EVIDENCE OUTLINE – LAWSON SPRING 2011

THEORIES AND FRAMEWORKS

1. The Cognitive Structure of Legal Proof – Proving anything in any field requires three things:
    a. *What Counts as Proof?*
        i. What sorts of things would tend to establish the thing that you're trying to prove?
        ii. NORMS – both implicit and explicit
            1. Certain norms of reasoning govern what is admissible – not only as a matter of some sort of distinct, concrete procedural rule
            2. With explicit norms:
                a. Is truth the only goal of the process?
                b. Or is there something else? i.e., fairness
        iii. EVIDENCE SET – set of things that are deemed to count towards establishing a particular claim
            1. Federal Rules of Evidence
            2. Operational versions of the evidence rules don't always track what's written down
    b. *How Much Do These Things Count?*
        i. Assign numbers to particular items in an evidence set to determine how much things count
            1. Norms (whether you're aware or not) that tell you how much things count
        ii. Law saying basically nothing to its decision-makers about how to weigh evidence – no formal rules
            1. Trying to come up with a system for how much weight people should give to evidence would be disastrous
            2. Even if measuring was possible, evidence doesn't come in discrete little bits
                a. They fit together (or don't fit together) in complex patterns
                b. Adding new pieces changes the relative significance of the pieces that you already had
        iii. Law just sort of gives up and tells decision-makers that they must be reasonable – part of the standard of proof
        iv. If we leave it to general norms of decision-makers to decide how much to weigh evidence, then why not leave it to the decision-maker to decide what counts?
            1. Most other countries do this – legal system that operates on free proof (let everything in and the judge can decide)
            2. Is there a logical difference between saying that something is inadmissible on the one hand, and saying that something is admissible but completely irrelevant on the other hand?
                a. There is no LOGICAL difference – in both cases, the decision-maker doesn't consider the particular piece of evidence
                b. There could be a PRACTICAL difference
                    i. If the rules of admissibility prevent the decision-maker from seeing the bloody shirt, then it doesn't get considered
                    ii. If the decision-maker sees the bloody shirt, but then is told that it is completely irrelevant, *practically*, the jury members cannot completely disregard the bloody shirt
                c. Basically don't have a system of free proof because there are certain things you don't want to the decision-maker to see
            3. Technically the rules of evidence apply to bench trials, but in practicality they're applied less leniently – judges aren't going to enforce the rules as strictly against themselves
    c. *How Much Proof Do You Need?*
        i. Standard of proof becomes very important
            1. Can have exactly the same evidence set, and the same norms for how people weigh the various issues in the evidence set, but depending on what the standard of proof is, can have very different conclusions as to whether the proposition is right
        ii. STANDARDS
            1. Rational Basis

a. Accept a proposition as true if it's not wildly insane
2. Preponderance of the Evidence
    a. Accept a proposition as true if it's more likely than not that it's true
    b. Standard in most civil trials
3. Clear and Convincing Evidence
    a. Accept a proposition as true if it's highly and substantially more likely than not that it's true
    b. Must have a strong degree of confidence that it's true
4. Beyond Reasonable Doubt
    a. Standard for criminal cases

2. <u>Structure of Trials – Operational Structure of Legal Proof</u>
    a. What is it that you're trying to prove at trial?
        i. Claims, propositions about the facts or law
        ii. Some ultimate results that you're trying to establish
        iii. Trying to prove that you ought to win, with whatever legal consequences flow from that
    b. TWO APPROACHES
        i. *<u>Elements Approach</u>*
            1. Tell the decision-maker that P has to prove every element of the offense, and if there is no relevant defense, then D is guilty
            2. BUT, if P (or prosecution) fails to find any of the operational elements, then rule for D
            3. Relevant standard of proof applies to each elements
            4. Every substantive legal norm can be broken down into legal elements, BUT is that the way that decisions are made . . .
        ii. *<u>Comparison of Stories Approach</u>*
            1. The theory is that a trial is not about arguments over particular elements – trial is really about P coming in and saying that D did him wrong, and D saying that's not what happened
            2. Parties offer competing versions of the events and the legal consequences that stem from the events
            3. Fact-finder takes in all of the evidence and weighs in favor of P – i.e., that P was done wrong – and the natural flow from this is that all of the various elements of the offense are met
                a. "State of the world" → therefore "element, element, element, etc."
    c. Operationally, the difference between the approaches:
        i. Under the elements approach, D never has to open his mouth
            1. P puts up a case and brings evidence of each element
            2. D does not have to offer a defense – can remain silent and still win if P does not meet his burden
        ii. Under the alternative approach, if D saying nothing, then D loses
            1. No alternative set of events that D offers, so fact-finder has no choice but to find for P
            2. Operationally, this approach places more of a burden on D
    d. By organizing legal structure around elements of causes of action, the law formally signs on to the first conception
        i. BUT doesn't tell a decision-maker the elements of the offense until after the trial is basically over
        ii. Don't know the things that they were supposed to be checking off until the whole thing is done
        iii. Problem for advocates
            1. Have to shape presentation in the formal way so that at the end of the day, there is sufficient evidence to prove each of the elements
            2. But if they try to structure their argument and presentation that way before the jury knows what those elements are, the jury is not going to be persuaded
            3. Can't do this in opening statement because you can't lay out the law
            4. The way that trials are structured, lawyers basically have no choice but to present their cases as "there it is" – to try to create in the decision-maker a sense of what

happened, so at the end of the day when they are told that these are the five things you have to find, they will find those five things within the narrative presented

iv. Structure of the trial is somewhat incoherent . . .
    1. The fact that each element has to be proven doesn't fit the procedure structure that the law has set up where the jury isn't told the elements until the end
    2. Places an enormous amount of weight on the closing statement – first chance lawyers have to relate those things to each other
v. Good argument for doing so is that the idea is that if jurors know the legal instructions in the beginning they are likely to make a judgment early on without taking into account all of the evidence

e. Critiques of Elements Approach
    i. If the goal of the legal system is to make sure that the majority of cases are decided correctly, there is a reason to think that the elements approach leads to more incorrect decisions
        1. Example: Have a rodeo with 1000 seats (packed); problem is that when you look at the gate receipts only 499 paid to get into the rodeo, so 501 people jumped the fence. The owner calls a random person out of the audience and asks if you have a ticket stub. The person says that he didn't keep his stub.
            a. If P (the owner) must establish that it's slightly more likely than not that he should recover, then P would win
                i. 50%+ chance (501/1000) that random D did not pay
            b. BUT, if that random person is liable, then so is every single person of the 1000 in the arena
                i. It's more likely than not EVERY person in the arena did not pay, including the people that did in fact pay
            c. If the goal is to minimize errors, then ruling for P is going to be less likely to be erroneous
            d. HOWEVER, most people think that P should NOT win regardless
    ii. If you attach probability theory, the less elements you have, the less likely that you will be able to meet the standard of proof
        1. Have to multiple the chances of each – the number keeps getting smaller as you multiply
        2. Therefore the more elements that you have, the less likely P is to win
            a. Example:
                i. If 4 of the 5 elements have a 99% of being true, and 1 element has a 48% chance of being true, then P LOSES
                ii. If all 5 elements have a 51% chance of being true, then P WINS
        3. Doesn't really make sense that the law would be created this way – the number of elements to the claim should not have an effect

