $\Delta$  is a thief (i.e., it leads the jury through the propensity box).
- But how could the state get around the propensity box?
  - Argue that the evidence is offered to show *knowledge*: of encryption—not just generally, but of *this company's* encryption systems.
  - Argue that the evidence is offered to show  $\Delta$ 's M.O. (that is,  $\Delta$ 's identity). However, to do that, the state would have to convince the judge that this is a signature crime.
- N.b. that California allows evidence of past domestic violence, in domestic violence cases.

**Thursday, February 3**

Problem 3.2 (p144)

- This evidence will not come in—any relevance re: identity here is due to propensity reasoning.

*Trenkler* (p150) (under-car bomb)

- How bad is the potential prejudice, here? Not as bad as usual, maybe, since the first bomb was very minor.
- The dissent argues that the LE investigator seemed to be *looking* for similarities

—i.e., the the investigator *forced* a match.

Problem 3.3 (p145)

- Unless you can argue that this is habit evidence (406), this evidence is very susceptible to a 404 objection.
  - However, it does go to an element of the employee's negligence (negligent hiring, supervision, and/or retention) (see 405(b)).
- Also, note how this is a multiparty trial—and this evidence is definitely not admissible against the engineer himself, because that's full of propensity reasoning. So, if the evidence does come in, you'd want to use a 105 jury admonishment (and a strong one, because it has to combat a risk of severe prejudice). Or, better, you might ask for separate trials (this would be likely if it was a criminal case, unlikely if civil).

Problem 3.4 (p146)

- The state's argument is that the arrest warrant was  $\Delta$ 's motive for firing on the officers.
- The  $\Delta$ 's argues that there's too much potential prejudice, in the form of propensity reasoning.
  - The state could rebut this by arguing for an *Old Chief*-style redaction, since the warrant was for attempted murder and so could strongly demonstrate  $\Delta$ 's motive.
- The trial court here allowed the evidence of the warrant, and that it was for attempted murder, but *not* that it was for an attempted murder of a police officer. That, the trial court thought, would be too much potential prejudice.

Problem 3.5 (p146)

- We're not being asked, here, to draw the kind of character inferences that 404 is concerned with—that is, they're not about what kind of *person* the guy is.
- Plus, these aren't really “other acts” (404(b)); rather, they're all part of the same series of events.

Problem 3.6 (p147)

- The AR15 and the police revolver: there might be some risk of prejudice here, but not much, and it's not very unfair. Whereas this evidence is *highly* probative.
- All the other evidence: too much prejudice risk to get it in—it makes  $\Delta$  look like a terrorist!!!

Problem 3.7 (p148)

- This won't come in—it's not unique enough to show identity, for one thing.

Problem 3.8 (p149)

- Lewis thinks this is a tricky problem:
  - The evidence is relevant, but how prejudicial is it? There is *some*

propensity reasoning here. And, you can't really go around the propensity box, either...

*Stevens* (p159)

- This is the “reverse 404(b)” argument.
- The court says that the standard of proof is lower here, because:
  - With a criminal  $\Delta$ , there are due process concerns.
  - There is also less risk of prejudice—there is almost *no* risk of prejudice to the state. So, it's purely a question of relevance.

Problem 3.9 (p167)

- This is a hard question, Lewis thinks: What do you do when, in order to tell a story, you have to prove prior bad acts?
  - There's lots of probative value, but also lots of prejudice risk.
  - So, you can try to *Old Chief* it.
    - However, with this story, redaction would make the story start making very little sense—it loses its narrative integrity.
    - So, you're back at a 403 weighing. And 403 says the evidence comes in unless the prejudice “substantially outweighs” probativeness.
  - Or, you could use a 105 admonishment (if you want to pretend that that would work).

**Monday, February 7**

Problem 3.10 (p168)

- Is there a route around the propensity box here?
  - You can argue that repetition shows design. But that does that go around the box??
    - What prejudice does  $\Delta$  face? That the jury will conclude that the act was by design.
  - Lewis thinks the critics of the doctrine of chances are off-base.
- How much prior conduct do you need?
  - *Huddleston* (p175): the Court is using the 104(b) standard here.
  - Problem 3.12 (p181): the prior jury did *not* use a preponderance standard. So, this decision makes logical since (even though it might seem a little unfair).
    - (N.b.: you probably couldn't offer evidence of acquittal—for reasons we'll study later on.)
- Propensity evidence in sexual assault cases
  - Rules 413 (“Evidence of similar crimes in sexual assault cases”), 414 (“Evidence of similar crimes in child molestation cases”), and 415 (“Evidence

of similar acts in civil cases concerning sexual assault or child molestation”).

- Note that these rules are not in IRE. And, while 413–415 are, of course, applicable in federal court, they're not going to come up much there, since sexual assault cases are almost always state matters.
- Are these rules well-advised? Consider *Lannan* (p183).
- Examples from Idaho
  - Idaho does not have a “depraved sex” exception, like in *Lannan* (p183).
  - However, Idaho does recognize something similar (but less well-articulated).
    - This type of evidence comes in in Idaho because it tends to show:
      - “Common plan or scheme”
      - Credibility (of the victim(!!!); this is pure propensity reasoning)
      - Identity
      - “General plan” to exploit minor female victims
      - Intent

*Guardia* (p201)

- What would happen here if we didn't have 413? Well, even if you got past 404, you'd still fail a 403 weighing.

## Tuesday, February 18

- Exceptions to rules 413–415
  - *Kirsch* (p188): the evidence here does not show motive, does not show intent, and does not show a common plan or scheme, the court says.

### *Character evidence exceptions*

- 404(a)(1): the “mercy” rule
  - Text: **(a) Character of accused.** [Except] Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.
  - This is a statement of the prior common law (as reflected in *Michelson* (p208)).
  - “Pertinent”: this just means it must be relevant to the charge.
    - E.g., in *Michelson*, honesty is pertinent, but violent-ness is not.
  - Limits:
    - You can't use particular events—you can only use reputation and opinion (see 405(a)).
      - Why? For practical reasons: “avoiding numerable collateral

issues which, if it were attempted to prove character by direct testimony, would complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation.” (¶1p212 (*Michelson*)).

- (Note how reputation and opinion are the rankest of hearsay!!)
- *But*, on cross you can inquire about specific instances of conduct.
  - Why? Because this is impeachment of a character witness. You're showing whether the character witness is actually familiar with Δ's reputation.
  - However, the cross-examiner can't just make stuff up. The crosser must have a good faith basis (*Michelson*).
    - Also, note, though, that the crosser can't prove (with extrinsic evidence) any specific instances.
- The last sentence of 404(a)(1), about the Δ offering evidence about the victim's character and thereby opening the door to his own character, was recently added to the FRE. This is yet another key to opening the door to Δ's character.
  - It has not (yet) been added to the IRE.
- 404(a)(2): victim's character
  - Text: **(b) Character of alleged victim.** [Except] Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor.
- 405(b)
  - Text: **(b) Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.
  - When does this apply?
    - There's only one situation in criminal law when it applies—in an entrapment defense.
    - In the civil setting, it can apply in:
      - Slander cases
      - Child custody cases
      - Negligent hiring/supervision cases
    - There are no limits here—specific instances of character can be used.
- 404(a) exceptions in quasi-criminal cases:
  - Proposed FRE amendments would add language *to the text* to clarify that the 404(a) exceptions apply *only* to criminal cases.

### ***Habit (406)***

- Habit versus character evidence:
  - Habit evidence concerns a person's case- and fact-specific responses.
  - Character evidence concerns a person's *general* traits.
- Note that rule 406 also covers routine practices of an organization.

## Thursday, February 10

### Problem 3.14 (p221)

- Character evidence objection:
  - Δ testified about her own character—so she's become her own character witness. And so she's opened the door, under 404(a)(1).
- Specific acts objection:
  - Because Δ opened the door, specific-instances inquiries are now okay on cross, under 405(a).

