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Teaching Evidence

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TEACHING EVIDENCE

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I teach Evidence in a four-hour course over one semester. It meets twice a week for fourteen weeks, two hours each session, which includes a ten-minute break in the middle of the session.

I. COURSE OBJECTIVES

I strive to instill knowledge of the law of evidence, proficiency in applying it, and a thoughtful and critical attitude toward it. I seek to equip students not only to function in the present, but also to anticipate and deal with the future. They should be able to handle change and understand the potential directions of change. They should be exposed to legal, factual, and cultural trends and developments that might affect the law we learn today. And they must be prepared to perform ethically.

Even if many students will never actually try a case, I believe knowledge of evidence will help them in almost any function they may perform as lawyers, since so much depends, in shaping any legal transaction, upon what

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the parties contemplate would happen if the matter went to court. Rights are not rights without proof, and a careful lawyer always has an eye on what could be proved.

A student or lawyer also has a duty to examine the justice of any field of law he or she is studying or applying. So we spend some time on the *consequences* of each important evidentiary principle we come to. My premise is that some day my students may be in a position to influence things for the better, as practicing lawyers, legislators, scholars, judges, or policy makers.[1]

As part of these lessons, I want students to appreciate the relationship among evidentiary theory, policy, and practice; to be exposed to some of the modern controversies in those areas; and to get a feeling for how evidence actually plays out in the courtroom and in other stages of litigation—a limited "how to do it" exposure.

I also try to rehearse the students in the reading and applying of statutory rules; to sensitize them to the elasticity and limits of the language used in rules; and to explore the role of judicial decisions vis à vis rules. I also want them to see that more than one rule may bear on the solution of a single problem. My focus is on the Federal Rules of Evidence, but I include other positions where they are different or illuminate something important. I want the students to see the relationship between the Rules and the common law, and not to overestimate how uniform or cut-and-dried things are, even under the Rules. The ability to analyze, see both sides of an issue, and make alternative arguments, is important in my class. I want them to understand that, to the extent judges have flexibility, arguments of "is" and "ought" are related.

I also help the students to see, as the course progresses, that while the course is primarily about the regulation of proof at trials, and therefore about the admissibility of evidence, there are some valuable implicit lessons about the weight of evidence, too. Most obviously, there are instructions to the jury about what uses can be made of certain pieces of evidence. We explore whether these instructions are sensible.

1. In every section of the course, I try to make students aware of the social forces and interests that helped shape the various rules. Obvious examples are the professional groups that lobby for privileges; the compromise of pro-prosecution and civil liberties interests behind the present shape of FED. R. EVID. 609 (convictions); the pro-prosecution interests resulting in grand-jury testimony being admissible under FED. R. EVID. 801(d)(1)(A) (hearsay exemption) and that have changed the shape of proposals to amend FED. R. EVID. 804(b)(3) (declarations against interest); the business interests manifest in several rules; etc. Other examples might include the women's rights interests that sensitized Congress to the need for FED. R. EVID. 412 ("rape shield"), the rash of sex crimes and child molestations that stimulated FED. R. EVID. 413–15, and the acquittal on insanity grounds of John Hinkley, President Reagan's attempted assassin, that led to reinstating the rule against ultimate opinions with respect to insanity and similar issues, under FED. R. EVID. 704(b). My experience in working with Congress when the Federal Rules were being drafted has been very helpful in this regard.

But there are other more important relationships between weight and admissibility that emerge. For example, it is often unclear—and in dispute between the opposing lawyers—as to what defects in a particular piece of evidence are so severe that they affect admissibility rather than merely weight. Students should understand that this is a central issue in Evidence—especially in areas like relevancy's counterweights and expert testimony. The answer is frequently subjective, and the judge may award the decision to the lawyer who argues most effectively on the facts. The student or lawyer who understands this will have an advantage. Hence, the importance of oral classroom participation.

Students should also realize that arguments first addressed to admissibility may be recycled later in slightly altered form to bolster or undermine the weight a jury might assign to the piece of evidence if it is admitted, or to help or hinder motions for directed verdicts, new trials, or the like. Good lawyers hang on to the notes they used even after the admissibility ruling is in.

Additionally, the course may accidentally yield some insights into how human beings in general—in all walks of life, not just the courtroom—evaluate evidence and come to accept propositions of fact as true.

II. METHODOLOGY

I don't believe much is learned lastingly through lecture alone. I therefore employ a multi-pronged methodology. Ideally, the student should get ten different perspectives on each topic in the course. He or she should be exposed to: (1) rules; (2) textual exposition; (3) case decisions; (4) lectures; (5) problems and hypotheticals; (6) give-and-take discussion; (7) role-playing; (8) video clips from actual trials; (9) transcript segments; and (10) related jury instructions. Even some anecdotal war stories can be helpful. They seem to fascinate the students.

Of course, I do not have the luxury of being able to do all of these things with every topic in a four-hour course. Nor would it be desirable, since some, like video clips and transcripts, might be redundant. Further, some topics lend themselves more readily to some of these techniques than others. But my lesson plan for each class tries to include as many of these different kinds of exposure to the material as seems feasible in the context.[2]

For the cases, problems, and jury instructions, I use our book, *Evidence: Cases, Materials & Problems*.[3] In addition to assigning homework in this book, I ask students to bring the book to class, where I use it as a "workbook" in the sense that we go over problems in it that I have assigned. For the textual

2. In this Paper, I do not always identify where or when in the course I utilize a particular vehicle.

3. ROTHSTEIN, RAEDER & CRUMP, EVIDENCE: CASES, MATERIALS & PROBLEMS (LexisNexis) (3rd ed. forthcoming 2006).

exposition component of the course, I assign the same authors' *Evidence in a Nutshell*.[4] It has a short treatment of most evidentiary topics, which can be assigned to avoid spending substantial classroom time on basics. The Rules themselves are assigned relatively seriatim as the course unfolds. Both books have the Rules reprinted in their appendices. I do not require a separate Rules pamphlet. The video clips are from a library I have been collecting over the years. Transcript segments are either in the workbook or distributed separately.

Some subjects on my assignment sheet are labeled "background reading." I explain that students are responsible for this material (like the other reading but in somewhat less detail) both for the assigned day and for the final exam; but that in class I might skip or skim it because it is self-explanatory and class time is limited.

III. ORDER OF TOPICS OVER THE SEMESTER

For years, I thought it was best to take up the hearsay rule and its exceptions first (after a general introduction to topics in the course), because the hearsay rule and its exceptions were "concrete law" that would get the students into a disciplined frame of mind, instead of the somewhat "fuzzy" frame of mind that seems to ensue from the other likely starting point, relevancy and it counterweights. Hearsay, I thought, involves complex, difficult concepts, best taken up when students are fresh and before class time becomes scarce. I still think there may be something to this—and my materials are adaptable to it—but I have, in recent years, adopted a different order, that is, the order of the Federal Rules of Evidence. Students seem more comfortable with having just one organizational "taxonomy" to cope with, rather than two—one for the Rules and one for the course—which always required some special explanation. So my course follows the order of the Rules (with a few slight deviations).

A. In Advance of the First Class

In advance of the first class, I distribute (or post on a class website) a document entitled "Preliminary Background for Course: Development and Key Concepts," in which I explain the basics of the Anglo-American trial system, including:

– The roles of its key players (judge, jury, lawyers);

– The primacy of live witnesses and cross-examination in contrast to the system in some other countries;

– Kinds of evidence such as "testimonial," "real," or "illustrative";

4. ROTHSTEIN, RAEDER & CRUMP, EVIDENCE IN A NUTSHELL (Thomson-West, 4th ed. 2003).

– What "exhibits" are;

– The difference between circumstantial and direct evidence;

– Some history of Evidence;

– The concept that each rule of evidence is a separate filter to pass through or a hurdle that must be overcome, and that they normally apply cumulatively;

– The four pillars of Evidence (relevancy, counterweights to relevancy, hearsay, and privilege); and

– A list with descriptions of the eighteen stages of jury trial litigation, from the pretrial conference through the different phases of the trial itself, to post-trial motions and judgment, with some emphasis on how evidence plays a role in many of these stages. Concerning the trial stage itself, the material explains how witnesses and other evidence are presented, and includes a brief description of what is meant by case-in-chief, rebuttal, surrebuttal, and direct, cross, and re-cross examination.[5]

I ask the students to read this document, and the table of rules of the Federal Rules of Evidence, in preparation for the first class.

B. The First Class

My opening class session attempts to capture students' interest and hopefully inspire the kind of enthusiasm I myself feel for Evidence. I usually select some reasonably current legal event that allows me to explore some of what the world regards as the main characteristics of the Anglo-American legal system: live witnesses in open court, with cross-examination. Such a recent event might be, for example, the much-publicized Washington, D.C. sniper incidents where many witnesses, apparently influenced by each other's stories in the media, swore they saw a white van speeding away from several of the incidents. Some eye-witnesses even reported they saw a weapon aimed from the white van. It was ultimately proven beyond doubt that the snipers were in a dark blue Chevrolet coupe. This example in class opened up a preliminary introductory discussion of the fallibility of eyewitness testimony (further illustrated by many recent DNA exonerations), the reasons therefore, and the several courtroom procedures we have for dealing with their fallibility—cross-examination, impeachment, expert testimony about fallibility studies, judicial instructions to the jury concerning evaluation, counter-evidence—and the limitations of each. This discussion introduces some of the things the course will be about.

On the first day, I also like to show a video of a really bang-up cross-examination from a current case, if I can. On one recent first day, I showed, in addition, a video of former trial lawyers who currently serve in Congress, cross-examining Administration officials at a congressional hearing about how

5. This "Preliminary Background" document will be included in the forthcoming edition of our casebook.

the military tribunal procedures established for suspected terrorists fall short of the procedural safeguards built into our regular criminal trials. This video served the triple purpose of showing skilled cross-examinations, demonstrating that cross-examination techniques can be deployed in other fora than trials, and laying out some of the salient features of our regular criminal trial system, with which the military tribunal procedures were contrasted point-by-point in the cross-examinations. It also showed that there are alternative conceivable trial systems.

After seeing some of these sample cross-examinations, we hold a discussion about whether Wigmore was right that "cross-examination is the greatest invention for the discovery of truth ever devised by the mind of mankind."[6] Since the cross-examinations shown in class, like most cross-examinations, arguably could appear one sided or even tricky to some, we usually get a pretty good discussion pro and con on the Wigmore quote. Hopefully somebody makes the point that alone, cross-examination can be misleading, but in the context of adversary proceedings, if the lawyers are equally talented, it may provide some counterweight to falsifications, exaggerations, or tricks the other side perpetrates, for example in direct examination.

The next item on the first day is to solicit from class members some broad subjects they might want to have rules on, if we were designing an evidentiary system from scratch. We generally come up with three: relevancy, reliability, and public policy. We put these on the board.