f. Considerable body of evidence that suggests that in point of fact, what everyone in the legal system actually does in the course of litigation is compare stories
    i. If it were more favorable to one or more parties to argue in terms of elements, then why would everyone fall into the storytelling mode?
    ii. When you are litigating a case, you're not trying to prove that what you think is true, you're trying to convince a decision maker to rule in your favor
        1. Have to give the decision-maker what he wants
        2. If what the decision-maker wants is a story of what happened, then that is what you have to give them

g. Goes to structuring the case – witnesses to call, sequencing
    i. Theory of the case: overarching structure into which you are going to place the evidence which you are hoping to get to introduce
    ii. Have to focus on the point of the enterprise
        1. From the standpoint of the lawyers, it's how to convince the decision-maker that they have proven their case
        2. From the standpoint of the jury, want to get it right – empirical work on juries shows that most of the time they take their job quite seriously

3. From the standpoint of the judge, want to have a fair procedure in the courtroom and not get reversed on appeal

iii. Not ALL about getting right answers – also about getting them at certain costs, under certain cultural constraints, etc.

3. The Domain of Evidence Law
   a. Rules of evidence apply ONLY TO PROPOSITIONS OF FACT
   b. Two large problems with this:
      i. If the logical structure of proof applies to anything at any time, whenever the parties are arguing about what the law means, doesn't there have to be operative some notion as to what counts, etc.?
      ii. Any attempt to try to draw a bright line between propositions of law and propositions of fact is doomed
         1. Example: Suppose that a case turns on who owns a railroad car
            a. Sounds like a proposition of law – to say that someone owns something is a legal conclusion
            b. BUT can also characterize this as: Was the signature of the bottom of the paper the signature of the owner of the company? Does the piece of paper say "Sale of railroad car?" Was the paper that said this, and signed by the owner, real and not forged?
               i. These are all propositions of fact, that make irrational or reversible, any conclusion of law other than A owns the railroad car
   c. *Can always reduce propositions of law to propositions of fact*

ALTERNATIVES TO EVIDENCE

1. RULE 201: Judicial Notice

a. TEXT OF RULE

i. (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

1. *"Judicial Notice:" Used in two distinct senses in evidence law*
   a. *Technical sense describing what 210 is about*
   b. *Also sometimes used in a broader sense to describe most or all of the entire family of things referred to as "alternatives to evidence" – including things that jurors are allowed to take for granted, etc.*

ii. (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either

1. **(1) generally known within the territorial jurisdiction of the trial court or**
2. **(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.**

iii. (c) When discretionary. A court may take judicial notice, whether requested or not.

iv. (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

1. *Appealable error if judge fails to do so*

v. (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

vi. (f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

vii. **(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed**
    1. *Jury is the fact-finder in a criminal case and has the option to disregard factual findings deemed by the judge as obvious or approvable*
    2. *Jury can acquit based on a finding that a judicially noticed fact is untrue, AND acquittal would not be appealable*

b. BASICS
    i. Judicial notice is a way of short-circuiting the process of having to prove propositions of proof that are very obvious
    ii. Otherwise, would have to bring in evidence to prove basically everything – each claim can be broken down into more basic things that one presupposes
        1. Example: Suppose that you have a person that is arrested for a crime that took place in Cleveland at 10 PM Eastern Time. The defense was that D was in LA at 9:15 Eastern Time (has security footage proving it). Does that mean D is automatically off the hook?
            a. Technically speaking, in order to establish D's innocence, have to add facts
                i. There are 2000 miles between LA and Cleveland
                ii. Forms of transportation have specific speeds
            b. Judicial notice prevents D, in order to establish the alibi, to have to bring in experts to establish these facts (i.e., experts on transportation, distance, etc.)
    iii. Example: A federal murder indictment was just issued against Jared Laughton. The reason that there is a federal indictment in this case is that one of the victims was a federal district judge – whoever kills or attempts to kill any officer of the United States government engaged in official functions shall be punished under federal law
        1. Government has to prove that Judge Rohl was present in the parking lot "engaged in . . . the performance of official duties"
        2. Judge Rohl was there to say hello . . . not the performance of official duties
        3. If, in fact, Judge Rohl was going to talk to Rep. Gifford about overcrowding, judicial workload, etc., that would be official business
            a. Going to come up with testimony of witnesses, etc. to establish that he was there to perform some official functions
            b. Otherwise it's not a federal crime
            c. *This is not the kind of claim that can just be assumed – not the same kind of obviousness as knowing that LA and Cleveland are more than 45 minutes apart*
        4. What about Judge Rohl being a federal officer or employee?
            a. Documents that show employment status – can formally introduce this into evidence
            b. But what if government forgets to do that – does it destroy the case? Is it so obvious that he's a federal employee? Is it so obvious that it makes no sense to go through more costly process of putting it into proof
                i. Maybe if you're having the trial in Arizona, it would be generally known that he was a federal employee, BUT since the case will probably be in CA, people may not be as likely to generally know this
                    1. Something may be obvious in one place and not in another
                        a. i.e., facts about farming equipment may be known in Kansas and not in Manhattan
                ii. Easily verifiable – exists and in a non-challengeable character
                    1. Does this matter?
            c. Because this is a criminal case, jury could acquit because of finding that Judge Rohl was not a federal employee and this would not be appealable

c. DISTINCTION BETWEEN ADJUDICATIVE FACTS AND LEGISLATIVE FACTS
    i. Legislative Facts: The types of facts that go into the process of formulating legal rules
        1. Name is misleading because it's not always legislatures formulating the rules
            a. Usually statutory interpretation, making of CL by judges
        2. If parties are in disagreement about the way the judge should read the law in the case, don't have to call witnesses/experts to support those claims through the normal evidentiary process
        3. Simply write briefs and reference the experts without cross-examination
        4. Example: Suppose that a judge is deciding a case and the claim is that there should be strict liability for the sale of ladders
            a. P comes in and says that the judge should adopt this rule b/c it's unnecessary for whatever reason
            b. D says that this will frustrate normal market incentives and will redistribute wealth
            c. The parties make factual claims about consumer behavior and knowledge, psychology, economics, etc. BUT they are not called upon at trial to support those claims . . . just cite their support in their briefs
        5. Judges are NOT limited by the information that the parties present in the their briefs and otherwise – can go out and look for other info
            a. Not subject to formal requirements of Rule 201
    ii. Adjudication Facts: Basically a name that evidence law has settled on for facts that are not legislative facts
        1. Not formally defined in the federal rules, although states have definitions
        2. Things that are particular to the case under dispute, that uniquely and specifically involve the parties and events in the case that is under dispute
            a. Normally prove these things by introducing evidence, witnesses, exhibits, etc.
        3. Subject to formal requirements of Rule 201 – Fact finder limited to the record
    iii. On Appeal
        1. Adjudicative fact found by the jury:
            a. Jury overturned only if *no reasonable person could have concluded what the jury concluded*
        2. Adjudicative fact found by the judge
            a. Judge overturned only if *clearly erroneous*
        3. Legislative fact found by the judge
            a. Reviewed *do novo* as if they are propositions of law because they are part of the lawmaking process
    iv. No clear dividing line between the two, but most of the time it turns out not to be a problem
        1. Example:
            a. Questions as to general relationship between mixing Pamelor and alcohol (see next section) could be legislative because it's of general application
            b. Questions as to relationship between particular amount of Pamelor and particular amount of alcohol in this particular person's brain is definitely adjudicative
d. LIMITATIONS
    i. *ALWAYS ASK: What is the proposition for which the evidence is being offered?*
        1. Example: *In re Thirty Acre* (debtors in bankruptcy cannot get out of debt based on willful or malicious injury; this D arguing that injury was NOT willful and malicious because he was drinking and taking Pamelor at the time)
            a. Even if you're not an expert, can be willing to take as true that taking prescription drugs with alcohol can cause you to be in a bad state
            b. D's Options
                i. D can bring in expert witnesses to testify about the chemical effects of Pamelor, effects of drinking, effects of mixing, etc.
                    1. BUT this case to be done at a cost