### Problem 3.15 (p222)

- This is “pertinent” under 404(a)(2); *but*, it's a specific instance, and so it can't be used, under 405(a).

### Problem 3.16 (p222)

- Again, we have specific instances, and so this isn't allowed, under 405(a).
  - However, she will be able to get it in to show *her* state of mind.

### Problem 3.17 (p223)

- This should come in—this isn't character evidence at all. It's evidence about the particular occasion in question.

### (More on habit)

#### *Halloran* (p231)

- Should 404(b) apply here? No—because they're not trying to show the *character* of this mechanic. They're just trying to show how this guy has handled a certain *situation* in the past.

### Problem 3.18 (p236)

- This evidence has stronger character overtones than the evidence in *Halloran* does.
  - It doesn't look like habit evidence.
  - If it *is* character evidence, then it can probably still come in under the doctrine of chances exception.

### ***Impeachment***

- Ways to impeach without showing character:
  1. Bias: which is relevant to truthfulness but does not refer to *character* for truthfulness.



- Note that bias doesn't show up in the rules. The Court, however, has said that there is an absolute right to demonstrate it. Thus, it's not subject to FRE at all (e.g., you can use extrinsic evidence to prove it).
- 2. Inconsistency: which doesn't take you through to propensity box, and so you're not limited in proving it.
- 3. Contradiction
- 4. Sensory/memory defects
- 5. Character for *untruthfulness*
  - a. General character for untruthfulness: 608(a) (“Opinion and reputation evidence of character”). Use 405(a).
  - b. Specific instances of untruthfulness: 608(b) (“Specific instances of conduct”). Under 608(b), no extrinsic evidence is allowed on cross.
  - c. Certain convictions: 609 (“Impeachment by evidence of conviction of crime”).
    - Note that IRE 609 is significantly different from FRE 609.
      - IRE 609:
        - Felonies only
        - The favorable “probative value must outweigh the prejudice” test applies to *all* witnesses.
        - Has an additional phrase: the court can determine the fact and/or nature of a conviction can be admitted, but it can *not* admit evidence of the circumstances of a conviction, ever.
      - FRE 609:
        - Applies whenever the crime was punishable by one year imprisonment or more (that is, the *available*, rather than actual, punishment). Or if the crime was one of dishonesty or false statements.
        - Applies the 403 balancing test for witnesses other than the accused; and only uses the favorable “probativeness must outweigh prejudice” test for the accused.

### **Monday, February 14**

- You can't just ask about “reputation.” You have to ask about an *aspect* of reputation (such as truthfulness or untruthfulness—see 608(a)).
- Rule 608(b) (“Specific instances of conduct”): allows a cross-examination attack only. But, no extrinsic evidence can be admitted as part of this attack.

#### **Problem 4.2** (p254)

1. No. This isn't about truthfulness.

2. No. This is extrinsic evidence, for one thing; and it's not about truthfulness, for another.
3. This is 609, with the favorable balancing test. Maybe admissible?
  - It would only be admissible if the probativeness outweighs the prejudice. So, probably not (Lewis says it *should* not be).
  - *Cf. Ybarra*: an Idaho case where the court sets up three categories or crimes wrt. 609. See Lewis's law review article in the course packet.
    - Where should drug crimes fall in *Ybarra*'s three categories? Well, the Idaho Supreme Court has said they are not relevant to credibility under 608(b).
  - *Bush* (course packet): where the Idaho Supreme Court screws up all over the place.
    - The court sets up a “no compunction” test (!!).
    - The court says evidence of past conviction for the same crime currently charged is not prejudicial (!!!!!!!!). (“How embarrassing!,” says Lewis.
    - The court conflates the facts, nature, and circumstances aspects of a conviction, set up in IRE 609. That is, the court says the circumstances *can* come in, at the trial court's discretion—but IRE 609 bars circumstances *completely!*
  - Also *cf.* 609(a)(2).

### ***Character evidence review***

- Permissible uses of character evidence (that we've studied so far):
  - Reputation or opinion of character
    - The mercy rule (404(a)(1))
      - The state can then rebut, if this is used.
      - But the state can't use specific instances (405(a)), unless it finds an exception (in 405(a)).
    - Victim's character
      - The state can then rebut, if this is used.
  - Character is an essential element (405(b))
  - 608(a) impeachment

### **Tuesday, February 15**

- When are specific instances of conduct admissible?
  1. Cross (405(a)), if relevant
    - But, no extrinsic evidence.
  2. KIPPOMIA uses (404(b))
  3. Essential element (405(b))
  4. Impeachment re: truthfulness (608(b))

- Limited to cross
- No extrinsic evidence

Problem 4.3 (p259)

- Probative value under a 404(b) (evidence of guilt) offering is totally different from probative value under a 609(a) (evidence of credibility) offering.
  - But, note that the potential for prejudice is the same, in both cases.

*Ohler* (p271 in text)

- If Δ brings up his priors on direct—anticipating the impeachment—he can't appeal the admission into evidence of the priors.

***The rape shield***

- Before 412, what theories were used?
  - 404(a)(2): victim's character re: consent
  - Credibility: i.e., unchaste means not credible.
    - However, this was only allowed in rape cases (!!!). Why not in all cases ?!!
- Then, there was the feminist awakening in the 1970s, which was what in many ways led to 412.
- N.b. the article by Galvin (p296), which argues that 412 should be case in the form of 404(b): it should say that you *can't* offer evidence *when* the reasoning is X, but that you can offer it otherwise. But, 412 is actually written to say that you can't *ever* offer evidence, *except* when Y.
- IRE 412 has two additional exceptions, beyond those in FRE 412.
  1. Evidence of false sex crimes allegations
    - Compare *Smith* (p300)
    - The FRE committee notes say that “evidence to prove allegedly false claims by the victim is not barred by Rule 412” (pp85s–86s).
  2. Evidence of sexual behavior with others that occurred at the time of the events in question.
    - It's not clear what would happen to this kind of evidence under FRE.

Problem 5.1 (p299)

- The FRE committee notes say that “the word 'behavior' should be construed to include activities of the mind, such as fantasies o[r] dreams” (¶2p86s). So, sexual “behavior” is to have a *broad* reading in 412.

**Thursday, February 17**

- General character evidence review: the door to character evidence has to be *opened*:
  - A criminal Δ has the key to his own character evidence.

- A criminal Δ has the key to his alleged victim's character evidence.
- All witness put their own character for *truthfulness* at issue by testifying.

#### Problem 5.2 (p300)

- The Δ here will have to argue 412(b)(1)(C): that the exclusion of the evidence will violate his constitutional rights.
  - Or, he possibly could argue from the policies underlying rule 412.

#### *Olden* (p307)

- This is an important case, Lewis says.
- Δ gets the evidence in, here, based on his constitutional right to present a defense.
  - This evidence shows bias—a motive to fabricate.

#### Problem 5.3 (p305)

- This is evidence of untruthful character, so look to 608:
  - You can't use 608(a)
  - But you can use 608(b).
    - Still, you're limited, under 608(b): no extrinsic evidence, and limited to cross.

#### *Stephens v. Miller* (p311)

- Res gestae: since the adoption of FRE, there's no longer any kind of res gestae doctrine. Even so, the idea remains, in the form of “narrative integrity.”
- The court here allows the Δ to say that he said *something* to his accuser that made her so angry that she'd falsely accuse him.
  - Since this idea is at the heart of the Δ's defense, is it unfair to curtail this? Well, the court says it's a “very minor imposition” on the Δ; and that to allow Δ to explain everything would gut the rape shield.
    - Lewis, though, thinks that this is unfair—the *jury*, not the court, should be allowed to decide for itself whether the Δ is lying.

#### *Knox* (p318)

- The Δ's theory is that this evidence shows his state of mind wrt. whether his alleged victim was consenting.
- The court says this isn't legitimate (here, at least). Either she's lying or he's lying, the court is thinking.