The final thing we do on the first day is go through the table of contents of the Federal Rules of Evidence. After I give some very brief summaries of what the various rules provide, and note some themes (such as admissibility and discretion) in the Rules as a whole, we sort the Articles of the Rules into the three categories (relevancy, reliability, public policy), jotting each of the Articles under the appropriate category on the board. We usually find we need to add another category: "Procedural Matters," consisting of "Evidentiary Shortcuts" (Judicial Notice (Article II) and Presumptions (Article III)) and "How to Do it Rules" or "Rules of the Road" (offers and objections and the other similar rules in Article I). All the other Articles fit under relevancy (Article IV), reliability (Articles VI through the end of the Federal Rules), or public policy (Privileges (Article V)). We rearrange the placement on the board of these now four categories (with their Articles under them) to correspond to the order of the Rules.[7]

6. 2 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 1697 (1904).

7. I realize the categories and characterizations are not absolutely air-tight, but they are good enough to be getting on with at this point in the course.

C. First Week, Second Session—Further Introduction; Procedural Rules

This second session focuses on our "procedural" category. We go through a series of practical courtroom-scenario problems in the "workbook" involving offers, objections, and preliminary questions of fact upon which admissibility hinges. These matters constitute the bulk of Article I of the Federal Rules. In these problems, the students are asked to perform like real lawyers, using the language that would be used in the courtroom; and also to consider why we have these rules and whether it is fair to default clients for procedural missteps of their lawyers. We also discuss an assigned case introducing the students to the notion of limited admissibility (Fed. R. Evid. 105). Can the jury compartmentalize their minds in this way? The class returns to preliminary questions of fact and limited admissibility as these subjects become pertinent to particular rules and problems later in the course.

I assign Articles II and III (Judicial Notice and Presumptions) as background reading for this session, with the *Nutshell*[8] and the rules themselves bearing most of the teaching burden. However, I do lecture briefly on both topics, highlighting salient principles and difficulties. The lecture uses specific case examples and hypos. When I first started teaching, I spent a lot of class time on presumptions, which is an endless and fascinating subject. In an older edition of the *Nutshell* (the second edition), I included what I still think is a useful related comprehensive treatment of the topic. But I have decided we do not have time for extensive treatment. The students have been previously exposed to presumptions in their course on civil procedure. So now I stick to a few evidentiary implications of the subject and assign the shorter version in the new *Nutshell*. In both judicial notice and presumptions, we consider briefly whether these concepts accord with the right to jury trial.[9]

D. Second Week—Relevancy: The General Concepts of Relevancy and Its Counterweights: Federal Rules 401–03

My main thrust here is to demonstrate what a low, but important, threshold relevancy is, and how it still leaves too large a field of potential evidence, so that Rule 403 (balancing of relevance or probative value of a piece of evidence against certain counterweights) is needed to whittle it down. I use the metaphor of Rule 401 (definition of relevant evidence) opening the jaws wide, and Rule 403 closing them down. I try to show that these rules are a concession to the shortness of life and the fallibility of human fact-finding.

8. ROTHSTEIN ET AL., *supra* note 4.

9. In neither presumptions nor judicial notice do we confine ourselves exclusively to civil cases. The Supreme Court's recent decisions expanding the issues upon which the criminal defendant has a right to jury trial are noted. We also note the internal contradiction in FED. R. EVID. 201 that arose because of late insertion of the provision dealing with criminal jury trial concerns. We briefly cover some of the things that can be done about it.

Utilizing specific problems (drawn from famous or interesting cases like O.J. Simpson or Dr. Jeffrey MacDonald) and diverse student reactions to specific hypos and pieces of evidence, I try to demonstrate (or lead students to conclude) a number of things about the 401–03-type calculus. For example, I want them to appreciate the subjective, argument-sensitive nature of the judgments called for. My lesson plan for these sessions additionally provides for discussion of the following matters:

– Current scholarly controversies surrounding relevancy (story-telling, formal logic, statistics, probabilities, attempts to mathematically represent the process, etc.);

– "Conditional relevancy" as an illogical but helpful concept;

– What should be done when reasonable people differ on the relevance of a piece of evidence (the class being the reasonable people);

– The difference between relevancy and other issues under Rule 104 (preliminary questions of fact);

– The difference between relevancy and sufficiency;

– The independent but sometimes overlapping meaning of each of the 403 factors;

– The tactical need to specify *exactly* how evidence might be prejudicial or misleading, as opposed to chanting only the terms of 403;

– Judicial concern about "trials within a trial";

– Comparative distortion under 403: when will exclusion distort fact-finding more than admission will;

– The implication in 403 that there is a range of permissible evaluations of a piece of evidence, with only extreme evaluations considered prejudicial;

– The "presumption of admissibility of relevant evidence": Rule 402, and the thumb-on-the-scales balancing under 403;

– The awesome power of the trial judge in view of the rarity of appellate court intervention on 403 matters: the concept of discretion and abuse of discretion;

– The trial judge's creative alternatives to blanket admission or exclusion under 403;[10]

– How 403 may operate differently depending on whether the trial is to a jury or judge;

10. One of these "creative alternatives" that we discuss in some detail (there are others we also treat) is the Supreme Court's decision in *Old Chief v. United States*, 519 U.S. 175 (1997), requiring the less prejudicial way (here, acceptance of a stipulation) to prove something—if it proves it as well as the more prejudicial way (here, introduction of the record of a past conviction). We explore the 403 balancing implicit in the question of whether it *does* prove it as well, or at least well enough, factoring in the need for evidentiary richness mentioned by the Court. What does the Court mean by this? We also explore whether *Old Chief* applies beyond questions of status.

– Whether credibility of witnesses factors into the 403 calculus; and

– How all of this squares with our notions of a trial by our peers.

At the end of this week, I say a few words about the relationship of Rules 401–03 to the other rules in Article IV ("Relevancy and its Limits") that will be studied in the next several sessions. I point out that in large measure the remainder of Article IV is a codification of how the 403 factors apply to anticipated, repeated categories of evidence, but that there are other considerations operating in Article IV as well. We note that Rule 403, generally speaking, is the rule applicable where evidence has not been specifically provided for elsewhere in Article IV. I also point out that while 403 cannot be used to render evidence admissible if the evidence is banned by another rule, 403 normally *can* be used (on the facts of a particular case) to render evidence *inadmissible* that is permitted by another rule, although there are a few exceptions to this. Rule 403, then, is the "great override," but in one direction only.

E. Third Week—Special Applications of Relevancy and Its Counterweights: Rules 407 (subsequent remedial measures), 408–09 (settlement negotiations and the like), 410 (certain pleas), and 411 (insurance). (We defer the character rules, 404–05 and 412–15, for treatment as a special subject in following weeks.)

The only thing that may be unusual about my coverage of these rules (407–11), is that in addition to studying and evaluating the policies and the practicalities of the rules and their "exceptions," I try to show the class something about the nature of a scheme that attempts to divide purposes into permissible and impermissible purposes, which is the scheme of most of the rules in Article IV.[11] The class begins to see that the purposes mix apples and oranges—some of the purposes are ultimate and some are mediate purposes—and this furnishes confusion and ammunition for argument that can be exploited by lawyers. For example, a single purpose for a piece of evidence can be both permissible and impermissible. We discuss what might be done about this. We also examine whether the permissible and impermissible purposes accurately reflect sensible judgments about likely probative value, prejudice, misleadingness, time consumption, or other policies. Would a straight Rule 403 analysis come out about the same, or would it not? Does the

11. The permissible purposes are thought of as "exceptions" to the bans expressed by these rules. The same structure appears in Federal Rule 404(b)'s character ban, as well. In actuality they are not exceptions but rather "faux" exceptions (because they are not situations where the evidence is admissible for the banned purpose, but actually describe other, permissible purposes). We use this "faux exception" terminology in class. In addition, we emphasize that evidence coming within the faux exceptions is not admissible, but is merely a "candidate for admissibility" because Rule 403 may still keep the evidence out.

judge have enough flexibility, or too much? Do these rules provide the judge any real concrete guidance?[12]

Some specific policy matters we explore concern:

– The applicability of the remedial measures rule, Rule 407, to strict liability cases (involving and not involving products);

– The wide variety of corrective measures and kinds of lawsuits that might be covered by this rule, in addition to safety measures in personal injury cases;

– The applicability of the remedial measures rule to product re-calls;

– The rule's relationship to the privilege (recognized in some courts) for self-evaluative, self-critical studies, analyses, and reports;

– The applicability of the settlement rule to mediation and arbitration;

– Gaps left between Rules 408 (inadmissibility of settlement matters) and 410 (inadmissibility of criminal plea matters). For example, can civil settlement matters be offered in criminal cases? We discuss the shortcomings of proposed new amendments on this;

– The practical effects, extensions, and fairness of *United States v. Mezzanatto*[13] (waivability of the ban on criminal plea matters);

– Whether that ban should be extended to cover statements to police as well as those made to prosecuting authorities;

– Does the insurance rule make any sense today?;

– What can be done to safeguard against improper suggestion of insurance in the jury selection process, and yet give lawyers a fair chance to weed out jurors who might have biases related to insurance?; and

– What are the ethical implications of a lawyer using a perfectly legitimate "exception" to get insurance in, when his real purpose is to prejudice the jury?

F. Fourth Week—More Special Applications of Relevancy and Its Counterweights: Character, Propensity, Similar Acts, Habit, Excluding Sex Cases: Rules 404–06

The anchor for this section of the course is a chart (the "Char→Act" chart) I put on the board for the duration of the subjects covered here. The chart has three elements, arranged in a progress from left to right, as shown by arrows. At the left is forms of proof: "Opinion," "Reputation," and "Specific Instances" (each written as a separate line under each other, representing alternative forms of proof). In the middle is "Character," and, under it, as alternative, fundamentally different kinds of propensities, each on a separate line and each enclosed in its own parentheses: "Specific Propensity," "Habit,"

12. We come back to all these matters later under character, in several exercises, including one concerning rape-shield, where they make a dramatic difference of great interest to the students.

13. 513 U.S. 196 (1995).

and "Mental Illness, Compulsion, or Scientifically Documentable Personality Trait as Testified to by an Expert." On the right is "Act in Conformity."

This chart immediately shows there are different paths to proving the act that appears at the right of the chart,[14] and suggests that the law may be different as to each path. The students can clearly visualize the logical chain that is forbidden under 404–05: anything that passes through "Character" on its way to the act.[15] The chart allows me to indicate that there may be some exceptional situations that are different depending upon which form of proof one starts with. And it allows me to suggest that if the center term is some kind of propensity or disposition other than character, the law may be different. This raises, then, another question we discuss: how is character different than the other propensities in the middle term of the chart?

The chart is on the board from the beginning, but I delay a little before getting to it. I want to introduce the general subject of character first. I start by asking whether the class thinks the commission of a former crime is relevant to establish a presently charged crime. To those who say no, I ask if they have children. To a student who has an infant child (below the age of understanding), I posit two potential baby-sitters who are identical in every respect, except one has a conviction of petty theft on his record, while the other has a totally clean record. The student is asked to suppose that he must choose one of these two people to baby-sit his child. (The baby-sitting is to take place at the *sitter's* house.) Which sitter would this student choose? Probably the one with the clean record, but if not, I alter the type of former crime, making it assault. This time, he usually chooses the sitter with the clean record. We explore whether choosing the "clean" sitter is rational or irrational. Is the choice of baby-sitter fundamentally different than or the same as the kind of judgment we want from a court? A vigorous class discussion ensues, and eventually the realization dawns that such evidence is usually relevant (given that a "tiny increment in probability" is all that is required for relevance), but may run afoul of the kinds of dangers listed in Rule 403 and other policy

14. Different as to which form of proof at the left, that one starts with, and as to which entity in the center one passes through.