ii. D instead asks for judicial notice based on an insert produced by the manufacturer (pursuant to FDA regulation) that advises against taking the drug with alcohol
c. Court refuses judicial notice
d. Could say that chemical effects of Pamelor + alcohol don't meet requirements
i. NOT generally known within territorial jurisdiction
ii. NOT easily verifiable by sources whose accuracy cannot be questioned
1. Insert is not enough, need more
a. Perhaps uniformly accepted treatise on pharmacology
b. Official FDA directive
c. Information obtained from FDA or medical dictionary
2. Not necessarily wrong, but not obviously correct either
e. BUT, would knowing the chemical effects of Pamelor + alcohol do the debtor any good . . . ?
i. The question in the case is not whether mixing Pamelor and alcohol in general impair someone
ii. The question is *<u>whether mixing the certain amount of both that this particular person took, and his specific brain composition caused him to be impaired</u>*
1. This would NEVER be established though judicial notice
2. Too specific

e. SOURCES
i. Personal knowledge of the judge does not count – not considered an unimpeachable source
1. *Storm Plastics v. US: trial judge taking judicial notice on the quality of fishing lours*
2. *US v. Lewis: judge took judicial notice of general anesthetic that he had been under recently*
a. *Could come up with sources that show GENERAL connection between general anesthetic and ability to think clearly (not for particular D), BUT judge's recent operation is not one of them*
ii. Not clear what types of sources are within the rule
1. Rastafarian case: use 1967 dissertation and 1960 research paper to prove that marijuana is part of the religion . . . probably COULD be judicially notices, but need better sources
2. Establishing amount rainfall in area
a. National Weather Service statistics on rainfall
i. Difficult for someone to say that this is not a source whose reliability can't reasonably be questioned
b. Also, secondary sources that draw material from National Weather Service
i. i.e., almanacs . . . but depending on the type of almanac
3. Ship that runs aground, dumps a bunch of oil off of Guam, captain is being sued for N on the ground that only a brain-dead moron would take the ship off of Guam during typhoon season – question of what would make things typhoon season
a. Can establish through expensive process of trial/experts
b. Judicial notice that Guam gets hit by typhoons, and particularly in November?
i. Does everyone in Guam know this? YES
ii. Even if everyone did not know this, isn't this something that you could get a reasonably unimpeachable source on? YES, National Weather Service statistics
4. NEWSPAPERS

a. Inmate who spends all time filing lawsuits, courts sometimes get sick of people, trial court finds that inmate has lots of money and therefore shouldn't get status where doesn't have to pay fees
    i. Gets info from local newspaper article calling the inmate wealthy, and quoting him as having made thousands of $ from extortion activities in prison
        1. Not sufficient basis for taking judicial notice – newspaper is NOT a source whose accuracy could not reasonably be questioned
b. In an age discrimination suit, D says P was not fired b/c of age, but the company was firing lots of people – to support judicial notice, uses newspaper article describing how many people they're firing
    i. Mere fact that it's a newspaper as the source would not establish it as something whose accuracy could be questioned
    ii. Could this be evidence that the layoffs were generally known through the community of the trial?
    iii. Close call as to whether judge could take judicial notice

5. Tobacco company lawsuit, D's say that since late 1960s, health hazards and addictive nature of smoking are common knowledge
    a. Little too controversial

iii. Judicial notice of factual findings in prior case is not appropriate
1. NOT generally known in the territory
2. NOT coming from sources whose accuracy cannot be questioned
    a. Trial judges make mistakes
    b. All that it takes to enter something as a finding of fact is preponderance of the evidence
3. Judicial notice that factual findings were in fact made would be appropriate but NOT judicial notice of the subject of the findings themselves

f. "JUROR NOTICE"
i. **<u>The case for any party is going to be the sum of:</u>**
1. **That which they formally introduce into evidence**
2. **That of which they take judicial notice**
3. **All of the factual judgments, assumptions, hunches, prejudices, etc. going through the mind of the decision-maker → JUROR NOTICE**

ii. Anyone is inescapably going to be making lots of factual judgments that are not part of the formal evidence at trial
iii. When testimonies are in conflict, may be necessary to rely upon things like facial expressions, tone of voice, body language, and general things that we use to figure out if we believe whether someone is telling the truth
1. Suppose case relies on testimony of star witness, and lawyer has reason to believe that witness has some mannerism that will make people not believe them (i.e., witness stutters)
    a. If lawyer convinces judge it's relevant to the case, can introduce evidence to show that stuttering is not associated with lying (bring some language expert)
    b. Same idea with eye contact – many people find this relevant
        i. If star witness comes from a culture in which it's rude to stare at people, so this witness will not be looking the jurors in the eye, lawyer can ask the witness why he's staring down to prevent jurors from using background judgments against the witness

iv. Not much you can do about the background proposition of fact that are essential, but not part of the process
v. It IS clear that jurors cannot go out and conduct their own investigations → ILLEGAL
1. The juror would then become a witness, BUT a witness who is not sworn in, not s/t cross-examination or other normal processes used
2. HOWEVER, in most states no one would ever catch it because you aren't allowed to talk to jurors after the case to find out what they did/said (some states you can)