#### Paula Jones article (p324)

- The evidence of Clinton being with other women is clearly propensity evidence, so it's admissibility is doubtful.

### **Competency**

- The FRE presume that all witnesses are competent.

- IRE is almost the same; the same idea, for sure.
  - N.b. that there's an Idaho Court of Appeals case involving a victim who was shot in the head and has “dreams” that he testified from.
  - IRE 601(b): the “dead man's” rule (in course packet).
    - This rule disqualifies testimony in certain situations by certain people—it prevents people from putting words in the mouths of dead men.
      - N.b. that people who have no *financial* interest are not barred—even if they're close relatives or friends.
      - The estate can waive this rule if it wants to.
    - Almost all, if not all, jurisdictions have a provision like this.

### ***Hearsay***

- First, we'll work on recognizing hearsay.
- Then, we'll turn to the hearsay exceptions.

### **Tuesday, February 22**

- For hearsay...
  - There has to be a statement.
  - And it that statement has to have been offered to prove the *truth* of the statement.

### ***Non-hearsay uses***

- Non-statements
  - E.g., the ship captain hypo.
    - Compare the Shlesinger variation on this hypo (Problem 7.9).
- Effect on the listener
  - Where the statement isn't offered to prove that the statement is *true*, but just that the listener heard the statement.
    - E.g., offered to prove that listener was on notice.
- Verbal acts / words of independent legal significance
- Verbal objects / “markers”
  - E.g., marking on a car that indicate its make.
  - Or, e.g., printed words on a matchbook from a restaraunt.
    - (This isn't a hearsay problem—it's an authentication problem.)
- Circumstantial evidence of a person's memory
  - E.g., a prior description, given by the victim, of an alleged rapist's apartment—if the description is sufficiently detailed to show that the victim must have been there.
    - (With this, though, you'd have to show relevance.)

- Impeachment by prior inconsistent statements
  - Here, the statements aren't offered to show the *truth* of the statements, but to show the *falsity* of them.

Problem 7.1 (p341)

- This is hearsay. It's sworn hearsay; but it's still hearsay—an oath is no substitute for cross.

Problem 7.2 (p341)

- Hearsay (801(a)(2) nonverbal conduct).

Problem 7.3 (p341)

- Hearsay—it's evidence of a statement made other than while testifying at trial.
  - Note, though, how easily this exchange could be converted into non-hearsay testimony.

Problem 7.4 (p342)

- Not hearsay, if it's offered to show the effect on the listener.

Problem 7.5 (p342)

- Not hearsay, if it's offered to show her state of mind.
  - (However, it is only *relevant* if felony theft is a specific intent crime.)

Problem 7.6 (p343)

- The only non-hearsay purpose here would be the effect on the listener use. So, this could be used to show that the lawyer was on notice; but you could *not* use this to show that  $\Delta$  would have been exonerated.

Problem 7.7 (p343)

- Not hearsay—this evidence is offered as words of independent legal significance (i.e., defamation).

Problems, p355

1. Hearsay—this is the Shlesinger hypo (Problem 7.9).
2. Ask whether the officer was trying to make a statement for an audience. He probably was not.
  - Note that whether the court thinks he was or not is a 104(a) question—and so it's totally up to the judge; the judge is not screening for the jury with a 104(a) question.
3. Not hearsay—it's not offered to show a belief that the speaker was trying to *express*.
  - (For me, this is hard to distinguish from an “indirect assertion,” described on p354.)

## Monday, February 28

4. Here, we have to first ask about relevance—it's relevant because it tends to show a conspiracy. As far as hearsay, it's only hearsay if it's offered to prove that he didn't actually say anything to the police—and that's probably not what it's offered to prove, here. So, this is basically the ship captain hypo, when you boil it down.
  - However, note the possibility that the declarant was actually asserting that he's in cahoots—then this would be hearsay.
  - N.b. that the state could also argue that the silence was an adoptive admission. This, however, probably doesn't work here because the parties thought they were alone—and so the silent one arguably wouldn't be expected to deny anything.
5. Looks like hearsay.
6. Appears to be an assertion.
  - But the state can also argue that this is circumstantial evidence of the victim's knowledge.
  - Or, maybe the state could argue that the assertion was identifying *who* would kill him—not that he *knew* those people. This argument could possibly work.
7. Ask about the nature of the diary—was it just for her, or not?
  - Note that this diary thing actually comes up a lot.
  - Also, here, ask whether there's any insincerity problem. Do people lie to themselves in their diaries?
  - Finally, note 803(5) (“Recorded recollection”), which you could use—except that you'd have a major foundation problem if you did that.

### *Hearsay exceptions*

- Admission of a party-opponent
  - This is a hearsay “exception” only, because 801 says that this is simply “not” hearsay.
  - Why do we have an exception for this?
    - Because, how can you complain about your inability to cross-examine *yourself* at the time you made the statement?! You can't—you are responsible for what you go around saying. So, this is the “your own big mouth” rule, Lewis says.
  - This is a very big hole through which to get hearsay!! You should *start* with this when screening for hearsay.
  - N.b., don't confuse this exception (801(d)) with admissions against interest (804). There is no requirement, here, that the admission be “against interest.” Any admission will do.

## Tuesday, March 1

*Boehner* (Idaho Ct. App.) (p15cp)

- We've got multiple layers of hearsay etc.:
  1. Δ says he wants to “kill a cop”
  2. He said that to an unknown person...
  3. ...who said it to another unknown person...
  4. ...who said it to the dispatcher...
  5. ...who told the LEOs...
  6. ...and the LEOs testify at trial.

So, see 805 (“Hearsay within hearsay”): you have to find an exception for each level. We don't have one for each level, here.

- Still, the state argues that it's not hearsay at all—that it's offered to prove the LEOs' state of mind.
  - But the court says the LEOs state of mind isn't relevant here; *and* that it's prejudicial—there's a risk that the jury won't honor an admonishment (against propensity) (§2p18cp). (In fact, it's so prejudicial that it's not harmless error.)
- Then, there's another possible hearsay statement etc.: the statement by the preliminary hearing witness.
  - Again, we have multiple layers of hearsay:
    1. The Δ's statement (admission of a party-opponent exception)
    2. The preliminary hearing testimony about Δ's statement (former testimony exception (804(b)(1)), maybe)
    3. Trial testimony of preliminary hearing testimony about Δ's statement

So, this is maybe admissible. The court here remands, saying that this is okay in the face of the hearsay exception, but might not be okay in the face of 403.

- (Note that the court doesn't even address the character evidence implications of this evidence.)

Problem 14, p359: note the sincerity issue here.

- Statements of party-opponents

Problem 7.10 (p364)

- The Δ might argue that this evidence is unreliable because she had incentives to overbill. But that argument doesn't work—just because it might be unreliable doesn't mean it's inadmissible; Δ can just get up on the stand and explain its unreliability. (Recall the “your own big



mouth” rule idea.)

Problem 7.11 (p365)

- This is pure hearsay—it's not a statement of a party-opponent because it was offered by O.J. himself!
- Still, O.J. can argue that it was an unasserted belief (ship captain).
  - But the state can come back on that and argue that O.J. was consciously asserting his innocence.

So, who decides what it was that O.J. was actually doing? That is, is this a 104(a) or a 104(b) question?

- It's a 104(a) question. In other words, it's a question of fact necessary to determine a question of law. So, the judge decides for herself (and she can consider *all* evidence that's not privileged).
- Admissions by adoption
    - Ask whether we would expect the silent party to deny if the statement was untrue.

Problem 7.12 (p366)

- Adoption?
- Coconspirator exception? Well, maybe, but you'd have to have independent evidence beyond just the statement itself (*Bourjaily*).
  - *Bourjaily* (p375)
    - The Court says that a court can consider anything allowed under 104(a) when determining whether there is a conspiracy for the purposes of the coconspirator hearsay exception.
      - But, could a court rely on *just* the statement itself? Well, *Bourjaily* doesn't answer this; but the answer is: probably not.
- Note that it doesn't matter, in this problem, that no “conspiracy” was charged. That doesn't matter for the coconspirator exception.