15. The chart enables me to demonstrate that if one of the terms in the chart—the middle term or the right-hand (final) term—is missing in the theory upon which the evidence is being offered, the evidence in not within the character ban. I illustrate this with both *Old Chief* (felon status as an element of the crime of possession of a weapon by a felon) and a case where an organized crime boss's reputation for violence is offered as the "weapon" by which extortion was accomplished. I also explain Rule 405(b) (essential element of a claim or defense) here. Other illustrations include specific instances of a victim's past violent behavior that were known to the criminal defendant offered by the criminal defendant to support a claim that he reasonably believed he was under attack and needed to defend himself. I assign a problem that distinguishes this self-defense use from the character use licensed by 404(a)(2) that can also come up in self-defense cases. Of course I point out that just because something clears the character ban, it is not necessarily admissible: 403 and other rules may ban it.

values. We discuss the justice of allowing this kind of evidence in criminal cases,[16] and whether *admission* or *exclusion* distorts the true probabilities of guilt more, in various circumstances—and which is more dangerous.[17] I have a simple hypothetical series in which the offered evidential crime gets progressively more like the charged crime, until it is almost identical in kind of crime, circumstances, and the very distinctive modus operandi. Most of the students agree that somewhere on the spectrum in the series, the evidence should be admitted and exclusion would unacceptably distort the probabilities of guilt. They differ as to where. But I think it gives them all a better appreciation of the problem and what the permissible categories in Rule 404(b) (motive, opportunity, intent, etc.) may be trying to get at,[18] and how Rule 403 might apply as an overlay.

I will not try to describe everything we do in this section (or any section) of the course. We generally go over some history of the character ban, and then separate the two quite different regimes expressed in Rule 404: part (a) (which deals with opinion and reputation evidence of character and provides genuine exceptions to the character ban) and part (b) (which deals with specific instance evidence, and provides "faux" exceptions).

1. Rule 404(a)

We examine and illustrate each of the exceptions in 404(a)—particularly the "mercy rule" allowing a criminal defendant to introduce pertinent "good guy evidence" about himself and "bad guy evidence" about the victim—and the permissible responses of the prosecution, that is, to rebut with similar opinion/reputation evidence and to cross-examine by reference to specific instances. We examine the justice of these rules. We mention but defer other impeachment matters to a later part of the course.

2. Rule 404(b)

On 404(b), we illustrate each of the "MOIPPKIA" faux exception candidates.[19] I use the Supreme Court's *Huddleston v. United States*[20] decision as a basis for discussion of the threshold questions of preliminary proof that arise before MOIPPKIA evidence may be admitted. *Huddleston* also gets us into the nature, scope, and effectiveness of instructions that should be given to

16. In general though, our discussion of character is not limited to criminal cases.

17. When we get to sex offenses, in the next section, we come back to these considerations, and ask whether they line up differently for sex offenses as compared with other offenses. This gets us into recidivism figures.

18. We question whether it does so successfully.

19. MOIPPKIA is my acronym for the permissible purposes in 404(b): motive, opportunity, intent, plan, etc. *See supra* note 11 and accompanying text for an explanation of my terms "faux exception" and "candidates."

20. 485 U.S. 681 (1988).

the jury to prevent inappropriate use of MOIPPKIA evidence. We also explore:

– The extremely difficult question of how to distinguish the MOIPPKIA purposes from the prohibited purpose under the rule;[21]

– The fundamentally different kinds of situations (some hinging on similarity and a human tendency to repeat and some not) that are embraced even by the same MOIPPKIA catchword;

– The very subjective question of how much similarity is required when similarity *is* required;

– Whether the similarity requirement is a function of Rules 401–02, of 404(b), or of 403 (which rule always applies as an additional step after determining that a piece of evidence is relevant and satisfies a MOIPPKIA gateway); and

– The case that can be made that Rule 404(b) fails to be a rule or to provide any practical guidance whatsoever. What could be done to better serve the purposes of the rule, and the objectives of justice?

In addition to a video of an actual courtroom argument concerning the admissibility of Rule 404(b) evidence, we utilize problems based on cases like the Atlanta child-murders case[22] and the O.J. Simpson case. One of the exercises we undertake in connection with the facts of an actual case is that some students are asked to compile (for the prosecution) a list of distinctive ways in which the evidential crime is similar to the charged crime. Another group of students is assigned to compile an opposite list for the *defendant* on the same facts—that is, a list of ways in which the crimes are dissimilar or the similarities are not distinctive. One lesson emerging from the geographically diverse decisions noted in the casebook, is that "other crimes" rules that read quite similarly are interpreted quite differently by different courts.

Upon concluding the subject of general character evidence (404–05), we try to distinguish from it habit and routine practice evidence, dealt with by Rule 406. Such evidence is more favorably received. Why? What is distinctive about it? After noting some applications and vagaries of Rule 406, we finish the week by briefly visiting some other kinds of evidence of similar

21. This gets us into the possibility that character means a general, morally tinged propensity, whereas more specific propensities or propensities that are not morally tinged are free of the ban. This may square with the purposes of the character rule. I explore this as a possible alternative explanation for the *Brides of the Bath* case and several other cases assigned that involve crimes having a somewhat distinctive modus operandi. It would not make sense to say someone has a character for doing something as specific as a particular modus operandi. We also at this point discuss whether the "doctrine of chances" can get one around the character ban, or whether it is merely circumlocution.

22. For a report of this notorious case, see "Prosecution Widens Case In Atlanta," WASH. POST, Jan. 26, 1982, at A6.

events or transactions that could become confused with, but technically are not, evidence of character, habit, or routine practice.

G. Fifth Week—Character and Conduct in Sexual Cases: Rules 412–15

The first two-hour session of this week concentrates on the complainant (Rule 412), the second on the alleged offender (Rules 413–15). Principle questions addressed are the history and policy of the special sex rules, why we treat, and whether it makes sense to treat, alleged sex offenders differently than other alleged offenders, why alleged sex victims and offenders are treated differently from each other, constitutional considerations, and the justice of the rules in this area. In the course of this, we note some of the social forces shaping these rules.

As respects Rule 412 relating to the complainant, we take up a problem that explores interpretative aspects and difficulties of the rule and also allows considerable venting by both the students inclined to argue for defendants' rights (and the societal functions defendants' rights serve) and students favoring protection of victim interests (and the societal functions they serve). What emerges is that the rule expresses an accommodation or compromise between important interests that are somewhat in tension, an accommodation or compromise we critique. We try to ascertain when the defendant's constitutional rights kick in, which gets us into a discussion of whether there is a general constitutional right to introduce defensive evidence as against exclusionary rules of evidence, the right's parameters if it exists, and what threshold must be met for it to apply.[23] The Supreme Court's *Olden v. Kentucky*[24] decision is central. Are there any principled limits to *Olden*? Surely the defendant is not entitled to introduce *any* evidence that could possibly raise a reasonable doubt in someone's mind, no matter how marginal the evidence may be, and no matter how strong, grounded, important, or historical the policy behind the exclusionary evidentiary rule might be. We use hypotheticals varying *Olden* to try to discern a line. It proves to be a difficult

23. This comes up in other places in the course, too, such as privilege and hearsay. It involves the Compulsory Process, Confrontation, and Due Process Clauses, U.S. CONST. amend. VI, VI, & V, respectively; whether there are any differences among them pertinent to this inquiry; whether the right to introduce defensive evidence applies differently if testimony of the defendant herself is involved; and whether it makes any difference whether the policy behind the exclusionary evidentiary rule invoked is to protect the trial process or extrinsic public policy. In addition to *Olden*, Supreme Court cases thrown into the pot on the whole question in various contexts throughout the course include *Davis v. Alaska*, 415 U.S. 308 (1974), *Chambers v. Mississippi*, 410 U.S. 284 (1973), *United States v. Scheffer*, 523 U.S. 303 (1998), *Rock v. Arkansas*, 483 U.S. 44 (1987), and others. The Supreme Court's *Montana v. Egelhoff* decision, 518 U.S. 37 (1996), which we first encounter in the relevancy section of the course and which post-dates some of these cases, casts doubt on whether such a constitutional right can ever trump ordinary exclusionary rules of evidence, as a practical matter.

24. 488 U.S. 227 (1988).

task. We conclude discussion of 412 by looking at some civil sexual harassment examples.

Concerning 413–15 relating to the offender, we demonstrate how much broader than MOIPPKIA these rules are.[25] We have a vigorous discussion of pros and cons, recidivism statistics, constitutionality, and whether Rule 403 does or should apply and whether that affects constitutionality. We discuss a case involving a doctor inappropriately touching female patients while treating them that highlights both the perceived need for and the questionability and difficulties of the sex offender rules. We talk about whether dissimilarity of offenses plays any role under these rules, and whether there can be cross-applicability of types of offenses between Rule 413 (sexual assault) and 414 (child molestation). We conclude with whether Rules 413–15 foreshadow the ultimate demise of Rules 404–05.[26]

H. Sixth Week—Extrinsic Social Policy: Privileges: Rule 501: Privileges in General and Attorney–Client Privilege in Particular

We open the week with a discussion of what privileges are.[27] They are exceptions to every person's duty to give evidence. They differ fundamentally from the principles we have studied thus far, which are mainly concerned with the integrity of the trial process and the effectiveness and efficiency of ascertaining the truth (with some exceptions). Privilege posits there may be concerns of society that are more important than that. We discuss some of these "transcendental" values and ask whether privilege is saying it is better that a murderer walk free to kill again (or that an innocent person be convicted) than that these values be infringed. Is there really a loss to the ascertainment of truth? How much? Do the privileges actually affect conduct and achieve the benefits the way they are supposed to?[28] Is there any empirical evidence?[29]

25. We also relate these rules to the common-law "lustful disposition" exception to the character ban, and its relationship to the notion of an "illness" or "compulsion" as the center term of the "char→act" chart, rather than "character."

26. And of the limits in Rule 609, although perhaps this can be reserved until later. I note a similar erosion of standards has already partially taken place under 609, with the inclusion of felonies that are arguably unrelated to credibility.

27. This involves briefly introducing and describing a few of the privileges, and setting forth Wigmore's criteria for recognition of privileges. *See* 8 JOHN HENRY WIGMORE, EVIDENCE § 2285, at 527 (John T. McNaughton rev. 1961). We tend to focus, although not exclusively, on communication privileges at this point.

28. We use various communication privileges as our references.

29. It might be worth pointing out to the class here that ironically, in *Jaffee v. Redmond*, 518 U.S. 1 (1996), in creating a new privilege, the Supreme Court relies on factual propositions that are not supported to the degree the Court has insisted upon for expert evidence under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). We also might reflect back on our discussion of Rule 201, judicial notice, to the effect that judicial notice of propositions of "legislative fact" (like those involved in a court

Why are the privileges limited to the ones we have? Aren't there other relationships and values as deserving or more deserving of recognition on the basis of the Wigmore criteria?