3. Example: "12 Angry Jurors" – knife with distinctive handle introduced into evidence . . . murder weapon AND D had it
    a. However, in the particular neighborhood, everyone had a knife with that handle
    b. Crucial element in ultimate acquittal
    c. The fact that this knife was common was never introduced into trial
    d. Never part of judicial notice
    e. Something that the juror went and found out and convinced the other jurors of

vi. Has been held that it's improper for a juror to go and consult a book about an issue relevant to the case

vii. There are more difficult questions of how much jurors can rely on their own personal background information - Where is the line between a juror acting improperly as an expert witness AND a juror acting as an agent that is specifically chosen by the law as a member of the community
    1. It's one thing to say that jurors can't go dig out evidence, but on the other hand the whole point of using a jury is to draw on different backgrounds and knowledge
    2. Example: Suppose that instead of going to neighborhood, juror just lived in that neighborhood
        a. Says that he sees that kind of knife everyday in the neighborhood – doesn't conduct an investigation, but that just happens to be part of the juror's knowledge
            i. Harder case
            ii. Generally thrust of law would suggest that it's wrong for jurors to rely on that knowledge
    3. Can't say that jurors can rely ONLY on formal evidence and judicially noticed evidence
        a. Psychologically can't – no one can shut down their entire brain and focus on just those propositions
        b. Whatever set of proposition you come up with based on those two things is going to be incomplete
            i. Need assumptions, connections, etc.
            ii. Have to be able to rely on some stock of knowledge that they have
                1. If it's just things that everyone in the community knows, then it's just replicating judicial notice
                2. So it has to be something more
    4. BACKGROUND KNOWLEDGE FOUND IMPROPER
        a. Murder case in TX (TX is one state that allows lawyers to talk to juries afterwards) involving strangulation
            i. One of the jurors was an ex-marine that knew a lot about strangling people with cords
            ii. Shares info with jurors, discovered after trial, and held improper
                1. Can argue that a juror with this type of knowledge is essentially testifying as an expert witness without being s/t to cross-examination, etc.
    5. BACKGROUND KNOWLEDGE FOUND OKAY
        a. Case from NM: D being charged with child abuse, child stabbed with screwdriver. Defense was that kid started to fall, D tried to catch him, but kid had fallen, cracked his head and landed on screwdriver that had fallen from counter. When D was found holding screwdriver, he said he was just trying to prevent the child from taking it out and bleeding to death
            i. One of the jurors who had some sophistication of mathematics, used simple version of conjunction rule
                1. There were a series of events that each had probabilities independent of each other
                2. So made chart . . .
                    a. Kill fell down

b. Fell exactly on screw driver
c. Etc.

3. Assigned rough probabilities of each event and used probability rule to find that D's story was almost impossible – one in ten billion

ii. After trial, D claimed this was improper b/c testimony about probabilities should be in court room

iii. Held to be okay – general knowledge of juror

1. All he did was formalize what other jurors were already saying – not in a million years
2. Didn't go out and investigate anything
3. Didn't consult a book

viii. Utilizing this background information is unavoidably adding factual content to the case, but also just the jurors processing material that they have in front of them

2. **Judicial Comment on the Evidence**
   a. In most jurisdictions the trial judge has the power at the conclusion of the case, to take the prerogative of summing up for the benefit of the jury, the general thrust of the evidence presented, and to provide his opinion
   b. In essence, another form of "evidence" that is part of the case
   c. Judge does not get sworn in or cross-examined on comments
   d. How does the legal system regulate this?
      i. Some states don't do it
      ii. Very difficult to regulate in the jurisdictions that allow it
         1. Nothing in Federal Rules of Evidence about judicial comment – seen as part of Federal Rules of Civil Procedure
         2. Parties can claims that judge substituted his judgment
            a. Example: Judge said that he saw witness rubbing his hands and that's a sign of lying
               i. Didn't take judicial notice of this
   e. Is the comment materially difference from taking judicial notice in a criminal trial? Basically telling the jury something that they can choose not to believe . . .
      i. Doesn't that suggest that all judges' comments should be s/t same rules as judicial notice
      ii. By the time the judge is sending the jury off it's too late for that
      iii. Rule 201 does not apply
3. **Stipulations**
   a. Judicial notice is largely concerned with facts that are so obvious that it seems dumb to make the parties go through formal procedures of proving them
      i. All of that presumes, just like the law of evidence presumes, that one side is trying to get certain evidence to be part of the case and the other side doesn't want it
   b. Much of the time, the sorts of things that are essential to the case of one side or the other just aren't going to be contested.
      i. Contesting things costs $$ as well
      ii. Judicial notice is one way of dealing with that – but only applies to facts that are obviously known in the community or capable of being readily established . . . might be facts that don't fit either of those.
   c. Stipulations are certain things that both parties agree not to contest and ARE READ TO THE JURY AS FACTS
   d. Can stipulate pretrial or during trial
   e. Once something is stipulated to, can't introduce facts as to the truth or falsity of them – waste of time and resources
   f. Can the parties stipulate to something that is false?
      i. WHY WOULD THEY DO THIS?
         1. MONEY:
            a. May be that the parties don't know whether something is true or false, costly for either of them to figure out, and think that they're all better off to not expend the resources to figure out whether it's true or false
         2. STRATEGY

a. Circumstances where parties may consciously and deliberately stipulate to claims that they know are false
b. Example: Case about recurring legal disputes between the state of CA and railroads about appropriate state taxation of RR property. Much more important for those parties to get resolution about meaning of tax status, than to determine whether this particular tax bill should be paid or not
    i. Tax that parties were arguing about had actually been paid – deposited in state's bank account
    ii. Therefore there was no unpaid tax for them to argue, but took it to SCOTUS to try to get resolution
    iii. Parties wanted to by mutual agreement stipulate that the tax had not been paid

ii. RULES

1. Can't stipulate to facts that create a case when there isn't one

a. Normally the legal effect of a stipulation of fact is binding
    i. Courts do not have the power normally to make them bring in evidence even when they agree not to
b. BUT, if there is no case or controversy without the stipulation, then it must be disregarded
c. (i.e., in this RR case, SCOTUS determined that it had to disregard the stipulation b/c if taxes were paid then there's no case or controversy)

2. **Can't stipulate to facts that are clearly and obviously untrue**

a. Even when the facts don't affect the jurisdiction of the courts?
b. Example: 14th amendment substantive DP case; import of regulations turned out to matter whether RR cars were owned or leased (different status). What the parties were looking for was a ruling on federal law treatment. The way that the case played out, it would have been more useful if one of the parties was an owner (and not a lessor) of the case
    i. Parties stipulated to state of affairs that was not true
    ii. Stipulation did not create a case that did not exist
        1. Still would have a federal constitutional case – just not the case that the parties wanted to resolve the problem
    iii. SCOTUS said that if it's clear and obvious that you're stipulating to something that is not true, then we're going to disregard your stipulation

iii. PRACTICAL APPLICATION

1. General proposition is that if parties stipulate to facts, courts won't check if facts are true
2. So surely the case, that on a routine basis courts are accepting stipulations that are, in fact, false, and that the parties know are false, but that the courts haven't recognized as false b/c they haven't checked
3. Sometimes it's so obvious (i.e., documents that show who own the car as important part of the record) that courts will disregard, but not always

g. Can the parties stipulate to the law?

i. Can stipulate to the law in a LIMITED sense (Contracts and Plea Bargains)

1. Any time you have a K and it involves parties in different states and/or different countries, there could be issues as to which jurisdiction will govern
    a. Commonplace for parties to agree in advance, which law or which jurisdiction will govern
        i. Sometimes this will match what the courts would come up with if they had been given the issue on their own, but sometimes it wouldn't
        ii. Nonetheless, routinely, without deliberation, courts accept contractual terms as to whose law governs (complicated legal determination)
2. Plea bargains, to some extent

ii. **BUT general rule is that parties can't stipulate to the law**
    1. i.e., can't stipulate to being a suspect class for 14th Amendment purposes; can't stipulate that case is governed by particular statute; can't agree not to look to legislative history and therefore stipulate that they want the court to decide the case on plain meaning and not legislative history (can choose to not mention leg history in their briefs, but then court can just send law clerk to research and still base ruling on leg history)