Problem 7.13 (p367)

- N.b. the possible post-*Miranda* issue that would come up if the daughter was a state actor.

**Thursday, March 3**

*Mahlandt* (p369)

- The note on the door

- The trial judge excluded this evidence because there was no “personal knowledge.” But the committee notes to the party-opponent exception tell us that lack of personal knowledge doesn't matter!!
- Even so, this is not an admission of a party-opponent, because it was offered, here, to prove what Poos himself *thought*.
  - It would be an admission of a party-opponent if offered to prove what the neighbor said.
- Thus, this has to do with *adoption*, not admission.
- The board meeting minutes
  - These would be admissible against the *center*, but not against Poos. So, if they were admitted, the court would have to admonish wrt. Poos.

#### Problem 7.14 (p373)

- Is this 801(d)(2)(D) (“statement by the party's agent or servant concerning a matter within the scope of the agency”)?
  - Well, to get this evidence in under this exception, you'd have to show that they guy was actually an employee. You don't have any direct proof of this agency, but you do have some circumstantial proof—why else would this guy be doing this, after all? (And that is a 104(a) question.)
- Prior statements of witnesses
  - N.b. Morgan's argument (p387) that *all* past witness statement should be admissible. But, alas, the rule-writers did not adopt this.
  - The conditions here are crucial:
    1. Statement has to have been made under oath.
    2. Statement has to have been made in a hearing or proceeding.
      - This would include grand jury sessions.
  - How, then, does all this unsworn impeachment evidence get in, that we see? It gets in because it's not hearsay—it's not offered to prove the truth of the matter asserted.

#### *Barrett* (p389)

- Why was this evidence so important? Because, the court says, a jury might have heard it and concluded that the informant was lying.

#### Problem 7.16 (p392)

- N.b. *Owens* (p417)
- Rule 613 (“Prior statements of witnesses”)
  - Note the old “Queen's case” rule—the FRE has dropped this. You can now “sneak up” on a witness re: prior statements.

*Ince* (p393)

- N.b. *Morlang* (p395 in text).
  - All circuits adhere to this doctrine—the *Morlang* doctrine—which says that you can't impeach your own witness *if* it's just a ruse to get in otherwise inadmissible evidence.

## Monday, March 7

### Problem 7.15 (p384)

- The translator here is *asserting*—asserting what the source said. Is this hearsay?
  - The state could argue, to get it in:
    - The coconspirator exception
      - But, with that, the state would have to show conspiracy with *more* than just the statement itself. But it could probably do that.
    - The spokesperson exception
      - Again, though, the state would have to show agency with *more* than just the statement itself.

### Problem 7.17 (p398)

- Is the speaker here intending to assert “We're guilty”?
  - It looks like it. And if so, it's hearsay.
    - What about the coconspirator exception? No—because the conspiracy is over by this point.
    - What about adoption by silence? No—we're post-*Miranda*.

- Silence

*Jenkins* (p399): pre-arrest, pre-*Miranda*.

*Fletcher* (p399): post-arrest, pre-*Miranda*.

- This silence *can* be used to *impeach*, this case says.
  - Is this decision correct? Don't the *Miranda* rights tell you the rights you *already* have?! (Lewis asks).
- But can this silence be used to show *adoption*? I.e., can you get it in as *substantive* evidence??

### Problem 7.18 (p405)

- This statement was made under oath, at a hearing. And 801(d)(1)(A) (prior inconsistent statement by witness) doesn't require that cross-examination have been available at the original hearing (however, the witness must testify at *this*

trial and be subject to cross now).

Problem 7.19 (p405)

- Is this inconsistent? Is it inconsistent to forget something that you remembered before??

*Owens* (p417)

- The constitution guarantees a right of confrontation—but not a right of *effective* confrontation, the Court is saying here. Lewis is very doubtful that this result is right.

*Tome* (p406)

- A prior consistent statement must have been made *before* a motive to fabricate arose, or else it is not relevant, the Court says here.
- Statements of identification
  - N.b. an Idaho decision, *Woodberry* (127 Idaho \_\_\_ (Idaho Ct. App.)).

**Tuesday, March 8**

- (On statements of identification:) see *Weichell* (p414).

Problem 7.20 (p422)

- Under *Crawford*, this problem is straightforward.

Problem 7.21 (p423)

- This problem can't really be answered—we can only note that there are differences between a criminal and a civil trial, especially wrt. a cross-examiner's motives.
  - Also note the differences *within* a criminal case between the cross-examiner's motives at a preliminary hearing and at trial. The courts, however, have not recognized this difference as meaningful.

*Lloyd* (p428)

- The majority butchers the rule here, Lewis thinks, by writing the predecessor in interest requirement right out of the rule!!
  - The dissent gets it right, Lewis says.

*DiNapoli* (p423)

- The tables are turned etc.: here, it's the  $\Delta$  who wants to introduce grand jury testimony.
- The court holds that  $\Delta$  can't get it in. Why?

1. It's not a substantively similar cross-examination motive/reason.
2. The state didn't want to reveal other evidence.
3. [????]

- Statements against interest (804(b)(3))
  - The rulemakers considered and rejected the idea that “interest” includes non-pecuniary and -proprietary interests.

*Williamson* (p454)

- Itc. says that *only* the parts of statements that are against the interest of the *declarant* are admissible.

### **Thursday, March 10**

[Skipped class.]

### **Monday, March 21**

Problem 7.29 (p458)

- The lunchtime phone call:
  - 803(1) (the “human camera” rule): ask—how soon, after the impression, was the statement made? Here, too late.
  - 803(2) (excited utterance): ask the witness—how did she sound? (A: very upset; agitated).
- The statements made when she came home:
  - Not 803(1) or (2).
  - And not likely admissible, period.

Problem 7.30 (p458)

- 911 call
  - 803(1): Yes—most 911 calls fit under this exception.
  - 803(2): Sure.

*But*, what about the “owner can't control the dogs” part of the statement? Here's there's a lack of personal knowledge objection, because the door was closed. Δ would have to lay enough foundation to show that declarant's assumption could be accurate (enough).

*Hillmon* (1892) (p459)

- The *Hillmon* doctrine: impressions of *present* states of mind *and* of future intentions are admissible.
  - Why?

- Because it's the best evidence we have.
  - Because there's little reason to fabricate future intentions.
- So, if a statement contains evidence past states of mind and of present states of mind and future intentions, then you can only offer the present and future portions of the statement.
- The committee notes (p223r) state, expressly, that the rules' intention is to leave the *Hillmon* rule *undisturbed*.
- The problem part of *Hillmon* is the part that allows the letters in to show that Hillmon went *with* Walters. This is someone *else's* intent.
  - *Pheaster* (p463x): this is a famous case. It says that *Hillmon* oversteps its bounds when the evidence has to do with *another's* intentions.
  - But—remember that the other part of *Hillmon*, the *Hillmon* doctrine, is *not* problematic.
- Statements for the purpose of medical diagnosis or treatment (803(4))
  - Hypo: “My stomach is killing me. Jones hit me in the stomach.”
    - “My stomach is killing me” comes in under *Hillmon*.
    - “Jones hit me in the stomach”?
      - Might come in under *Hillmon*.
      - What about 803(4)? Does the doctor need to know *who*?
        - *Iron Shell* (p471)
        - This is a recurring issue in child sex abuse cases—identity *can* be relevant to a doctor:
          - So that he doesn't return the child to danger.
          - Because it's important to know whether the abuser was a parent or a stranger.
          - (N.b. that there's an Idaho Ct. App. case on this issue.)
  - Why have 803(4)? Because people have *disincentives* from lying to their doctors. (But then, why does the rule cover both treating physicians and experts?!!)
  - N.b., also 803(4) in the context of HIV.