This week then moves to how Rule 501 in general operates: its bifurcation into types of cases and issues, what happens if issues are mixed, the difficulty of separating issues during discovery, and the meaning of the various individual elements (italicized here) of the phrase "*principles* of the *common law* . . . interpreted . . . in the light of *reason* and *experience*."[30] We use the Supreme Court's analysis in *Jaffee v. Redmond*[31] to examine what factors and reasoning the Court says should be instrumental in ascertaining whether to create a new privilege. Does *Jaffee* signal a change in a conservative judicial attitude toward the phrase?

We next talk about some things that a number of privileges have in common: communication, confidentiality, waiver, the principle that facts and pre-existing documents are not necessarily privileged even if the communication of them might be, etc. We then establish an organizational structure for what kinds of privileges there are.[32]

We then move to the attorney–client privilege in particular. We rather thoroughly canvass the contours of this privilege, from the basics through special problems of the corporate and governmental setting, through the effect of intentional and unintentional access gained by third parties of various types, through joint-interest situations, through the crime-fraud and other exceptions to the privilege, to things not strictly regarded as privileged communications, like the fact of a conversation, the fees charges, the general subject matter of the consultation, etc. I try to put the students into real-lawyer situations and expose them to the special problems they might face: the lawyer wearing two hats for the business (as counsel and as an officer of the corporation or member of the board); the lawyer who inadvertently discloses privileged material in a massive document discovery; a lawyer preparing a witness with privileged documents; a corporate lawyer interviewing corporate employees whom he does not personally represent; a lawyer contemplating potential Sarbanes–Oxley disclosures; a lawyer advising on a course to take to avoid complex regulatory liability which might be misconstrued as criminal advice; a lawyer who wishes to include-in on a client consultation accountants, medical experts, or assistants like law students; a lawyer who communicates with his client

creating a privilege) are subject to a much less stringent standard than judicial notice of propositions of adjudicative fact.

30. FED. R. EVID. 501 (emphasis added).

31. 518 U.S. 1 (1996).

32. I distribute (or put on the class website), the privilege provisions of the Uniform Rules of Evidence (and in some instances, the Supreme Court Draft F.R.E. privilege provisions) for the students to consult as concrete formulations of the particular privileges as we come to them. These are in our forthcoming new edition of the casebook.

through e-mails and cell phones; a lawyer who wishes to claim his or his client's selection of unprivileged documents in connection with a legal matter, might itself be privileged,[33] etc. Cases we discuss include, inter alia, the Supreme Court decisions in *United States v. Zolin*,[34] *Upjohn Co. v. United States*,[35] and *Swidler & Berlin v. United States*.[36] We consider, inter alia, a fact-problem where a client telephones his lawyer that he has killed his wife, the lawyer advises him to get rid of the gun (we don't know whether the client takes the advice), and the whole thing is overheard by a telephone operator. This raises questions concerning overheard communications, the care that should be taken in communicating, whether (when there is an eavesdropper) the privilege should apply differently to the eavesdropper's testimony as opposed to the lawyer's or client's, what third parties will be considered necessary and facilitative to the communication, the effect of interception of cell-phone and e-mail communications, whether the privilege should force face-to-face communications, should the whole conversation or just criminal parts of it be affected by the crime-fraud exception, whether the client's or the attorney's knowledge of criminality should govern, and if anything rides on whether the client followed the illegal advice or not. Many of the lessons learned in connection with one privilege are transferable to others.

I. Seventh Week—Husband–Wife, Doctor–Patient, and Other Privileges

Since I have detailed my coverage of the attorney–client privilege, I will not detail my coverage of the remainder of the privileges. I cover the standard privileges, and some of the governmental privileges. I briefly treat the journalism privilege. I do not treat constitutional privileges, but from time to time throughout the course, I cover some aspects of the privilege against self-incrimination as it pertains to trial procedures.

The two husband-and-wife privileges garner a lot of discussion from the students, particularly concerning:

– The realistic or unrealistic nature of the policies that differentiate the two spousal privileges and dictate their different parameters;

– Common law and same-sex marriages;

33. We do say a few words about work-product protection in the attorney–client privilege section, but the students have had that in Civil Procedure. Nevertheless, I review the basics, because a number of questions under attorney–client privilege necessarily get into work-product—like the question in the text here.

34. 491 U.S. 554 (1989) (discussing procedures for determining the crime-fraud exception).

35. 449 U.S. 383 (1981) (discussing which employees within the corporate client can make confidential communications to the corporate lawyer).

36. 524 U.S. 399 (1998) (discussing the privileged status (after his suicide) of communications made by Vince Foster, a close aid to Bill and Hillary Clinton, to Foster's lawyer. Those communications were sought by independent prosecutor Kenneth Starr, who suspected the suicide had something to do with a Clinton scandal).

– Why don't most jurisdictions have a parent–child privilege?;

– A fact-problem I assign about a nanny in the next room overhearing an incriminating conversation in the bedroom between husband and wife;

– Another fact-problem concerning a divorced wife who is asked to testify against her husband: that, in open public view, he went into the license bureau to forge an application for a license and ownership title in a false name, concerning a car he stole, while she waited in the car;

– Whether the rationale of the Supreme Court's decision in *Trammel*[37] makes sense in view of the pressures brought to bear by the prosecution on witness–spouses in many *Trammel* situations;

– The applicability of a crime-fraud exception to the husband–wife privileges, and

– A case we study involving a wife who arranged with the FBI to secretly wiretap and tape her telephone conversations with her husband.

We discuss doctor-patient and psychotherapist–patient privileges in connection with *Jaffee v. Redmond*, which we revisit here. We consider whether the distinction between psychotherapy and regular medicine made in the opinion[38] makes sense; whether it has any implication for recognition of a general doctor–patient privilege in federal law cases; the position of the FRE Advisory Committee on a general doctor–patient privilege; and the extension by the decision of the psychotherapy privilege to social workers performing similar functions (the "poor-man's psychiatrist"). We discuss the "dangerous patient" exception to the whole privilege suggested by the Court. The students are helped to see the connection to *Tarasoff v. Regents of University of California*,[39] which they had in Torts.

We conclude our discussion of the standard privileges with some speculation about the future, about other privileges that there might be, and about why the law has chosen to recognize only some privileges but not other likely candidates, which we mention. We ask whether society would be better off without privileges, and whether there are other mechanisms to protect the values they represent.

J. Eighth Week—Reliability: FRE Article VI: Witnesses

The first session of this week is devoted to competency, impeachment in general, and impeachment by prior inconsistent statements, contradiction, and bias in particular.[40] We start with competence. We note the bifurcation under

37. Trammel v. U.S., 445 U.S. 40 (1980).

38. 518 U.S. 1, 4 (1996).

39. 551 P.2d 334 (Cal. 1976).

40. I assign as background reading the subjects of support of credibility; methods and scope of direct and cross examination; leading questions; and preparation of, refreshing memory of, and sequestration of witnesses. We return to refreshing memory when we subsequently consider the

Rule 601, and the elimination of most incompetencies under its federal branch. We discuss how certain former incompetencies might be raised in new guises under other parts of the Rules; the incompetency of children; and state Dead Man's Statutes. We take up the Supreme Court decision in *Rock v. Arkansas*,[41] concerning the competence of hypnotically refreshed testimony.[42] We discuss not only the constitutional aspects, but also some of the different approaches states have taken to the evidentiary admissibility of this kind of testimony.

The Supreme Court's decision in *Tanner v. United States*[43] usually invokes heated discussion. We treat not only the drunken conduct of jurors in that case, but also other egregious practices (like racial slurs or flipping coins in the jury room) that also seem to be protected by the juror incompetence provision in Rule 606(b). What is the justice of such a rule? There are limits, both procedural and substantive, on the reach of Rule 606(b), which we explore with hypos.

We then move from witness competence to witness credibility in general. The first step here is to review the stages of the trial (case in chief, rebuttal, etc.) and the stages through which each witness goes (direct examination, cross-examination, etc.). Then we try to get the terminology down: "substantive evidence," "credibility (impeachment, support) evidence," "cross-examination is not the same as impeachment," "extrinsic evidence vs. evidence adduced on cross examination," "leading vs. impeaching," "refreshing recollection or awakening conscience vs. impeaching," "impeaching your own witness," "vouching for your own witness," "impeachment vs. contradiction," etc. At this point, and as we later go through the methods of impeachment, some degree of contrasting with the common law is useful. As to some matters, the common law position still prevails in some jurisdictions. Next, we draw up a list of customary "Lines of Attack," that is, methods of impeachment.[44] We make clear that this customary list of methods does not foreclose a lawyer's creativity to indulge in others. In the course of drawing up the list, we isolate the "testimonial qualities" that are important in witness credibility: perception, memory, sincerity, and recounting ability.[45] We also indicate that there are special rules pertaining to some of the lines of attack—crystallizations of the Rule 403 factors. As to others, naked Rule 403 will apply.

hearsay exception for past recollection recorded, FED. R. EVID. 803(5), which we contrast with refreshing memory.

41. 483 U.S. 44 (1987) (concerning an attempt to exclude a criminal witness/defendant whose memory has been "hypnotically refreshed").

42. *Id.* at 45.

43. 483 U.S. 107 (1987) (establishing incompetence of jurors to impugn their own verdict by revealing severe intoxication on the part of other jurors).

44. I assign jury instructions for the students to read in connection with each line of attack.

45. We come back to these later under hearsay.

We then proceed to focus on each line of attack individually. We start with prior inconsistent statements (or conduct). We distinguish in some detail, with examples, between the impeachment use and the substantive use of such statements. We describe the applicable legal rules about this line of attack on credibility, and contrast the common law, asking which is better strategically, fairness-wise, and societally, in various situations. *Queen Caroline's Case*,[46] the reforms of Rule 613, and some anecdotal war stories highlighting tactical considerations garner a lot of discussion from the students. We show this line of attack in action in some video clips of master cross-examiners using the technique to advantage. They involve written, oral, and recorded former statements.

We then advance to the next line of attack, contradiction (which has impeachment as well as substantive thrust). We concentrate on the impeachment aspects here. At this point, we bring in the so called "collateral matters rule" (and its "exceptions"). That rule is a limit on prior inconsistent statements and contradiction. We illustrate its operation with some hypos.

Then we move on to the next entry on the list of lines of credibility attack: bias. The Supreme Court's decision in *United States v. Abel*[47] provides a great jumping-off place for discussion. We also have video clips from several high-profile cases where famous trial lawyers expose witnesses for having a financial motive for testifying as they do—frequently to enhance their "marketability" in the book and media world. We explore the many kinds of interest and influence that can be shown under bias, and subdivide the technique into "biased fact," and "prior biased statement," illustrating each with hypos. We inquire whether anything like the common law foundation applicable to prior inconsistent statements (i.e., *Queen Caroline's Case*) applies to either of these. It does, in some courts. We discuss the fairness of having and not having such a foundation requirement.