STANDARDS OF PROOF

1. TOTAL CASE
    a. Conventional Evidence
    b. Judicial Notice (Formal)
    c. Judicial Notice (Informal – background facts help by trier of fact)
    d. Judicial Comments/Summary
    e. Stipulations
2. THEN SOMEONE MAKES A DECISION
    a. Admissibility (based on a-e above)
    b. Significance
    c. Standards of Proof
3. Standard of proof can be thought of as part of the case (becoming f above)
    a. One way to make your case stronger is to bring more evidence from a-e that supports the claims that you're making
    b. Another way to help your case is for the law to say, there's less that you have to put in
        i. Proving your case is a function of what you put in, and how much
4. Crucial mechanism for determining what you have to prove/how much you have to prove
    a. Certain circumstances can defend by doing nothing based on:
        i. Burdens of Persuasion (standard of proof)
        ii. Burden of Production: who has to bring evidence forward and who can do nothing
    b. Law will always allocate to one or the other party in a case, the obligation to do something
        i. Consequence for THAT PARTY of failing to do something is that the party loses
            1. Preclusive motions, judgments as a matter of law
        ii. Normally the party making the affirmative claim has the burden of production, but sometimes not the case
            1. Actual impact of burden of production depends on the burden of proof
                a. How much evidence a party needs to produce depends on the burden of proof
                b. If the lowest burden is much higher, then imposing burden of production on someone is much harder
5. <u>Burden of Persuasion in Civil Cases</u>:
    a. CLEAR AND CONVINCING EVIDENCE
        i. Fraud claims, certain First Amendment claims
    b. PREPONDERANCE OF THE EVIDENCE
        i. MAJORITY of civil cases
        ii. No clear definition of what this means – common understanding is "more likely than not"
        iii. What does it mean to say that a proposition is more likely than not to be true?
            1. For certain events, possible to give mathematical probability
                a. BUT, The problem is that almost nothing that is the subject of a legal dispute, falls into that kind of event that can be subject to that kind of rigorous analysis
                    i. i.e., was motive of employer product of anti-union or just product of poor performance of worker?
                    ii. Presupposes that you have a series of identical events . . . just NEVER happens
                    iii. Back to example of 501 people that hopped the fence – more likely than not that any give person didn't pay . . . 501/1000

chance that person didn't pay, BUT this is going to be true for any random person that you select

2. Trying to give some coherent account of what it means for something to be more likely than not in a non-statistical setting is an extraordinarily difficult task
3. Assumption is that decision-makers can make those kinds of evaluations
4. POSSIBILITIES
    a. Simply no account of what decision-makers are doing
    b. It really is statistical – people are making quasi-mathematical types of judgments about what is and what is not more likely
        i. Not generally accepted by practitioners
    c. Compare one proposed set of events against the other proposed set of events to decide in a COMPARATIVE fashion which seems more plausible
        i. Not comparing the claim of P to reality, but rather comparing the claim of P to the claim of D
        ii. Measure of evidence suggesting that this is exactly how decision-makers act, and how litigators believe that decision-makers act
        iii. If always comparing the case of P and the case of D, this means that D can't defend by doing nothing – what you've done by describing the process in terms of comparing the cases, is vastly increase the litigation costs because now you have to put out as much as you can . . . might have an incentive to do that anyways
        iv. Don't actually tell juries this – told to compare P's case to objective reality
    d. Just telling decision-makers what kind of mood to be in
        i. Have preponderance of the evidence, clear and convincing evidence, and beyond reasonable doubt
        ii. Trying to figure out what kind of instruction that is giving to decision-maker
        iii. Maybe all it's doing is telling the decision-maker how carefully to scrutinize P's claim – how mean and nasty to be against P
5. Study done about 40 years about understanding of juror when told to determine whether case is supported by preponderance of the evidence
    a. Jurors understood this to mean a probability somewhere 0.7 or 0.8
    b. Doesn't match up to law's assumptions
6. Certain model about what litigation must be about that leads to 50% +1 allocation
    a. The goal of litigation would be to make as few mistakes as you can
    b. The higher the burden of persuasion, the more likely you are to make mistakes
    c. If going into the case, you don't actually know who's right and who's wrong, then why start out with a presumption that the D is wrong?
    d. If you have a P that says that D owes 2,000 and D says no, what you really have is disembodied 2,000
        i. Makes sense to not start with any strong views one way or another about which way the case should come out
        ii. 50% +1 leads to lowest chance of being wrong
            1. Rodeo owner wins 1000 cases – 501 right and 499 wrong
    e. BUT, maybe minimizing the number of errors is not the excusive goal of the process . . . maybe what jurors are doing by ramping up what the law seems to say is superimposing their own conception about what the litigation process is about to a view that says it's a bigger deal than just deciding where disembodied $2,000 goes

iv. Court can reduce the standard of proof
1. Party bringing wrongful death claim on behalf of deceased is allowed to bring less evidence
2. Amnesia

a. *Schechter v. Clanford: N claim after boat collision, injured boy bringing claim had amnesia so court lowered his standard of proof*
b. Presumably there is a stock of knowledge that P would have about the accident that the accident wiped out (as though crucial document got chopped up in propeller blades in an accident)
i. What does it mean to reduce standard of proof?
1. If baseline standard for civil action of N is preponderance of the evidence, and if that is normally understood to mean more likely than not, if that turns out to mean 50+1%, then what does it mean operationally to reduce the standard?
a. Does that mean P wins even if it's less likely than not that D was negligent? YES, that's what it means
b. Could have a system in which P is presumed to win unless D establishes that's P shouldn't . . . BUT kind of an odd notion given the structure in the US
2. If what "preponderance of the evidence" means what jurors understand it to mean (0.7 or 0.8), then telling them to ramp it down a little bit, that all of a sudden doesn't seem so weird
3. The law enhances the party's case, not by the introduction of more evidence, but by reducing the amount of evidence that the parties need to provide
a. Party with amnesia would be just as well off if there was some rule that allowed him to bring in evidence that normally wouldn't be allowed
i. i.e., shredded document would allow for hearsay
b. That's why standard of proof can be substitute for evidence
i. Just like it enhances your case to have judge make comment, can also benefit from legal rules allocating burdens of proof

v. WHAT has to be established by a preponderance of the evidence?
1. Depends on elements v. "comparison of stories" approach (pg. 2)
a. Can say all substantive elements of the case must be proved by preponderance of the evidence
b. Can say that it maps onto the case itself