Problem 7.32 (p470)

1. 803(4)? No (the statement was made to a lawyer). 803(3)? Maybe, as a “statement of memory or belief” relating to a *will* (see the 803(3) “unless” clause).
  2. 803(4)? Yes.
  3. 803(4)? Maybe—the doctor may want to get the guy out of danger. This is a close question—a court could go either way.
- N.b. that with very young children's statements to doctors, the Idaho Ct. App. has said that a child may not realize what's going on—the child may not realize that he's talking to a doctor and/or what significance that has.

Problem 7.33 (p475)

- The issue here is with the identification of the father.

Problem 7.34 (p476)

- This is like the Idaho Ct. App. case mentioned just above, where the court said that very young children may not be cognizant of the significance of talking to a doctor.

Problem 7.35 (p477)

1. The committee notes say that you can have a statement, covered by 803(4), that's made to a non-doctor, if that non-doctor is meant to transmit the statement to a doctor.
2. Same analysis as (1).
3. Does 803(4) require that the statement originate with the patient? It looks like it does—however, some courts have applied 803(4) to cover statements like this one.

**Tuesday, March 22**

- Recorded recollections (803(5) and 612)

Problem 7.36 (p478)

1. The candy bar wrapper: this can't be introduced itself, because it is only a substitute for the witness's live testimony, which is what we prefer (n.b. that the jury does *not* get a transcript of the testimony).
  - The witness here would have to say: "I know that what I wrote down was accurate to what I heard from the passenger."
  - Note that we have hearsay within hearsay, here:
    - What the passenger wrote down (present sense impression (not too late, Lewis thinks)).
    - What the passenger heard the driver say.

*Johnson* (p479)

- What *didn't* the witness say that he needed to say for this evidence to come in? That the statement he made was accurate when it was made. This requirement comes directly from the text of 803(5) ("and to reflect that knowledge correctly"). It's not enough that he said that the events were fresher in his mind when he made the statement.
- Business records (803(6))
  - N.b. 902(11) (self-authentication of business records), which expressly cross-references 803(6).
  - Foundation witnesses

- You must have a witness to testify that this record was made in the ordinary course of business.
- You must have a witness to testify that the person who made the record would have had personal knowledge.
- [There may be other 803(6) foundation requirements.]

*Palmer v. Hoffman* (1943) (p488)

- What's wrong itc.? Not in the regular course of business.
- Itc. has been criticized, because if a record doesn't qualify because it's made in self-interest, then what *could* qualify? And so some courts have said that some itc.-like records *do* qualify. But, 803(6) has an out for such records—the “trustworthiness” clause.

Problem 7.37 (p491)

- See the committee notes (p229r). Here, the consumer has no *business duty* to make accurate records.
  - Plus, we've got hearsay within hearsay, here.
  - Note, though, the possibility of adoptive admission here.
- N.b. 803(7) (absence of business record) and 803(10) (absence of public record).

## Thursday, March 24

*Vigneau* (p492)

- Why couldn't these forms come in? The source of the information contained on the form must have a business duty to be accurate. (Note though, that the court here finds a reason that a couple of the forms here might could come in (see p495).)
- Public records (803(8))
  - *Rainey* (1988) (p496)
    - The Court makes a distinction between the facts found in a report, and the opinions made.
    - The Court looks at legislative history of the rule and finds no help—the statements of the House and the Senate conflict. So, then the Court goes to the committee notes.
  - IRE 803(8)
    - Note that IRE 803(8) is different in substantial ways from FRE 803(8).
      - It's reworded, for one thing.
      - A law enforcement report, introduced against a criminal Δ?
        - FRE: no.
        - IRE: no.



There are confrontation clause problems with doing this.

- A social worker's report used in a custody case?
  - FRE: yes.
  - IRE: *no*.
- Plane crash report?
  - FRE: yes.
  - IRE: *no*.
- A law enforcement report in a civil case?
  - FRE: yes.
  - IRE: *no*.
- A state agency report in a lawsuit against the state?
  - FRE: yes.
  - IRE: *no*.

So, the bottom line is that IRE 803(8) is significantly narrower than FRE, in certain circumstances.

*Oates* (p503x)

- Here, the state wanted to offer a crime lab report, not using 803(8) but under 803(6) (business records) where there's no law enforcement limitation. The court won't let the state backdoor like this (Idaho says the same).

*Hayes* (p506x)

- The court distinguishes *Oates*, because itc. the evidence:
  - Concerns routine matters.
  - Is in a non-adversarial setting.
  - Doesn't present a confrontation clause problem because the author of the report testified.
- Refreshing a witness's recollection (612)
  - What can you do? Just about anything—*but*, the other side can get whatever you hand the witness, by making a request. And, the other side can introduce it into evidence, if they want.
  - Note that if you prep a witness with privileged documents, you might lose the privilege (!) (this is not so, though, under IRE).
- Other hearsay exceptions
  - Ancient documents
    - FRE: 20 years
    - IRE: 30 years
  - Market reports (803(17))
  - Reputation (803(21))
    - *Cf.* 405 and 802(2): this exception is necessary since all reputation evidence is hearsay.

- Family records (803(13))
  - E.g., the inscriptions in the family bible
- Vital statistics (803(9))
  - E.g., a birth certificate
- The residual exception
  - IRE has two, like FRE used to.
  - FRE 807 (however, most of the committee notes are still found at the old 803 (24).
  - The idea here was to allow continuing growth of evidence law, and to have it occur through common-law-type development. But, the residual exception is “used like jelly beans,” Lewis says; especially in child sex abuse cases.
  - Requirements:
    - Notice to the other side.
    - Demonstrate guarantees of trustworthiness equivalent to the specific exceptions.

*Dallas County* (p507)

*Laster* (p514)

- The state couldn't use the business records exception here because it didn't have a foundational witness.
- The court rescues the state, though, with the residual exception (but what about 807(B)?!).
- Idaho
  - *Gray* (p26cp)
    - The court, in using the residual exception, notes:
      - That the statement was spontaneous (it wasn't a response to a question).
      - That there was no motive to fabricate.

So, we have a new hearsay exception in Idaho?! And a huge one!!!! Lewis thinks that this is an instance where the judge thinks the  $\Delta$  is guilty, and figures that the state needs all the evidence it can get, and so he uses the residual exception.

- *Ransom* (p32cp)
  - CARES video: it's admissible here. It's hard to find, though, where the court identifies *any* incentive for the child to tell the truth (!!!).

## Monday, Mach 28

- CARES videos: are there any circumstantial guarantees of trustworthiness? Well, the court sure didn't identify any in *Ransom*, although it admitted the video.
- *Gray* (p26cp): what about Roundy's testimony about her fear of her ex-boyfriend? Does 803(3) work? No, because that would be backward-looking, and neither 803(3) nor *Hillmon* allow backward-looking stuff.

### *The confrontation clause*

*Crawford* (2004) (p206r)

- The minimalist view: that “witnesses” against  $\Delta$  are *only* those who come into the courtroom to testify during *this* trial. The Court has never subscribed to his view, although some scholars have.

*Mattox* (1895) (p519): here, the Court explains how *some* hearsay can get past the confrontation clause (in the context of dying declarations).

*Roberts* (1980) (p396r)

- Test: necessity and reliability.
  - Necessity: the state must show unavailability—this prong of the test has been *abandoned* (even before *Crawford*).
  - Reliability: indicia of reliability are required (such as a firmly-rooted hearsay exception).
- Sometimes, though, you have to realize that there just isn't a confrontation clause problem at all. E.g., *Ransom* (cp), where there was no confrontation clause problem because the witness was at trial and could be cross-examined.

*White* (1992) (p402r): the Court abandons the unavailability requirement from the *Roberts* test.

*Inadi* (1986) (p397r): the Court deals with coconspirator statements and says they do not present a confrontation clause problem.