The second session of the week is devoted to the remainder of the entries on the "lines of attack" list, focusing mostly on attacks on general character for credibility by opinion evidence, reputation evidence, convictions, or non-conviction bad acts, as formulated by Rules 608[48] and 609. The most time is

46. 129 Eng. Rep. 976 (1820). Here I give some of the facts of the Queen Caroline episode, which is strangely like the Monica Lewinsky/Bill Clinton case as respects the evidence gathered and excessive and unpopular measures taken by the investigators to gather it. From time to time, I find it is interesting to the students for me to go into some history, for example, Jeremy Bentham's diatribe against lawyer–client privilege, A TREATISE ON JUDICIAL EVIDENCE 304 (Rothman & Co. 1981) (1825), and the Sir Walter Raleigh case, 2 How. St. Tr. 1, 15–16, 24 (1603), as they may illuminate the reasons for the hearsay rule and the Confrontation Clause, U.S. CONST. amend VI. There are others.

47. 469 U.S. 45 (1984).

48. An early simple hypo is designed to prevent confusion between this subject (general character concerning credibility) and bias (a specific reason to lie in this case). The hypo

probably spent on getting the students to distinguish the various categories of crimes and witnesses in Rule 609; how the standard is different for each of them (and from the standard applicable to presumptively time-expired convictions); and how most of these standards differ from Rule 403.[49] Hypotheticals are useful. The counter-intuitive role of similarity here presents another difficulty because similarity plays an opposite role under Rule 404(b) (MOIPPKIA). This helps underline that the inference *here* is not guilt, but incredibility, even though the process—incidents offered to prove character in order to prove an act in conformity—is the same. But the character here is for incredibility and the conforming act is telling an untruth. We also try to determine how courts ascertain whether a crime involves "dishonesty" or "false statement" and what those terms mean anyway. There is a confusing new amendment to Rule 609 attempting clarification. A host of other interpretative problems get treated, as well. We also examine the practical use of motions *in limine*, the policy and tactical implications of the Supreme Court's procedural holdings in *Luce v. United States*[50] and *Ohler v. United States*,[51] and whether those cases apply beyond Rule 609. We have some transcript material showing how 609-style impeachment is done. We conclude by trying to assess whether Congress "got it right" when they drafted Rule 609.

We finish impeachment with some materials on the fallibility of eyewitness identifications and on psychological examinations of witnesses. These materials include a popular press article about a terrible case of mistaken identification that students can relate to; and a case discussing studies showing why eyewitness identification—especially when a Caucasian is identifying an African American, and not vice versa—is less reliable than people might think, and examining when it might be appropriate to receive expert testimony or give jury instructions to help the jury evaluate such testimony. I also reproduce some model jury instructions on the subject of eye-witnesses.

K. Ninth Week—Reliability: Expert and Lay Opinion and First-Hand Knowledge: Rules 602 and 701–06

This week of the course is devoted basically to four things: (1) understanding the law concerning first-hand or personal knowledge and opinions (conclusions, inferences) and how that law differs for lay witnesses

involves an attempt to show that a prosecution witness has committed another crime for which he has not yet been charged or convicted. If the purpose is to show that he is inclined to favor the prosecution because the government has a charge over his head and he hopes for leniency, the matter is in the category of bias, and not governed by the more restrictive requirements of Rule 608 (for example, that extrinsic proof may not be made, and that the crime must be of a nature that relates to credibility).

49. We introduce some of the drafting history here.

50. 469 U.S. 38 (1984).

51. 529 U.S. 753 (2000).

and expert witnesses, (2) understanding the seven liberalizations[52] in this area brought in by the Rules, (3) sensitizing students to the fact that the number and kind of issues upon which lawyers may find it advantageous to have an expert witness in today's litigation are enormous, and (4) extensive video clips illustrating the multifarious uses of expert testimony and the differences between the Rules and the common law. Among these are a judges' and lawyers' training video and a video of expert testimony on voting machines in *Bush v. Gore*.[53]

This week of the course can proceed largely without reference to the reforms wrought later by *Daubert* and *Kumho* (which are taken up the next week). The teaching here is heavily fact-intensive, since the terms used by the law in this area are rather vacuous if not studied in connection with particular facts, and even then, they can be very subjective.

L. Tenth Week—Reliability: Further Reform of Expert Testimony: Herein Mostly About Scientific-Type Experts

My objectives here are twofold: (1) To instill understanding of *Frye v. United States*,[54] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[55] and *Kumho Tire Co. v. Carmichael*,[56] and (2) to expose the students to a number of different kinds of scientific and forensic evidence and the issues that surround them today. I use a video clip of a DNA expert testifying; a case and article on DNA; and cases, articles, materials, and sound or video recordings relating to polygraph, several kinds of syndromes,[57] mathematical probabilities (*People v. Collins*[58] and Sudden Infant Death Syndrome), handwriting analysis, language stylistics, fingerprints,[59] and trace evidence generally, including hair and tool

52. These are: (1) more receptivity to lay opinion, (2) expansion of the class of experts, (3) expansion of the topics appropriate for expert testimony, (4) reform of the hypothetical question, (5) licensing certain types of inadmissible evidence in the expert's basis, (6) optional omission of the basis from the expert's direct testimony, and (7) the partial abolition of the rule against ultimate opinions.

53. 531 U.S. 98 (2000).

54. 293 F. 1013 (D.C. Cir. 1923).

55. 509 U.S. 579 (1993).

56. 526 U.S. 137 (1999).

57. Treating both the scientific evidence aspects and the character aspects of some of them.

58. 438 P.2d 33 (Cal. 1968).

59. I have a large blowup of two fingerprints with similarities indicated between the two, which was used in an actual case. The chart shows that, of course, not every feature is compared, and that we become satisfied of a match at some point and stop comparing features—sometimes because the fingerprint is incomplete, and sometimes because the practitioners feel enough is enough. Stopping short of all entails some risk. This process of "counting and comparing of a limited number of all the features, stopping short of all," and the question of when it is safe to stop short of further comparing, are at the basis of a large number of the other forensic identification techniques we consider, and so I spend some time on the chart. I also show a video

marks. I have some spectacular examples of unjust convictions based on erroneous scientific evidence. Several broader messages I hope the students come away with concerning scientific evidence are that (a) scientific evidence is a shifting target, changing every day, (b) such evidence can be amazingly good or amazingly bad and should be approached with great care, (c) *Daubert* and *Kumho* and the ensuing Rules revisions are extremely malleable, just as *Frye* is, (d) there are questions as to whether *Daubert* is being fairly applied, applied differently in criminal cases than in civil cases, and applied discriminatorily against civil plaintiffs[60] and criminal defendants. We end with some consideration of whether *Daubert* really is different from *Frye*, whether *Daubert* and *Kumho* are achieving their purposes of increasing the reliability of expert evidence, whether they have made any difference at all (there are several studies on this), and whether they strike the proper balance between judge and jury in a jury trial system.

M. Eleventh Week—Reliability: Basic Hearsay: Rule 801(a)–(c)

The hearsay rule and its exceptions have been extensively written about elsewhere. Much of our own philosophy of teaching hearsay emerges in our *Evidence in a Nutshell*.[61] Consequently, I will only mention a few things that may be noteworthy or unusual about the way I teach it.[62]

I start with a parable about a student approaching two strangers at a fork in the road. Although she does not know which is which, the student knows one is an absolute truth-teller, the other an absolute liar. One road of the fork is the road to damnation, the other to eternal bliss. The student knows that the strangers know which road is which. The student must proceed on one of the roads in the fork. She gets to ask one question only, of either stranger. "What question should the student ask? What should she do?" I ask the students in

clip about the recent misidentification of fingerprints that seemed to implicate a west coast American lawyer in the Madrid bombing.

60. We get into consideration of some mass torts cases here, and the relationship of *Daubert* to summary judgment. A study I participated in with RAND on the empirical effects of *Daubert* comes into play here. For further explanation of the study, see http://www.rand.org/pubs/research_briefs/RB9037/index1.html.

61. ROTHSTEIN ET AL., *supra* note 4.

62. I defer study of the Constitution's Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36 (2004), until after the hearsay rule and all its exceptions. I have tried treating confrontation sooner, but deferring it and treating it as a prohibition of certain things that the hearsay rule of a particular jurisdiction might allow seems to work much better.

Throughout hearsay and its exemptions and exceptions, I supply some brief transcript-like excerpts showing the language actually employed in the courtroom to convey the hearsay concepts we are examining, in the form of offers, objections, and supporting argument.

my class. The correct answer is in the footnote below (so you can think about it for awhile).[63]

This parable shows something central to hearsay: that if a truth to be established passes through two—a declarant and a witness—and either is lying, mistaken, or joking[64]—accuracy is affected. Hence, the critical importance (for hearsay purposes) is the fact that the declarant is not on the stand and thus is not subject to all of the courtroom safeguards (cross-examination, oath, penalty for perjury, realization of importance and consequences, exposure of demeanor, etc.).

We examine the courtroom safeguards, and how they operate to either help expose incredibility or incline a witness to care and truthfulness. We decide to thereafter use the shorthand "cross-examination" to refer to all the safeguards.

We give a few examples of primordial hearsay where the absence of the safeguards is important. Then we sketch situations where it seems less important to subject the declarant to the safeguards—perhaps the declarant is acting less like a traditional witness, or the possibilities of his incredibility seem less within the traditional role of cross-examination, etc. Our examples include out-of-court words of contract, of defamation, and the like. These situations we connote by saying "the out of court statement is not being offered for the truth of the matter stated by the declarant," and we discuss the special way in which we mean that phrase.

Since I believe the basic "truth of the matter stated by the declarant"[65] concept is best taught by fact patterns, the assignments and class discussions are heavy with specific examples—numerous very short cases, problems, and hypos.

I also use a chart that stays on the board throughout our discussion of basic hearsay. The chart is divided into a left half and a right half. The right half represents the inside of the courtroom, the left is the outside world. The top horizontal line of the chart represents a case of ordinary non-hearsay. At the extreme left of this line is a fact (a shooting, for example) that is of significance in the lawsuit. An arrow from the fact leads to the center line of the chart, which is straddled by a witness. An arrow leads from the witness to the jury box which is at the extreme right of the chart. The next horizontal line

63. One stranger (it doesn't matter which) should be asked what the other one would say is the road to eternal bliss, and then the traveling student should take the other road. This is because, since the "truth of the matter" passes "through" the two when the question is answered, and one is a liar—the answer will be an untruth.

64. We relate this to the testimonial qualities previously discussed under impeachment: perception, memory, sincerity, and narration (or recounting ability).