6. <u>Burden of Proof in Criminal Case</u>
a. BEYOND REASONABLE DOUBT
b. Long standing assumption in criminal case is that prosecution must prove all elements of its case beyond a reasonable doubt
c. Same difficulties plague the problem of giving an account of "beyond a reasonable doubt"
d. What we know post-1970, is that as a matter of federal constitutional law, that is the mandated standard for each element of a criminal offense (5th and 14th amendment makes it apply both to states and federal gov't)
i. ***<u>Winship</u>***: Constitutionalization of BRD standard for criminal cases
1. Juvenile case . . . some states were treating juvenile cases differently (lower standard) b/c penalties aren't typically as severe, often crimes don't show up on record, etc.
2. SCOTUS said NOT OKAY – states MUST prove juvenile cases beyond reasonable doubt → which means that they must do the same for real crimes
3. EFFECTS
a. Doesn't really change much in the states b/c they were all pretty much already using BRD standard
4. Black did not go along with majority b/c he saw it as a substantive DP issue – collateral consequences were two-fold
a. Penalty for crime can be EITHER jail time or fine
b. Most of the time fines are civil (i.e., parking tickets)
c. BUT, what distinguishes civil fines from criminal ones?

i. Is it NOT the nature of the penalty?
ii. Is it the standard of proof that the government has to use?
1. That's the issue: if it is a civil fine- the government doesn't have to prove anything BRD to impose a fine…
2. If you call it *criminal*- the basic elements would have to be established BRD

d. So if you're a drafter coming up with a code that hinges on fines, would you want them to be civil or criminal?
i. There are advantages from gov't standpoint to having civil: lower burden of proof
ii. Then there are arguments in favor of calling it criminal
iii. There is a consequence to the government (as a consequence of *Winship*)

e. So what do you base it on?
i. There's a huge body of litigation on this
ii. Hard cases involve fines imposed by administrative agencies—and defendants obviously don't want the POE standard (with adjudication done by judge and not jury)
iii. There is a LOT of case law about WHEN the gov't can impose large fines using the civil process w/its burden of proof rules versus the criminal process
iv. Most don't focus so much on burden of proof distinctions/consequences
1. Jury trial is a big focus connected to civil v. criminal
2. There are lots of other issues that come into play

f. As of this moment in time- we don't have a clear answer other than what the legislature says
i. If they say civil- it's civil; criminal- criminal…
ii. Doesn't appear to be much of an external standard
iii. Courts don't want to constitutionalize a doctrine where the court looks at legislative scheme, but questions what has been said

e. PROBLEM: WHAT exactly is it that the state has to prove beyond a reasonable doubt?
i. Could translate this to mean that the state must prove everything necessary to put someone in prison beyond reasonable doubt
1. Might have unintended effect of making unconstitutional the regime in which criminal D's have to raise affirmative defenses . . . normally judged by preponderance of the evidence standard
2. If this were the case, the state would have to prove, beyond a reasonable doubt, that:
a. D did everything that prosecution says it did
b. Everything was illegal
c. The law means what prosecution says it means
i. Not the case in most states
ii. Rule of lenity – when statute is ambiguous, fudge it in favor of D for criminal statutes
d. Prosecution must negate any conceivable defense that D could put forward
i. Not the case that prosecution must anticipate D's case and negate these possible defenses beyond a reasonable doubt
ii. D could do nothing and wait for directed verdict, but can also put on case
1. Law is structured that it's up to D to put up certain claims and not up to P to negate them

ii. CASES
1. ***Mullaney v. Wibur (1975)****:* Maine homicide statute breaks homicide down into murder and manslaughter – if it is murder, life in prison, if it is manslaughter, maximum 20 years

a. Claim is that D was acting in heat of passion, so becomes manslaughter
b. BURDENS
    i. PROSECUTION: In order to establish homicide, had to prove beyond reasonable doubt that D killed someone
    ii. DEFENSE: Then up to D to prove, by preponderance of the evidence, that D acted in heat of passion
        1. P then had to defeat the preponderance of the evidence claim for murder conviction
c. HELD UNCONSTITUTIONAL
    i. If state wants to put D away for life for murder, can't make D prove by preponderance of evidence that he acted in heat of passion
    ii. Up to state to prove beyond reasonable doubt that he did not
d. CONSEQUENCES
    i. Says that it is unconstitutional for state to make D put on affirmative defenses
        a. Can't shift burden to D, and can't change to preponderance of the evidence standard
        b. That would be spectacular revolution in process
    2. Result was flood of lawsuits claiming that all state statutes requiring burden on D were unconstitutional
        a. i.e., insanity defense
            i. NOT the case that P has to prove that D was sane … not part of the claim
            ii. SCOTUS said it was silly to claim that this was unconstitutional?
            iii. But how is this different from *Mullaney* ruling?

2. ***Patterson v. NY (1977)***: NY statute defined homicide as intending to kill and causing death; statute allows affirmative defenses, including acting under influence of extreme emotional disturbance for which there is an explanation or excuse
    a. Looks just like *Mullaney* case on the surface – if it's unconstitutional for criminal defendants to have to prove that they acted under heat of passion, wouldn't it be unconstitutional to make D prove that he acted under EED
    b. COURT UPHELD THIS AS CONSTITUTIONAL
    c. DIFFERENCE is in wording of the statute
        i. Prosecution must prove beyond reasonable doubt the offense in the statute - here have statute that defines the elements of murder two-fold (intending to kill, killing), and state proved this beyond reasonable doubt
        ii. Everything else was cast as affirmative defense
    d. CONSEQUENCES
        i. NOT saying that states can never had affirmative defenses
        ii. But if it's part of the claim, it must be proven beyond reasonable doubt
            1. Constitution telling state legislatures how to draft statutes . . .?
            2. Writing statute as bare bone crime with affirmative defense is fine, but writing defense into the statute isn't okay?

3. ***Martin v. Ohio (1987)***: Ohio statute says that self-defense is an affirmative defense
    a. As close as we're going to get in the real world to pushing the envelope
    b. BURDENS
        i. PROSECUTION: Must prove beyond a reasonable doubt that D intended to kill someone and killed that person

ii. DEFENSE: Must prove by preponderance of the evidence that D killed the victim in self defense

c. SCOTUS UPHOLDS THIS because of the way that the statute is written
    i. Constitutional to make the criminal D prove that he acted in self-defense
d. So the *Winship* rules applies to the basic crime and nothing more
e. Upshot is that there is essentially a constitutional rule about how states have to draft their criminal statutes
    i. PROBLEMATIC: Creates incentive to draft laws that minimize the things that count as elements of the crime and max the stuff the counts as mitigation
        1. So what about this – It shall be a crime in state of MA to be within the borders of MA, BUT we have lots of affirmative defenses
            a. Did not rob anyone, did not kill anyone, did not commit vehicular homicide, etc.
            b. So you're writing the entire criminal code as a set of affirmative defenses
                i. Therefore, prosecution would just have to prove beyond reasonable doubt that D was in MA, and D would have to prove by preponderance that he did not commit any of those crimes
            c. Would be unconstitutional, but WHY?
                i. Where everything seems to turn on form of drafting … where does the requirement come from?
    ii. BUT, the flipside would essentially be SCOTUS telling the states what is and is not an element of murder in their codes
f. RESULT
    i. Essentially an abdication to the states that says "whatever it is that YOU write into statutes as the definition of the crime- THAT you have to prove BRD"--- everything else- "do what you want"
    ii. This does drain *Winthrop* of some bite but not ALL
g. LIMITATIONS
    i. SCOTUS reserved itself the phrase: "maybe there will be a case where the state has gone too far"
        1. It is far cry to find a case where the gov't has gone too far to drain a crime of its essential content in order to minimize the burden on them of proving what they have to prove
    ii. 8TH AMENDMENT
        1. There is a safeguard in the 8th Amendment which prohibits *cruel and unusual punishment*
        2. Has been held to impose a certain minimal requirement of proportionality between crime and punishment – a punishment that is disproportionate to the offense is unconstitutional
        3. The exact content of the proportionality norm is unclear
        4. BUT one could use the body of doctrine to say "if the basic crime is being in the state of MA, ANY punishment connected to that crime would be disproportionate b/c the crime isn't really one requiring punishment"
        5. Constraint on ability of state to drain content from criminal law, would NOT come from directly the *Winship* rule that they have to prove everything BRD, but from the 8th Amendment