*Wright* (1990) (p400r): the Court, in the child sex abuse context and in an Idaho case, says that reliability must come from the statement (and its circumstances) itself, alone—it can't be based on corroborating evidence. (N.b. that Lewis wrote a law review article about this.)

*Crawford* (2004) (p206r)

- Note that this case *could* have been decided based on *Roberts*. But it wasn't.

- Hold: out-of-court testimonial statements that are *not* subject to cross-examination (before *or* now) are *inadmissible*.
- So, what's clearly covered by itc.?
  - Well, the wife's statements itc., obviously. These were not formal statements, but they were made to a law enforcement officer.
  - Preliminary hearing testimony.
  - Grand jury testimony (!).
  - Statement to police during investigation.

N.b. ¶2p414, where Scalia, for the majority, gives various formulations of what could be “testimonial.”

- The Raleigh trial: note how Raleigh was tried with *two* kinds of hearsay—one of which is not mentioned by Scalia.
- And so, what happens with *non*-testimonial hearsay?
  - Lewis notes that nothing in the *Crawford* opinion itself says what to do with it.
  - Does *Crawford* overrule *Roberts* wrt. non-testimonial hearsay? Lewis thinks it does *not*. (N.b. ¶3p422r.) Lewis thinks that Scalia simply could not get enough justices to overrule *Roberts*.

## Tuesday, March 29

### Problem 8.1 (p441r)

- Before *Crawford*
  - 803(1)? No, because you can't show personal knowledge.
  - 803(2)? Same problem.
  - 807? Any indicia of trustworthiness? Well...
    - No apparent motive to fabricate.
    - Too coincidental to be random.
    - Corroborative (but, *Wright*).
- After *Crawford*
  - Testimonial? Well, it's in the “testimonial” gray area. It could be well argued that this is a statement to the police. Even so, *nobody knows!!*

### Problem 8.1a (p443r)

- Before *Crawford*
  - Statements against penal interest (*Williamson and Lilly*): this is *not* a firmly-rooted hearsay exception.
  - Indicia of trustworthiness? Well, it was made to a family member (the trial judge noted this, but it isn't very persuasive, Lewis says).
- After *Crawford*
  - This is clearly *not* testimonial. So, nobody knows whether to subject the statement to confrontation clause analysis or not. The best bet,

therefore, is to use the *Roberts* test.

- Post-*Crawford*
  - Police lab reports? Are they like police interrogation statements? Probably maybe.
  - 911 calls (by clearly excited declarants)? This is a *hard* questions, Lewis says.
  - Dying declarations? Testimonial ones, at least? *Crawford* has a footnote in it saying that these are maybe sui generis, and so this is another, unique gray area.

### **The *Bruton* doctrine**

*Bruton* (1968) (p551)

- The prior law was that a limiting instruction to the jury would solve the problem.
- Here, the Court holds that a limiting instruction does *not* work.

*Cruz* (1987) (p560)

- The Court here says that *Bruton* applies whether the confession is “interlocking” or not.

*Gray* (1998) (p564)

- Concerning redaction of the statements.

### **Thursday, March 31**

- Which exceptions are “firmly-rooted”?
  - “Spontaneous expressions”: which would seem to include both excited utterances and present-sense impressions.
  - Diagnostic statements
  - Dying declarations
  - Statements against interest (but *only* that portion of the statement)
  - Coconspirator statements
  - Business records? There's been no ruling, but this exception probably is firmly-rooted.
- Which are *not*?
  - The residual exception
  - Statements against *penal* interest
- (N.b. that the outline on p38cp is *not* updated for *Crawford*.)

### ***Compulsory process***

*Chambers* (1973) (p573)

- Hearsay offered by the accused: this is not a confrontation clause issue, but it may be a compulsory process clause and/or due process clause issue.
- Hold: a state can't mechanically apply rules of evidence to deny an accused the use of demonstrably reliable evidence.

### ***Opinion testimony***

- Lay witnesses
  - What opinion testimony is admissible?
    - Generally, observations of others are. So, e.g., “he looked like he was in pain” would be admissible.
    - But, where do we draw the line? We cross the line when the observation is of something that we don't think laypeople can generally discern. So, maybe this is the “you had to be there” rule.

Problem 9.1 (p587)

- Lewis says that most, if not all, judges would allow this testimony.

*Figueroa-Lopez* (p591)

*Johnson* (p596)

- Note all of the lack-of-personal-knowledge problems here. Unless this guy can testify that the “Colombian” pot he smoked was *actually* Colombian, then there's a personal knowledge problem.

*Jinro America* (p598)

- Isn't this a form of character evidence?? N.b.

## **Monday, April 4**

Problem 9.5 (p602)

- Lewis would want to know more—does the witness have experience with *these* specific phrases?

Problem 9.6 (p603)

- Will this help the jury? The court ruled that laymen can come to an opinion on their own with this.

Problem 9.7 (p603)

- Will this address things that the jury is not informed about? What if it's an all-white jury?

*Hygh* (p604)

- Experts can't testify on matters of law.
  - (Note, though, that there's a rules-grounded exception for expert testimony on foreign law.)
- Ultimate issues testimony—here, it's testimony about what's “negligent.”

*Batangan* (p608)

- Ultimate issues testimony: what could the expert have legitimately testified about here? Tendencies, and why those are tendencies. The problem here was the testimony about *truthfulness*.

*Hines* (p613)

- Why *didn't* this testimony cross the line? See the factors that affect eyewitness accuracy, discussed at p614. Note how each factor has a reliable foundation and is something that the average juror might not understand.
- N.b., learned treatises: 803(18). Before this exception, it was very hard to get this kind of hearsay in. The rule significantly expands the ability to get treatises in. Now, you can establish authority by using *your own* expert—i.e., you don't have to establish it through a hostile witness.
- Can an expert take hearsay into account when forming his opinion? Yes—if it's the type of evidence reasonably relied on by experts in the field.
  - Okay, so then can an expert testify about that otherwise inadmissible evidence itself? No, unless it satisfies the *reverse* 403 test (see the last clause of 703). Plus, the court must give a limiting instruction (if requested).

Problem 9.8 (p619)

- Can he form an opinion based on hearsay? “Yes if...” So, the prosecutor would have to show that experts in this field *do* rely on conversations with experts. And that they *reasonably* rely on those conversations. (Thus, this is probably inadmissible.)

Problem 9.9 (p620)

- Is this a business record? Probably not.
- So, the best bet is to call the expert. And then you have to meet the “reasonably relied” requirement.

**Tuesday, April 5**

*Melton* (p621x): must meet the reverse 403 test.

## ***Daubert, Frye, and Kuhmo Tire***

- Warning: these are *federal* decisions, and they're not based on constitutional grounds. So, they're not binding on the states. However, they are highly persuasive.
  - Idaho: the supreme court hasn't expressly adopted *Daubert*, but it has pointed to it as helpful.

### *Frye* (p625)

- The “generally accepted” test.
- The cost of itc. is that advancing, helpful, potentially reliable technology may not be admissible for a long time after it appears.
- The cost of *abandoning* itc. is that if experts in the field can't determine the reliability of a technology, then how can we expect lawyers and judges to?!

### *Daubert* (1993) (p626)

- Reliability plus fit.
- *Daubert* on remand (p639)
  - Reliability: no original research.
  - Fit: no showing of more probably than not.
- *Daubert* reliability
  - Five factors articulated in *Daubert* itself:
    1. Has it been / can it be tested
    2. Rate of error
    3. Peer review / publication
    4. Established / maintained methodology
    5. *Frye* general acceptance
- Impact of *Daubert* on forensic science
  - Things that haven't passed or can't pass a *Daubert* test:
    - Handwriting analysis
    - Shoeprint analysis
    - Bloodspatter analysis
    - Bitemark identification
  - What about fingerprint analysis? See the description of decisions in the text.