65. Notice I do not say "truth of the matter asserted." Students get confused and think "asserted" means asserted by a party in the pleadings, or by the witness on the stand, or means the ultimate proposition the offeror hopes to establish with the piece of evidence. I spend some time on disabusing them of these notions, citing examples.

down is the same, except it represents typical hearsay, so there is a declarant interrupting the arrow to the witness. The next horizontal line down is the same as the hearsay example, except the declarant is placed either in the position of the fact, or in the position of the declarant (but in this latter case, there is nothing to the left of the declarant). This horizontal line, which may be in either of these two forms, represents an out-of-court statement not offered for its truth—a statement of legally operative fact, or a verbal act, like "I agree" to a contract (or any of a bunch of other similar examples). The chart seems to cause something to click in the students' minds and they seem to immediately grasp the distinctions among non-hearsay, hearsay, and out-of-court statements not offered for their truth that partake of two features of hearsay ((1) in-court evidence of (2) an out-of-court statement) but not the other indispensable feature ((3) offered for the truth of the out-of-court statement). There was a time (long ago) when I did not use this chart, and the students seemed to have much more difficulty grasping the concepts. Former students of mine who are lawyers and judges today tell me that although they may have forgotten everything else they ever learned in law school, when they have a hearsay question, the chart immediately flashes before their eyes (and, hopefully, helps).

In our discussion, we divide out-of-court statements not offered for their truth into primarily two kinds: (1) statements that are offered as *themselves* being an operative fact or verbal act that directly has legal effect (as opposed to being just *reflective* of some fact or act that has the legal effect); and (2) statements offered as a basis for the state-of-mind of (or reasonable justification for an act of) the hearer. I rehearse the students in these concepts, with umpteen different short problem examples of each. In the course of this, I always have to emphasize that a permissible theory of the offeror is what counts, but that theory must be relevant. The name of the offering lawyer's game here is to come up with a permissible and relevant purpose for the evidence. We also discuss what happens if there is both a permissible and a potential hearsay use of the selfsame piece of evidence, and whether what the law does makes sense.

We also take up the topic of implied out-of-court statements; the difference between the common law and the Federal Rules test of implied statements; the interesting new English definition of implied statements, superior to our own in many ways; and the gap in the Rules concerning whether and when *verbal* conduct can be an implied statement. Many of my class examples on this and other subjects involve students assigned to role playing. For example, I use individual students to play out the roles of the *dramatis personae* in a simplified version of *Wright v. Tatham*.[66] We also treat whether omission to act can be an implied statement.

66. 112 Eng. Rep. 488 (K.B. 1837).

As part of basic hearsay, we also examine decisions holding out-of-court statements to be non-hearsay if they are offered as circumstantial evidence of the state-of-mind of the declarant. We note the relationship of these decisions to the upcoming state-of-mind hearsay exception.[67] It is my belief that the decisions which find these statements to not be hearsay, usually make more sense if we treat the decision as holding that the statement is not offered for its literal truth but for an unsaid proposition about the declarant's state-of-mind. They would also have to hold that there is nothing we would recognize as an *implied statement* setting forth the state-of-mind. For such an implied statement *would* be being offered for its truth and would be hearsay. But there are some of these cases that cannot be explained this way. They are the cases where there is either an express, or a clear implied, statement actually expressing the state-of-mind, and the court still holds it is non-hearsay (as opposed to being within a hearsay exception) even though the statement is offered to prove just what it says: the state-of-mind. These cases seem to make no sense (if they also subscribe to a "truth of the matter stated" definition of hearsay), because the statement is obviously being offered "for the truth of the matter stated"—the state-of-mind. However, they might make sense if we interpret "truth of the matter stated" in the definition of hearsay to mean "truth of an *external* matter stated," so as to exclude from the definition of hearsay statements where the matter stated is an internal state-of-mind. We discuss some possible reasons why this kind of fact (or "matter") is distinguishable in terms of credibility, and whether it is possible to interpret a relatively unqualified prescription in a rule or statute this way.

We conclude the section with a discussion of the technicalities and the justice of cases holding that a declarant's knowledge of distinctive features of premises can be used to establish presence on the premises, and thus is not hearsay.

N. Twelfth Week—Reliability: Hearsay Exemptions for Prior Witness Statements and Party Admissions: Rule 801(d)

As a matter of preferred terminology, we treat statements that conform to the definitions of Rules 801(a)–(c) as hearsay, notwithstanding that they may come within 801(d) which relieves them of the hearsay ban. Statements which come within 801(d) we say are within an "exemption"[68] from the hearsay rule. I think it is clearer to use this terminology in discussions, as long as the "non-hearsay" terminology is also explained.

67. FED. R. EVID. 803(3).

68. Not "exception." We explain that in practical effect, there is little difference between an exception and exemption; but that the rationales may be somewhat different.

1. Prior Statements of Presently Testifying Witnesses

Here we note that, under the general definition of hearsay in 801(c), which embraces out-of-court statements both by someone other than the witness and by the witness, the statements in the heading would be hearsay—but under a narrow set of special conditions (Rule 801(d)(1)), they can be exempt from the hearsay rule. We explore whether this is a good idea, and whether a broader exemption, like that expressed earlier in the drafting history of the Rules, and in the law of some other jurisdictions, would be better. We review the difference between credibility and substantive use of such statements, and note this provision allows substantive use, provided that other rules, like 403, and the Constitution, are not transgressed (which is a point we reiterate throughout as respects hearsay exemptions and exceptions). We discuss the Supreme Court's *United States v. Owens*[69] decision and whether, under the rule and the Constitution,[70] the requirement of an opportunity for present cross-examination of the witness means *effective* opportunity. Is *Owens*'s cramped reading correct and just?

We note the pro-prosecution concern with turncoat witnesses that lay behind including grand jury proceedings in the prior inconsistent statement portion of the rule and behind the prior identification provision. We avert to the latter's checkered history and the policy debate that led to it. Are these provisions good or bad? On prior inconsistent statements, we contrast our earlier discussion of such statements used as impeachment, explore what kinds of proceedings might qualify under the rule, and lay the groundwork for distinguishing the former testimony hearsay exception.[71] What policy accounts for the different requirements there?

Concerning prior consistent statements, we explore the meaning of the "recent fabrication or improper influence or motive" provision,[72] especially as interpreted by the Supreme Court's *Tome v. United States*[73] decision. Can this provision ever be satisfied, on facts like *Tome's*? Is there any room left for offering such a statement on credibility only? Are the requirements different?

With respect to identification statements, we note that the station-house line-up is a frequent example. We ask a number of questions. What is meant by identification, as distinct from reporting a crime? Are indirect identifications covered? We contrast California's provision, which seems to have more safeguards. Are there any constitutional safeguards applicable here? Are there any other safeguards? Can proof beyond a reasonable doubt be established by a statement under this provision alone?

69. 484 U.S. 554 (1988) (witness now amnesic; still O.K.).

70. I don't think *Crawford* changes what *Owens* teaches on this.

71. FED. R. EVID. 804(b)(1).

72. FED. R. EVID. 801(d)(1)(B).

73. 513 U.S. 150 (1995).

2. Admissions

We examine the rationale of party admissions and lay the groundwork for distinguishing declarations against interest. Either here or when we come to declarations against interest, we inquire whether the different rationales of the two rules justify the differences in their requirements. Why doesn't a party need to know his admissions were against his interest when he made them? I am careful to demonstrate that, unlike various kinds of judicial admissions, the admissions we are studying are almost never binding—they are just evidence, can be explained away by the party or refuted by other evidence, and the jury gives them whatever weight they want after hearing arguments about them, if any, at the end of the case. They are also subject to Rule 403, which is the source of many of the doctrines about various kinds of party admissions (such as when something can qualify as an implied or adoptive admission). They are subject to other rules as well. For example Rules 407 (remedial measures) and 408 (settlement matters) apply to a kind of implied admission.[74]

We spend a good deal of time with examples separating out the various kinds of admissions there are under the Federal Rules, and differences from the common law. We examine the fairness of the various provisions and whether the changes from the common law are justified. We take up *Bourjaily v. United States*[75] and the host of practical, procedural,[76] and substantive problems that arise in the area of co-conspirator statements, distinguishing the theory of the exemption from the theory that the statements are part of the crime of conspiracy. We discuss the justice of this exemption, and have several graphic examples where a high profile party has been "done in" by an alleged co-conspirator's statement that may have been false and merely made to further a solo plan by the declarant. We illustrate the "during the course [of]" and "in furtherance of" requirements.[77]

We examine the relaxation of the opinion and firsthand knowledge rules that have always attended party admissions, and we ask whether that is justified, especially for the more remote party admissions by agents, and party admissions not perceived by the admitter to be self damaging. Does the relaxation apply to other hearsay exceptions? Why/why not?

We have a short series of problems designed to illustrate the principle of adoption by silence in the face of an oral accusation. We distinguish offering the statement of the accuser for its truth, and as a basis for the meaning of the

74. These may or may not be hearsay in the first place, aside from the admissions exemption. Even still, one would need the party admissions exemption. This depends on whether they qualify for the definition of implied hearsay statements in Rule 801.

75. 483 U.S. 171 (1987).

76. Including how Rule 104 applies in practice, in criminal cases involving a conspiracy charge, criminal cases not involving a conspiracy charge, and civil cases.

77. *See* FED. R. EVID. 801(d)(2)(E).

silence. The series illustrates the factual permutations that lead a court to allow or disallow the silence as a tacit admission, and how the same facts can be argued as a matter of weight to the jury in closing, if the evidence is admitted. We talk about the rules-of-thumb or factors the courts consider to determine if the circumstances will allow an inference from silence, and how these rules-of-thumb differ for failure to respond to a writing. We reveal the falsity of the common notion that no matter what, an accusation made in the presence of one's client is legally adopted by the client if he remains silent. We also explore the special situations where the Constitution comes into play to make silence inadmissible.

Other fact-problems assigned include one illustrating how an attempt to bribe a witness can be an implied admission. Another problem involves a two-count complaint brought by a wife for the death of her husband. One count is for her personal loss, the other is for his damages (which claim she brings as the administrator of his estate). Some courts call the one a wrongful death claim, and the other a survival claim. In the problem, the decedent has said, about the injury resulting in his death: "It was my fault." Can his statement be used in her lawsuit? This gets us into the differences between the two counts, who is a party or agent of a party under the Federal Rules and the common law, the absence of the common-law privity admission notion from the Federal Rules,[78] and how broad conclusions may be tolerated in admissions. We lay the groundwork for whether declarations against interest[79] may apply in some cases where party admissions[80] do not, and vice-versa.

Another problem involves a workman who drops something on a bystander and tells the bystander the workman himself did it. Later a claims-agent of the workman's employer, who is trying to settle the case, tells the bystander's family that the workman did it. Are these statements introducible against the workman's employer? What about the ban on settlement matters? Assuming we get around that, are these statements admissions of the employer? Is there a difference between the two statements concerning admissibility? Is each admissible at common law (where the test concentrates on whether the statement was expressly or impliedly authorized)? Is each admissible under the Federal Rules (where the test is broader)? We have another problem that involves a government official telling an employee of a corporation that the corporation's application will not be approved unless the corporation pays a bribe. These facts raise the possibility that when the employee goes back to his bosses and tells them of this conversation, the employee's statement to his

78. When we get to the catch-all hearsay exception, FED. R. EVID. 807, we ask whether many of the things not included as specific exemptions and exceptions in the Rules can be brought in through the catch-all.