iii. CONGRESS
1. Congress presumably could also pass a statute saying that there are some things that states just can't make a crime
2. Then states would have to argue whether they can make certain things a crime

h. Most of the time this doesn't come up because states aren't going to re-write their criminal codes for the purpose of screwing over criminal D's
i. Most of the time we are talking about fairly well-established elements- and no one is really contesting what it's the obligation of the state to prove and what is left to the D

PRESUMPTIONS

1. The law is full of presumptions . . . we sometimes talk about the role of the criminal D and the BRD standard as a "presumption of innocence"
2. Position of Editors (and Lawson) – Can functionally do away with the label "presumptions"
   a. ANYTHING that the law does to which the word presumption is attached can be explained and can be done by mechanisms in the law OTHER than presumptions
   b. [you could go through and delete every reference to the word presumption, and substantively the MODERN law could reach the same result with other devices]
3. OLD LAW could not have done away with presumptions
   a. But the law that has generated the concept of presumptions has been updated and yet the concept has not been removed
   b. DIFFERENCES BETWEEN OLD AND MODERN LAW
      i. Role of the jury has evolved considerably (and a good part of evidence law is jury-oriented)
      ii. Discovery Machine
         1. Civil Procedure: one of the key legal functions/operations that can be performed by a presumption is to move around burdens of persuasion and proof
            a. Example: Suppose that receipt of a letter is essential to a particular case
               i. Trying to prove receipt/non-receipt is difficult
                  1. Often the best/only proof that you have that something was received is that you delivered it into the system
                  2. But that's not very sufficient
                  3. D is the ONE person who knows if he received it and he might have an incentive to say that it was not received
               ii. TODAY there are things that P can do to uncover that kind of information
               iii. BUT, for the vast majority of legal history didn't have discovery opportunities like we have today
         2. The burden of production made a LOT more of a difference in a legal world without discovery, or with discovery that was extremely cumbersome, inefficient, and unpredictable
            a. Burden of going forward became quite substantial, and therefore presumptions were created to ease this high burden of production – shifting of burdens
            b. Can describe this in TWO WAYS:
               i. SHIFTING BURDENS
                  1. As long as P can show that he mailed the letter – even though mailing doesn't conclusively show that it was received – then D will have to come forward to prove it was not received, OR
               ii. PRESUMPTIONS
                  1. If P proves that he mailed the letter, *we will PRESUME that D got it* (because that is what usually happens and if it didn't happen, then D is in a better position to explain)

4. Standardized Typology of Categories of Presumptions
    a. Irrebuttable Presumption
        i. An irrebuttable presumption just is LAW
        ii. Proving A = Proving liability → Law – there will always have to be a set of things proven to have liability (substantive elements of the law)
            1. Suppose someone said "if we prove A, that will necessarily establish fact B, and that will = liability"
            2. You could say then, that there is an irrebuttable presumption that A = liability
            3. OR: creates a presumption of B → same thing
        iii. To the extent there is any problem with an irrebuttable presumption it has to do with the government not being allowed to establish L from a given element
        iv. Today it is universally understood that an irrebuttable presumption is just another way of describing the substantive elements creating liability.
    b. Rebuttable Presumption
        i. "If you mailed the letter, we will presume it was received, but it is rebuttable if the other guy comes up w/evidence that suggests it wasn't"
        ii. Redundant
        iii. WHAT would make a rebuttable presumption mandatory?
            1. It just means that if the basic operative facts that give rise to the presumption exist, then that presumed fact must be inferred by fact finder unless and until facts to the contrary are established → Forced inference
                a. How conclusive the inference depends on how rebuttable the presumption: what does it take to defeat that inference?
                    i. A question no one really knows the answer to . . .
            2. OPTIONS: Say you have a letter mailed – the fact finder must infer from the mailing that the letter was received, UNLESS WHAT?
                a. Any evidence is brought in?
                    i. No, it has to be evidence of some relevance or credibility . . . but how credible?
                b. Convincing evidence?
                    i. Receipt?
                    ii. Direct witness/spy testimony?
        iv. Does this presumption do anything, or is it just a way of moving around the burdens of production?
            1. No clear crisp answer – usually doesn't come up
            2. EXAMPLE where it might make a difference:
                a. Suppose you are filing a patent application with the PTO and deadline is May 3; you mail your letter on April 18 (you can prove it); you do not have access to what went on in the PTO, BUT there IS a general presumption that once mailed it was received and one CAN establish the general timing of the mails → you have the presumption it was received by the PTO within a certain number of days of April 18. The PTO has internal methods to record receipts of mails. Suppose the PTO stamp on the letter says May 5. The date stamp does NOT conclusively prove it was received May 5. By the same token- proven that you mailed the letter doesn't prove that it got there → it's just that the law presumes that mailing leads to receipt. BUT same thing in PTO: presumably the PTO has standardized rituals- normally stuff gets stamped when it gets in… doesn't mean it's what always happens… but would seem to justify having a presumption that the day it is stamped is the day it was received. (The law recognizes such a presumption b/c it is a regularized practice). The Patent Office denies the patent.
                    i. P claims that he gets the presumption of the receipt within the time period
                    ii. PTO claims they have the presumption that receipt is based on stamp

iii. NEITHER PARTY HAS CONCRETE EVIDENCE about when the letter actually got to the PTO
iv. So does either party have evidence?
1. DC Circuit says *NONE of it is EVIDENCE*
a. Evidence is what establishes the mailing and stamping
b. All they have are presumptions – **inferences that will be made if nothing else is introduced to the case**
c. Applicant lost
v. Presumptions are devices for structuring and containing evidence – they move around burdens of production
vi. If you are moving around an actually standard of proof, however, that CAN be an actual substitute for evidence (but still don't need the label "presumption")

c. Permissive or Weak Presumption
i. "If certain basic facts are established, it is NOT a mandatory inference that the fact finder do the next thing, BUT it is OK to infer that…"
ii. Does NOT change the legal universe in any fashion
iii. STRATEGICALLY can be an advantage to P to have the law describe these things as presumptions
1. Essentially a standardized judicial comment on evidence → law saying to the jury "we are bringing this specifically to your attention"
2. The terminology brings forth the opportunity for misuse