### • Polygraphy

- *Crumby* (p651)
- N.b. the Saxe and Shakhar article (p660)
- What about the idea that the *jury* is the polygraph?! And that we shouldn't substitute or augment that??
- N.b. the Risinger article (p657): arguing that if polygraph results are admissible at all (and thus are reliable), then they should be required of *all* witnesses (!).

### *Kuhmo Tire* (1999) (p669)

- This case has to do with non-scientific experts. There, there must be an



external demonstration of reliability.

### **Thursday, April 7**

[Missed class.]

### **Monday, April 11**

*Kinney* (p682)

- The court here allows expert testimony on rape trauma syndrome.
- But, it won't allow that expert to testify about statistics wrt. rape reporting, because that testimony would be vouching for the victim-accuser's credibility.
- N.b. additional *Daubert* factors articulated by the Idaho Supreme Court, in *Konechny* (p39p, at p44p). Plus, other courts have also announced additional factors (see, e.g., *Kuhmo Tire* on remand). In total, there are about a dozen factors floating around out there. Not all of them, of course, need to be applied or even considered in every case.

Problem 9.12 (p694)

- The testimony here is that the guy fits the profile of a murdering, battering husband. Note how the testimony here is used offensively, rather than defensively as usual. Why is this different than the defensive use? Because this is profiling—i.e., isn't this just propensity evidence? (The casebook author agrees that most courts would exclude this testimony.)

### ***Privileges***

- Idaho (see p60p): Idaho has a *lot* of privileges, unlike FRE.
  - All of the Idaho privileges have exceptions except one—the priest-penitent privilege.
- Privileges are unique, in a way, because unlike other evidence rules, they *frustrate* truth-seeking. Why do we allow this? Because privileges uphold a felt need to encourage certain kinds of communications.
- Be sure to distinguish *confidences* from privileges. Confidences are generally *not* insulated from introduction at trial, as privileges are.

*Jaffee* (1996) (p732)

- This case involves communications made in counseling sessions with a clinical social worker.
  - N.b. IRE 503 (p61p): the communications etc. would *not* fit under this privilege. *But*, one of 517 or 518 *would* work.
- Here, the Court does two things:

1. Creates a psychotherapist-patient privilege.
    - Why? Because it promotes candor and thus effective treatment of mental illness, and there is a public interest in the populace's mental health.
      - Scalia, dissenting, doesn't think it would be all that bad, though, if these conversations were to come out in court.
  2. Extends the brand-new privilege to clinical social workers.
    - Why? Because they serve the same function as psychotherapists, the Court says.
      - Scalia disagrees, saying that these social workers don't have the rigorous training that psychotherapists do.
- Note how there is not (yet) any federal decision establishing a doctor-patient privilege (!!!).
    - Idaho does have this privilege (IRE 503). However, there is an exception to it, in criminal cases, that removes the protection for doctor's *observations*.

*Morales* (p743)

- Here, we've got a statement to a priest.
  - Is it hearsay?
    - Is it a statement against interest? No, because he wouldn't have thought that he was exposing himself to criminal prosecution by telling a priest—i.e., he would have thought that his statements to a priest were protected.
    - 807? Probably yes—in fact, this might be a classic example of an 807 exception, because it's so trustworthy.
      - The court lets it in using 807, in light of *Chambers* (“*Chambers* reliability,” Lewis says).
  - But what about the privilege?
    - The priest concluded that the statement wasn't a “confession,” but rather that the communication was a “heart-to-heart talk.”
      - What would happen under IRE 505? It's not necessarily privileged—Δ could be said to have waived the privilege under IRE 510. (N.b. that the *teller*, not the hearer, holds the privilege.)

**Tuesday, April 12**

- What would it take to waive the priest-penitent privilege in Idaho? IRE 510 says that you waive your privilege if you reveal any “significant part” of the communication.

- N.b. that it is the *communication*, not the facts, that are privileged. So, you can't insulate any facts by telling your lawyer about them, e.g.
- What happens if a witness uses his am5 privilege to totally close off any cross-examination?
  - You could strike his direct testimony and admonish the jury to ignore it.
  - You could instruct the jury that they may infer whatever they want from the am5 invocation (not with a criminal Δ, though).

Note the imbalance, here, too—if the state wants the answers, it can grant immunity and get them. The Δ can't do that. (Could the judge grant immunity? Lewis doesn't know.)

*Gionis* (p758): what result under IRE 503??

*Blackmon* (p765): the controlling question here is whether it was the client's intent to communicate in private.

- See an Idaho case on this: *Hoysington* (sp.)

#### Problem 12.1 (p767)

- What should the controlling question be here? It's: was there a waiver of the privilege by tossing the paper in the trash?
- The court in this case said that because the paper was torn up, it evidenced an intent for the document to remain confidential. However, another court has come out the opposite way on this same question.
- In Idaho, you'd use IRE 510 to determine whether there was a waiver.
- What's the safest practice? Use a shredder—shredding certainly should express an intent to maintain privacy.

#### • The client's identity

- The general rule? The client's identity is not privileged.
- The *Baird* doctrine
  - *Osterhoudt* (p771)
    - The court outlines three approaches, but ultimately adopts the *Baird* approach: if the purpose of C going to L was to protect C's identity, then C's identity is privileged.
  - Problem 12.2 (p768)
    - Ask: would revealing C's identity reveal (indirectly, at least) any *communication* between L and C.
      - The court in this case held that it didn't have enough information to determine anything, but did adopt the *Baird* rule.
  - Problem 12.3 (p769)
    - The court here said there was no privilege because L wasn't performing any legal services (i.e., L wasn't applying any legal

expertise).

- But note how if the *Baird* court had taken the same approach, there would have been no privilege there, either (!!).
  - Even so, *isn't* there legal expertise here? I.e., L's ability to maintain anonymity and confidentiality?
- Problem 12.4 (p774)
- There's nothing confidential about the payment of a fee, Lewis says.

### Thursday, April 14

- Problem 12.5 (p774)
  - L may testify. Why??

*Swidler* (1998) (p776)

- This case is about the duration of the ACP after the death of the client.
  - The Court says that the ACP *does* survive death, because it encourages candor by allowing the client not to worry about his posthumous reputation and family matters.
  - What would Idaho say about this? Well, there's no mention of death in IRE 502, so that supports the argument that the 502 ACP is meant to survive death.

*Zolin* (1989) (p783)

- The Court here points to 104(a), and says that courts can review, in camera, the materials that a party suggests establish a crime-fraud exception to a privilege, to determine whether they do establish a crime-fraud exception.
- The test (pp787-88): you must first show evidence that the materials *may* be covered under the crime-fraud exception.

*Stockhammer* (p788)

*In re Lindsey* (p790)

- This is a challenging decision to understand, Lewis says.
  - What reasons are there for treating a government lawyer different than any other lawyer? Well, who does a government lawyer represent? The people?? The office? The official, as an individual??
  - The court says that there is a strong interest in ferreting out wrongdoing in government. It also notes that a public officer is free to hire private counsel, too.
- 
- ACP in the corporate context
    - This isn't really covered in the text, Lewis notes.