79. FED. R. EVID. 804(b)(3).

80. FED. R. EVID. 801(d)(2).

bosses may be a party admission of the government official—either because the official necessarily authorized the employee to tell his bosses, or because it is a co-conspirator statement (the latter depending upon the facts, timing, and motivation of the employee). Here we explore the co-conspirator requirements and the difficult preliminary-proof problems it entails. Because the employee also testifies to the conversation, there may also be a question of whether this could come in as a prior consistent statement, which requires some additional fact suppositions.

At the end of our study of the hearsay exemptions, I assign something called "Hearsay Quiz," which is a series of twenty-eight short fact problems designed to test nearly everything we have learned in the hearsay and hearsay exemptions material.[81] Unlike most of the problems throughout the course, I ask that answers to this quiz be done in writing. We go over the answers in class. The students grade themselves, and turn the graded answers in. They are allowed to keep a copy to study from for the final exam. At the beginning of the semester and on the syllabus, I have told them that classroom participation can influence me in a doubtful case to raise a grade (say from B on the exam to B+ for the course),[82] and I tell them that good performance on this quiz can do the same thing. I do not lower grades obtained on the exam. The students are quite mature and realize that class participation and answering the problems contributes to their understanding of the material, their performance on the final exam, and their ultimate performance as lawyers, so there is generally no "slacking off."

O. Thirteenth Week—Reliability: Exceptions to the Hearsay Rule That Operate Whether Declarant Is Available or Not: Rule 803

I will only say a few things about my treatment of hearsay exceptions. In this and the next set of exceptions, after noting the theoretical necessity and trustworthiness rationale of hearsay exceptions in general, we discuss each exception in the light of these rationales, sometimes severely criticizing them. I do not mention the catch-all exception until we come to it after all the other exceptions. At that time we may re-visit some of the examples we talked about in connection with other hearsay exceptions, if pertinent. The reason I don't mention the catch-all is that I have found from experience that it engenders a bad attitude in studying the other exceptions. Some students seemed to feel

81. Like most of the other problems assigned throughout the course, these appear in our casebook.

82. Exam grading is done anonymously by number, but after the grade is turned in, the teacher gets a decode sheet with the students' names, and can recognize class performance.

only the catch-all was important.[83] For a similar reason, I take pains to explain (when we come to the catch-all) that the catch-all does not really catch *all* or even *most*, despite the fact that it was I who coined the term "catch-all exception" now in common use.[84]

With respect to Rule 803 (hearsay exceptions not involving unavailability), we go over only Rules 803(1)–(8) and (17)–(18).[85] The students are told to merely read through the other subdivisions of Rule 803.

We introduce this group of exceptions with the present sense impression[86] and excited utterance[87] exceptions. Perhaps the most interesting part of the discussion of these exceptions is how these exceptions reflect what is going on in almost all the hearsay exceptions: The title of the exceptions reflect some feature *inherent in the nature of the statement or the circumstances in which it was made* that is supposed to allay our concerns with at least *some* of the declarant's testimonial qualities, not necessarily all. In excited utterances, for instance, I ask whether it makes sense to assume that a terribly excited person is going to give a reliable report. But apparently it is enough that the capacity to fabricate—lie—is muted, even if the potential for mistaken perception and narration may be increased. We note, however, that the latter may always be argued as a matter of weight to the jury.

In this group of hearsay exceptions, other matters that require some special work with the class include, inter alia, differentiating among situations that are and are not covered by the state-of-mind exception.[88] I assign a problem involving six permutations of declarant statements to help the students with the differentiation:[89]

– (1) A declarant's statement (simultaneous with her discharge of a gun that kills the victim) of her then existing intent to kill the victim, offered in a case where an intentional killing defeats the victim's life insurance coverage;

– (2) A declarant's statement that yesterday she intended to kill, offered in a similar context;

83. While the students are aware there is a catch-all, they don't focus on it until we come to it if I don't mention it. If I do find it desirable to mention it before we come to it, I don't play it up.

84. In my defense, I coined the term when the draft catch-all provision was very broad. I used the term originally as a pejorative, to get Congress to narrow the provision, which they ultimately did before enactment, although not exactly in the language I would have liked.

85. Present sense impressions, excited utterances, state-of-mind, medical diagnosis, recorded recollection, business records, government records, market reports, and treatises, respectively.

86. FED. R. EVID. 803(1).

87. FED. R. EVID. 803(2).

88. *See* FED. R. EVID. 803(3).

89. I am not spelling out here all the details of the problem.

– (3) A declarant's statement that she intends to kill the victim in the future, offered to show (a) the later discharge of the gun was not accidental or (b) that it was declarant who discharged the gun, not another person;

– (4) A now dead declarant's statement "I'm going to X location with Bob," offered to implicate Bob in the declarant's death, which occurred at X place.

– (5) A declarant's statement "My mind contains a picture of the Ford going through the red light" offered to show the Ford went through the red light. This is inadmissible pursuant to the "memory" exception to the state-of-mind exception;

– (6) An example of the "testamentary" exception to the "memory" exception. The testamentary exception embraces material intellectually indistinguishable from the inadmissible declaration in number (5) above, yet it is admissible under the rule.[90]

The relationship between the hearsay exception for medical statements,[91] and Rule 703 (expert may base her opinion on inadmissible evidence) requires considerable explication. I assign a fact-problem hopefully illuminating that matter. The Advisory Committee's Note to the hearsay exception about Rule 703 as it relates to the scope of the hearsay exception appears illogical, but may be practical.[92] But it is not clear exactly what the Note might mean in various situations not directly addressed by it. How would it treat statements to non-treating consultant physicians who will advise a lawyer but who will not be testifying? Or statements a testifying physician does not rely on in forming his opinion? Or statements to a treating doctor overheard by a secretary who wants to testify to them? Or statements to a physician consulted in order to obtain a clean bill of health for purposes of securing employment or securing life, health, or long-term care insurance? Our fact-problems shed some light on these matters. We also raise the question whether recent changes in Rule 703 render the Advisory Note even more suspect.

Concerning the hearsay exception for past recollection recorded,[93] we have a classroom demonstration requiring courtroom-type role playing that shows the foundation needed for this hearsay exception, and distinguishes the doctrine of present memory refreshed.

Some of the other matters that need special attention in class pertain to the business record exception.[94] These include, inter alia, how the business records rule applies to computer generated material and e-mail; the *Johnson v.*

90. In class, I call the "testamentary" exception "an exception to the exception that appears in the state-of-mind exception" or "exception cubed."

91. FED. R. EVID. 803(4).

92. *See* FED. R. EVID. 803(4) Advisory Committee's Note.

93. FED. R. EVID. 803(5).

94. FED. R. EVID. 803(6).

Lutz[95] and *Palmer v. Hoffman*[96] problems; and a series of issues that I will summarize here as arising from the fact that the "regular course" and "routine practice" notions depend upon the level of generality one uses to describe the record and the business activity. We note that the business records exception takes the attitude, as do many of the other Rules, that if evidence is good enough for a particular business, profession, or governmental body, it should be good enough for the courts. We critique this notion. As we do throughout the discussion of hearsay exceptions, we try to stay alert to other rules that might apply either to get the evidence in or keep it out.

The public records exception[97] also requires some special attention, focusing mainly on the distinctions in the rule that relate to (1) the kind of activity or event that is being reported, (2) who prepared the record (law enforcers or others), (3) what kind of case the record is being offered in (civil or criminal), and (4) which side is offering it. What renders a record untrustworthy also claims some of our attention, as does the judicially created "routine records" exception to the ban on law enforcement records,[98] as well as the permissibility of using another hearsay exception (such as business records) to get around the ban, and why a different notion than the normal one that hearsay exceptions are cumulative, might apply to an attempt to use another exception this way.

A final exception discussed from this group is the learned treatises and articles hearsay exception,[99] and how it differs from its common law analog, which allowed these writings only to impeach an expert witness. Yet some of the requirements from its impeachment days are continued in the new rule. We discuss why this might be so.

We conclude with a discussion of whether the whole hearsay edifice so far makes any sense and operates justly. We briefly revisit that subject at the end of our entire discussion of hearsay and all its exceptions.

95. 170 N.E. 517 (1930). This case raises the issue of a person outside the business reporting the fact in issue to the business.

96. 318 U.S. 109 (1943). This case raises the issue of the trustworthiness of a self-prepared favorable business record offered in its own behalf by the business that prepared it.

97. FED. R. EVID. 803(8).

98. When we come to the Confrontation Clause and *Crawford*, we reflect back on a number of things we have studied in the hearsay section, including the government/public records hearsay exception, the ban on law-enforcement records in it, and the routine-records exception to that ban, to see how *Crawford* affects them, if at all.

99. FED. R. EVID. 803(18).

P. Fourteenth Week—Exceptions to the Hearsay Rule Requiring That the Declarant Be Unavailable, and Other Hearsay Concepts: Rules 804–07; Hearsay and the Constitution

Regarding hearsay exceptions requiring unavailability, we first study what unavailability means. The most difficult part of this is the parenthetical clause in Rule 804(a) that imposes what we call the "duty to depose."[100] This duty can be tricky, since it only applies in certain situations; requires not only taking a deposition, but asking certain questions at a deposition; and is probably circumscribed by a "reasonableness" notion. I assign a fact-problem that explores all this. We also note the provision that unavailability procured by the offeror is not unavailability,[101] and explore various fact-situations that might come within the notion of procured unavailability. We point out that this provision is the obverse of the "forfeiture by wrongdoing" provision,[102] where it is the *objector* who procured the unavailability. Later we examine situations that might come within this forfeiture provision and note the "trial within a trial" problem. We consider the justice of both these provisions.

On the former testimony exception,[103] most of our time is spent on the difference between criminal and civil cases; whether the predecessor-in-interest requirement is different than the "similar motive" requirement; how the "similar motive" requirement is a more relaxed version of the identity requirement of the common law; and what "similar motive" means in various contexts. We have some fact problems involving earlier and later proceedings where some parties have changed, the issue is slightly different, the earlier proceeding was an agency proceeding, or one proceeding is civil and one criminal. We explore whether preliminary hearing transcripts can qualify, or a grand jury when the transcript is being offered *against* the prosecution.[104] We distinguish the "former inconsistent statements at a proceeding" provision of Rule 801(d)(1)(A). We ask why the former testimony hearsay exception, which seems to have almost every judicial safeguard, requires unavailability, whereas those hearsay exceptions that are less safeguarded (those in Rule 803) do not.

With respect to dying declarations,[105] we note some of the crazy assumptions behind, and patchy limits of, both the common-law and the Federal Rules version of this exception, while identifying the differences between the two versions. As we did with excited utterances and present sense

100. FED. R. EVID. 804(a)(5) ("(or in the case of a hearsay exception under subdivisions (b)(2), (3), or (4), the declarant's attendance or testimony)").

101. *See* FED. R. EVID. 804(a).

102. FED. R. EVID. 804(b)(6).

103. FED. R. EVID. 804(b)(1).

104. *See*, *e.g.*, United States v. Salerno, 505 U.S. 317 (1992).

105. FED. R. EVID. 804(b)(2).

impressions, we reflect briefly again on the reasons behind and applicability of the requirement that the statement must relate to the event. We note that a dying declarant may well be quite enfeebled and thus not very reliable, and though this (perhaps oddly) does not invalidate the exception, it certainly can be argued as a matter of weight.

Regarding declarations against interest,[106] we distinguish, using fact situations, party admissions. We have some assigned problems involving the requirement of declarations against interest that the declarant know the statement is against his interest; involving a declarant who makes a statement that hurts one interest and helps another; and involving a statement of amount of earnings made by a decedent declarant during life to the IRS on her tax return, that is either in interest or against interest depending on which side now offers it on damages in a wrongful death suit.[107] We study *Williamson v. United States*[108] and some of its vagaries and extensions. We explore whether as a practical matter any interests are left out of the rule. We talk about declarations against penal interest, *Chambers v. Mississippi*[109] and its extensions and limits, the provisions of the rule that are parallel to *Chambers*, and the difference between declarations against penal interest offered by the criminal defense and those offered by the prosecution. We inquire whether this difference in standards is unconstitutional. We discuss the amendments that have been proposed to remedy the difference but that have now been put on hold because of *Crawford v. Washington*.[110] I have deleted some of my discussion of declarations against penal interest offered by the prosecution, because I believe it has been obviated by *Crawford*.

Then we take up the catch-all or residual exception.[111] We begin with a problem involving a statement blurted out about an auto accident by the driver a considerable amount of time after the accident, but immediately upon waking up from a coma that stretched from the time of the accident to the blurting. Is it an excited utterance? A present sense impression? If not, can it qualify for the catch-all? This problem allows us to discuss the requirements of the catch-all, the near-miss notion, the kinds of guarantees of trustworthiness required under the catch-all, and whether a catch-all is a good idea. Is a catch-all more necessary where the other exceptions are rigidly codified? Does the catch-all (or indeed, any liberalization of hearsay exceptions) make more sense in a system where judges can comment on the weight of evidence? What are the tactical considerations involved in a lawyer deciding whether to take his

106. FED. R. EVID. 804(b)(3).

107. The question really is which of two statements inherent in the statement of amount to the IRS is being offered: "I don't make less than . . . ." or "I don't make more than . . . ."

108. 512 U.S. 594 (1994).

109. 410 U.S. 284 (1973).

110. 541 U.S. 36 (2004).

111. FED. R. EVID. 807.

chances that the evidence will be held to be within the other hearsay exceptions (here, in the coma case, excited utterances or present sense impressions) or give the notice required by the catch-all? What is the function of notice in terms of the policy of the hearsay rule and why isn't notice required under other hearsay exceptions? What does the catch-all do to the predictability and uniformity that the Rules were meant to promote? Are the provisions too vague and subjective? Can lawyers plan their cases and predict and apportion expenses in order for their clients to make good decisions about litigation?

We examine the history and evolution of the catch-all through many progressively narrower drafts, starting with one where there was no rule against hearsay at all, but the judge was to decide admissibility of out-of-court statements based on her assessment of necessity and trustworthiness. The standard hearsay exceptions were listed as non-exclusive examples of where a judge might find the evidence necessary and trustworthy. We discuss the pros and cons of that approach.

We note that the trustworthiness requirement in the catch-all does not mean corroboration. We explore, with hypos, the imprecision of the requirement that the offered evidence must be the best reasonably available evidence on the point being proved. What is the point that is being proved? If the offered hearsay says the light was green, and there is other evidence it was red, is the point being proved by the hearsay, that the light was green, or merely "the color of the light"? Assume that on the one point, the offered hearsay is the only and best evidence. On the other, it may not be. Or suppose the offered hearsay is that the crash was heard at 12:17 p.m. The records of the computer that controlled the relevant traffic light show it was green at that time. Suppose the attorney offers the hearsay that the crash was at 12:17 in order to prove that the light was green. Is the "point" on which he is offering the hearsay, that the light was green, or that the crash took place at 12:17? Is he offering it on the mediate point or the ultimate point? It might make a great deal of difference because there might be other more satisfactory evidence on one of these "points" than on the other. The proffered hearsay may be the only evidence of the time of the accident, but there may be other arguably better evidence (say an eyewitness) of what color the light was. There are further questions we explore in this connection. Is a live witness always better evidence on a point than hearsay would be? Assuming there already is in the record evidence on the point, will cumulative evidence that reinforces the point always be deemed unnecessary? The evidence offered under the catch-all must be the best evidence on the point that the proponent could procure through reasonable efforts. What evidence is better than other evidence? What efforts are "reasonable"? On all of these matters, what *should* the rule be? We finish up on the catch-all by examining some materials on whether the catch-all is being fairly and even-handedly applied and whether it is being applied the same way in civil and criminal cases.

We near the end of our hearsay discussion by examining the Rules' provision on hearsay-within-hearsay,[112] that is, chain or multiple hearsay. We play the childhood game of "telephone"[113] in the class, to show the deterioration in accuracy, the more repetitions there are of an oral message. Then we consider a fact-problem, involving the story of an auto accident witnessed by one neighbor, who told it to another, who told it to another, etc., multiple times from one neighbor to another over back fences and over the telephone to friends. Can the last one in the chain testify in the auto accident case, to the story of the accident? Is each recounting a present sense impression or excited utterance? What is the "event or condition" (spoken of in the present sense impression and excited utterance rules) for each person in the chain? Can something you hear be an event or condition? Do any other rules (like 403) come into play? What *should* be the result?

Near this point in the course, the students write out at home and turn in answers to a multi-part "Hearsay Exceptions Quiz" that performs a similar function to the earlier "Hearsay Quiz" and is graded the same way, except this quiz tests what they have learned about hearsay exceptions. It too is in our casebook.

We conclude hearsay with a discussion of the future of hearsay, including a consideration of some of the innovative hearsay developments and proposals.

Q. Constitutional Confrontation: Crawford

As indicated above, I find that it works better to reserve our Confrontation Clause[114] discussion until after hearsay and its exceptions. Otherwise there is a misperception that the teacher has to fight, which is that the hearsay exceptions do not matter because confrontation takes care of it. But also, there is a much better understanding after the hearsay-and-exceptions study, of the kinds of fact situations that can arise, and how confrontation might apply to them.

On the Confrontation Clause as it relates to hearsay, in addition to having the students read *Crawford*[115] I rely on a brief textual exposition (written by myself) of *Ohio v. Roberts*,[116] subsequent interpretations of *Roberts*, *Crawford*, and what *Crawford* does to *Roberts*. The students also read something on the Sir Walter Raleigh case. Then in class, I explore some of the ramifications of what *Crawford* has done. Does *Roberts* have any continued vitality (for

112. FED. R. EVID. 805.

113. I write down a short message on a piece of paper and read it to the first student in the class. She whispers it to the next, who whispers it to the next, on through the class until it reaches the last student, who then tells out loud what the message was. I then have someone compare what this last student says with the message on the piece of paper, which I have kept hidden until this point. Needless to say, there is always a considerable loss of fidelity.

114. U.S. CONST. amend. VI.

115. 541 U.S. 36 (2004).

116. 448 U.S. 56 (1980).

example, for non-testimonial statements)? What does "testimonial" mean in a variety of hypothetical situations that vary from the relatively clear testimonial statement in *Crawford* itself? I focus in part on 911 calls in domestic violence cases, and I use the New York Court of Appeals case of *People v. Moscat*[117] to explore possible alternative interpretations of *Crawford* in that context. I also reproduce the *New York Times* article reporting that the real facts in *Moscat* were not as the court supposed them to be.[118] Although that lends color, it is not ultimately of legal significance.

Then we go back and revisit concepts, cases, problems, and hearsay exceptions that might or might not be affected by *Crawford.* These include statements not offered for their truth, government records, declarations against interest, *Bourjaily*, and others.

We conclude by inquiring whether students think *Crawford* is better than *Roberts* and what they think the future holds in this area. Is *Crawford* more, or less, subjective than *Roberts*? Is *Crawford* pro-prosecution, or pro-defense? Will it ultimately be held that the Confrontation Clause has nothing to say about non-testimonial statements, or will *Roberts* still apply? Will that change whether the prosecution or the defense is favored? What is the message to states about what they can do with their hearsay rule? Is the Court headed along the right path on Confrontation analysis?

There are now two cases pending in the United States Supreme Court that will have to be added to the *Crawford* mix. They promise to shed light on *Crawford* and what "testimonial" means. One involves a 911 call;[119] the other, statements to police on the scene as part of an attempt by police to ascertain whether a crime occurred, which statements were then reduced to affidavit form.[120]

I also like to say a few words in class about another application of the Confrontation Clause that is probably unaffected by *Crawford*: the Supreme Court's *Coy v. Iowa*[121] and *Maryland v. Craig*[122] decisions, involving child witnesses giving testimony in criminal cases against their alleged assaulters, through a television hookup or from behind a one-way screen. If we have time, I also briefly review some of the material we have touched upon in the course on the Compulsory Process and Due Process Clauses.

117. 777 N.Y.S.2d 875 (2004).

118. Sabrina Tavernise, *Legal Precedent Doesn't Let Facts Stand in the Way*, N.Y. TIMES, Nov. 26, 2004, at A1.

119. Davis v. Washington, No. 05-5224 (filed July 8, 2005) (oral arguments heard Mar. 20, 2006).

120. Hammon v. Indiana, No. 05-5705 (filed Aug. 5, 2005) (oral arguments heard Mar. 20, 2006).

121. 487 U.S. 1012 (1988).

122. 497 U.S. 836 (1990).

R. Writings and the Like: FRE Articles IX and X, Authentication and Best Evidence or Original Documents Rule

I assign this as background reading, which the students can do at any time during the semester.

S. Final Exam

The class ends with some discussion of how to approach the final exam. Previous final exams, and answers, are available to the students online, and they can ask me questions, either in class, by e-mail, or in my office, about that material, or any other matter in the course. These opportunities for outside-of-class consultations with me are of course open throughout the semester and I encourage the students to take advantage of them. Although there are approximately 100 students in the Evidence class, consultations have been regular but not burdensome.

My final exam is three hours in length and is on a limited open-book basis: students can bring to the exam any of the course materials and anything they write on them. This is announced at the beginning of the course. Other professors may prefer a completely open book basis and/or take-home exams.

My exam questions usually involve several essay questions and a series of shorter questions that each can be answered in a few lines or less. I do not give multiple choice questions or questions that need to be answered with the equivalent of a short "yes" or "no" without opportunity for an explanation. I do not give machine-gradable exams. Except for machine-gradable exams, it is required at Georgetown that the professor grade his or her own exams. Almost all of the exams are answered on computers and are printed out, although students do have the option to hand-write. The computers are the students' own laptops. Beginning recently, they are not disabled in any way while the student takes the exam, and the students are largely trusted not to consult disallowed material. There are proctors. The grade range is A, A-, B+, B, B-, C+, C, C-, D, and F. There is a strongly recommended curve that discourages more than a few of the lowermost grades. There is also a complicated pass-fail option for students if the professor does not object, but the pass-fail option entails some risk for the student who opts for it. The professor must grade the exams, assigning the regular grades, even if a student has opted for pass-fail. The professor is not informed of who opts for pass-fail.

IV. CONCLUSION

I hope the above yields some insight into what I hope to accomplish in my Evidence course at Georgetown University Law Center.