- See IRE 502(a)(2), which says the ACP covers “an employee of the corporation...” This substantially broadens ACP in the corporate context.
- N.b. *Upjohn Co.* (SCOTUS).
- Am5 and the ACP
  - Physical evidence can be compelled (e.g., a blood sample, fingerprints, a lineup, maybe a handwriting sample, etc.)
  - Am5 in civil cases
    - There's no authority on this in Idaho.
    - Many courts hold that you can make a witness assert am5 *in the presence of the jury*, and that you can ask the jury to draw adverse inferences from it.
  - You can assert am5 and still assert that you're innocent. Am5 protects you against the possibility of *prosecution*, not of conviction.
  - *Fisher* (1976) (p802): the act of producing documents *can be* testimonial, but it wasn't here.
  - *Doe* (1984) (p812): this case is different from *Fisher*, the Court says, because here the production *was* testimonial.
  - So, *Doe* and *Fisher* represent the two ends of the spectrum, Lewis says.
  - *Hubbell* (2000) (p818).
  - How do you do use immunity? You seal your evidence and file it with the court, so that you can show that you didn't need to have the document to know about the stuff you're going to ask about.
  - Problem 12.6 (p809)
    - The state's argument would be that this is no different than a blood test.
    - The Δ's argument would be that this is testimonial because the measurement probes the contents of the Δ's *mind*. (Lewis and the casebook author agree with this argument.)
  - Problem 12.7 (p810)
    - Could the state have compelled the Δ to answer “how do you spell 'ransom'?” No. And so isn't that the same thing that's happening here? Well, that's a hard question, Lewis thinks. The court in this case said that this was *not* compelled testimony—that it was just a handwriting sample.
  - Problem 12.8 (p811)
    - This is a lot like *Fisher*. The court here said this was *not* compelled testimony.

## Monday, April 18

### *Marital privileges*

- The testimonial privilege versus the marital communications privilege

- First of all, there's no testimonial privilege in Idaho.
- Civil, criminal, or both?
  - Testimonial: civil only (in most jurisdictions)
  - Communications: both
- Who can assert it?
  - Test.: in federal courts, only the witness-spouse can assert it
  - Comm.: both
- Does it survive divorce?
  - Test.: no
  - Comm.: both
- Does it cover bedroom conversations?
  - Test.: yes
  - Comm.: yes
- What's the rationale?
  - Test.: protection and preservation of the marriage
  - Comm.: creates a zone of private against the state

*Rakes* (p841): what result here under IRE 504? No exception would apply, so it reaches the same result.

- Should there be a familial privilege?
  - In Idaho, we have a parent-child privilege (IRE 514). This is very unusual (only Idaho and Minnesota have one).
  - What are the costs and benefits?
    - Well, if you have one, you lose potentially very relevant evidence.
    - But, you lessen the pain of testifying for family-related witnesses, and avoid possible permanent damage to a familial relationship.
  - *Grand Jury Proceedings* (p847)
  - IRE 514: the *child* holds the privilege.

#### Problem 13.1 (p846)

- Waiver? No, because privileges do not attach to facts, and the communication itself was never revealed here. (See IRE 510 for waiver analysis in Idaho.)
- *But*, there's a compulsory process argument, and it probably would work here.

#### ***Other privileges***

- IRE 509: identity of informant privilege
  - The purpose of this privilege is to allow the state to assure anonymity to informants.
  - This rule can allow a witness to testify *anonymously* against a criminal  $\Delta$  (!!!). But, if this ever actually happened, it probably wouldn't survive a confrontation clause attack (e.g., the  $\Delta$  wouldn't be able to impeach, would he?!).

- More commonly, though, this privilege is used to protect the identity of non-testifying witnesses.
- What's the balance struck here, with this privilege? Preventing harm to the informant versus the Δ's need to know the informant's identity.
  - The rule requires an ex parte showing to the court (*if* the informant is possibly a material witness) as to whether the informant really is a material witness. If the court thinks the informant is a material witness, then the state can either reveal the informant's identity or drop the case.
    - Note how this process relies 100% on the integrity of the prosecutor!!!
- IRE 519: hospital privilege
  - Hospitals convene special committees after something bad happens. This privilege protects the discussions that take place in those committees.
  - However, this privilege is far from absolute:
    - It protects *only* statements of opinion—not any statements of fact.
    - Even statements of opinion will lose their protection if the maker of the statement testifies about *any* opinion at all during trial.
    - Statements about *ongoing* care are not privileged at all.

## **Tuesday, April 19**

- N.b. I.C. §9-203: this is a statutory marital privilege, still on the books; but it has no force at all. The Idaho Supreme Court has said that IRE trumps statutes like this.

### ***Presumptions***

- “Irrebuttable presumptions”: these aren't what we're talking about. This is just a euphemism for “rule of law.”
- “Permissive presumptions”: these aren't what we're talking about either.
- What we're talking about are “mandatory presumptions.” These dictate the result in the absence of rebutting evidence.
  - E.g., the presumption of delivery in due course of any item deposited in the U.S. mails.
  - E.g., the presumption against suicide.
- IRE 301
  - IRE 301 is the same as FRE 301 with one difference: IRE 301 adds “unless otherwise in appellate decisions.”
  - FRE 301 (and so IRE 301) follow the “bursting bubble” approach to presumptions—once the bubble bursts, the jury is told nothing about the presumption.
    - N.b. IDJI instructions on presumptions (in cp).
  - Scenarios:

- Basic facts undisputed, presumed fact disputed: the bubble is burst—no instruction given.
- Basic facts undisputed, presumed fact disputed, but with an appellate court decision shifting the burden: instruction given about the presumption.
- Basic facts undisputed, no evidence on the presumed fact: IDJI 1.30.1 (“the following facts are undisputed...”; thus, the presumption dictates the result).
- Basic facts disputed, presumed fact disputed: the bubble is burst—no instruction.
- Basic facts disputed, presumed fact undisputed: IDJI 1.30.2 or 1.30.3 (if-then instruction).

In any case, the instruction should not mention “presumption”; we think that's too confusing for a jury.

- Constitutional aspects of presumptions in criminal cases
  - History (p53cp)
    - *Winship* (1970): started this whole thing by constitutionalizing the reasonable doubt standard.
    - *Mullaney* (1975): you can't shift the burden of proof to the defendant on any element of the crime.
    - *Patterson* (1977): the Court retreats a little.
    - *Sandstrom* (1979) (handout):
      - The Court looks at what a reasonable juror *might* have read into the instructions, and says that mandatory presumptions on an element of the crime are unconstitutional.
    - *Francis* (1985): rebuttable presumptions are unconstitutional too, on an element of the crime.
    - *County of Ulster* (1979)
  - What about the “implied malice” murder offense in Idaho, then? The question is: does it relieve the state of its burden??

### **Thursday, April 21**

- *Hebner* (Idaho) (p55cp)
  - You can't instruct the jury, in a criminal case, about a prima facie presumption about an element of the crime, the court says.
    - So what do you do? IRE 303 tells you what to do.

### ***Judicial notice***

- Evaluative versus legislative versus adjudicative facts
  - Legislative facts are understandings about the nature and needs of society, on



- which courts draw in deciding cases. These are *not* subject to 201.
  - Adjudicative facts *are* subject to 201.
- FRE/IRE 201
  - If a fact is adjudicative, when will a court take judicial notice? Well, when the fact is generally known or capable of ready determination, 201 tells us.
- When is judicial notice actually used? Pretty much its only use is when a party realizes that it has holes in its case *after* its rested.
- N.b., judicial notice of foreign law, which is specially treated in IRE.
- Judicial notice in criminal cases
  - Here, we have problems with the reasonable doubt standard.
  - *Gould* (handout)
    - The state failed to ask: is cocaine HCl a derivative of coca leaves? (This is what the statute requires). So, if that is an adjudicative fact, the case would have to be dismissed.
    - The court says that it is a legislative fact—whether cocaine HCl is a derivative of coca leaves does *not* change case to case, the court reasons.
  - *Lewis* (handout)
  - *Bowers* (handout): here, the court says that whether Fort Benning is on U.S. land is a *legislative fact*. (But this isn't a fact that *never* changes (!!)...)
  - *Bello* (handout): the court here holds the opposite from *Bowers*, and criticizes *Bowers* in doing so.
    - So who's right between *Bowers* and *Bello*? Lewis thinks *Bello* seems to be the right one.
  - Note that the state always has the option of moving to reopen, rather than requesting judicial notice.
  - In any case, with a criminal case, the question is always: is there enough evidence in the record that a reasonable jury could conclude beyond a reasonable doubt the way it did?
  - N.b. *State v. Smith*, 124 Idaho 671, 862 P.2d 1093 (Ct. App. 1993).