5. Incidental Features of Law of Presumptions:
a. Primary case being used to describe presumptions
i. SCOTUS case in mid-1970's: Congress had enacted a comprehensive statute providing comp to coal miners for black lung – benefits to be paid by the coal companies; did NOT require the miners to actually conventionally prove that they had medical conditions that were caused by coal mining; as long as they proved they had a condition and they had worked for the coal company for certain time coal company was L to pay w/o proof of causation
1. Those were irrebuttable presumptions as a matter of law → the only really constitutional Q was whether Congress had the power to require coal companies to pay
b. *US v. Klein*: All sorts of back and forth about what to do about southerners post-Reconstruction – Confiscation? Eligibility to serve in Congress? Key statute- prescribed certain evidentiary consequence to be attached to a pardon (Pres believing Cong was being unfair/unreasonable-started issuing lots of pardons; Congress passed statute that said Presidential pardon would be conclusive proof of disloyalty) → federal courts said NO—congress could not dictate the outcome of cases in this way
c. IMPLICATIONS of these two cases:
i. Statutes, enacted by Congress basically telling federal courts what is allowed to be considered as evidence in cases
ii. Could Cong pass statute: "In any case w/a claim where gov't has taken prop… rulings will be for the gov't"?

HOW INFORMATION IS ELICITED FROM WITNESSES

1. The bulk of the Federal Rules of Evidence regulate the substance of the evidence
2. Neither rules of evidence nor rules of procedure spell out detailed norms for how it is that witnesses are meant to be examined
3. Don't attempt to regulate the process – RATHER, give courts the power to regulate if it looks like it's going to be a problem

4. RULE 611: Mode and Order of Interrogation and Presentation

a. (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

i. **(1) make the interrogation and presentation effective for the ascertainment of the truth,**
ii. **(2) avoid needless consumption of time, and**
iii. **(3) protect witnesses from harassment or undue embarrassment.**

b. (b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

c. (c) Leading questions. Leading questions should not be used on the <u>direct examination</u> of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions <u>should be permitted on cross-examination</u>. When a party calls a <u>hostile witness</u>, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

<u>RELEVANCE</u>

1. FIRST THRESHOLD FOR ADMISSIBIILTY
2. **<u>RULE 402</u>: All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.**
3. **<u>RULE 401</u>: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence**
4. **<u>BACKGROUND INFORMATION</u>**: In most cases, judges admit some testimony that doesn't have an obvious connection to the elements of the cause of action.
    a. Reasonable background information about the person that is testifying is always admissible (makes sense because it goes to credibility)
    b. Becomes problematic when witnesses describe actions and events – allowed to describe them in some detail so that jury members can understand the events in some detail when they didn't see them themselves
        i. If you have a carefully constructed rule of evidence that says that you don't want to hear anything that isn't of consequence to the case:
            1. Would be irrelevant under Rule 401
            2. BUT advisory notes say that background information which looks like its irrelevant under 401 and therefore inadmissible under 402 is universally admissible
            3. So maybe after the language of Rule 401, add:
                a. OR evidence that enhances the believability, understandability, coherence of the narrative being spun by one of the parties
    c. So what seems to be the crisp, clear command of 401 and 402 isn't that crisp → **<u>HUGE exception to that</u>**
5. Outside of background info, need to have connections between evidence you're trying to get in, and something of importance that you're trying to prove
    a. Evidentiary Fact → Fact of Consequence → Essential Element
    b. Background assumptions that are used to connect the evidence must be at least plausible
6. *Ways in which evidence is relational*
    a. Substantive Elements
    b. Relation to a particular set of background assumptions that are not part of the formal rules of evidence
        i. What makes something a background assumption is whether the parties think it's important enough to prove it

c. Other evidence
    i. A single piece of evidence may not be relevant to a substantive element of the case, given a particular set of background assumption, in isolation.
    ii. However, if you combine that piece of evidence with 3 others, they may cumulatively have a relationship to the substantive elements of the case that they would not have otherwise
    iii. In this sense, can connect to the narrative story (thereby connecting to a formal element)

7. GENERALIZATIONS
    a. Judges don't require objective proof about generalization that sound reasonable – would cost a lot to prove all propositions about human behavior
    b. Some generalizations are so ridiculous that judge can refuse to let evidence in
        i. If the only way to connect the evidence you're introducing to an essential element is through a ridiculous generalization then the trial judge can just say no (i.e., astrology)
    c. Interesting questions are generalizations based on stereotypes
        i. Suppose you were trying to identify someone at a crime scene and a witness saw them wearing cowboy boots, would it be relevant for identification purposes
            1. Defendant is black – wants to introduce witness that saw cowboy boots to show that it probably wasn't him
            2. Would legal system admit that kind of evidence?
                a. ALMOST SURELY NOT – but not because of relevance in the logical sense
                b. Reasons for rejecting background assumptions of this sort
8. Constraint on admissibility created by 401 and 402 is not very large
    a. (Other constraints on evidence, BUT just looking at screening function provided by 401 and 402 is not very much)
    b. *<u>Knapp Case</u>: D admits to killing victim, but said that he was scared and therefore killed him due to self-defense*
        i. Why was D afraid?
            1. Afraid because some people around town told D that in the past, in the course of arresting an old guy, this law enforcement officer had beat the old guy to death
            2. Victim was coming to arrest D, and D was old, so thought that victim would do the same
        ii. Asking if evidence is minimally relevant enough to be admissible in court
            1. Almost surely yes, that's going to come in
            2. Asking if it has ANY tendency to make a fact of consequence more probable than it would be without the evidence
        iii. Prosecution wants to bring evidence that person that D heard got killed by officer beat-down actually died from another cause
            1. Defense: what does that have to do with anything? For SD purposes, doesn't matter if what D believed was true – matters if D actually believed it
            2. Prosecution argues that if, in fact, that never happened, makes it marginally less likely that someone in the town actually *told* D that the officer beat another old man to death
                a. This is a REALLY THIN CHAIN
                    i. Arguments is that people tell the truth, so if it's not true, makes it marginally less likely that D actually heard this, which makes it marginally less likely that he had any reason to be afraid for SD purposes
                    ii. If you gathered up the entire universe, is it marginally less likely that someone would tell D that the police officer clubbed him if it wasn't true? And therefore marginally more likely that D didn't act out of self-defense?
                b. Court says that it's good enough!

9. <u>PROBLEMS</u>
    i. Johnson Case (trial transcript): Correctional officers testified that reports after incident did not state that they opened the food port door
        1. Essential Element:
            a. Self Defense

b. Have to come up with something that links this testimony to helping establish that whatever Johnson did was done in SD

2. Fact of Consequence:
    a. Guards attacked first
3. Evidentiary Fact:
    a. Food port door closed
    b. How does food port door evidence connect to the guards attacking first?
        i. Guards story was that they were there to collect trays; Johnson
        ii. If food port door was never opened, just open the cell door and come in and beat on Johnson, that has some tendency to help Johnson's case
4. Therefore, this would be relevant evidence → makes it marginally more likely that the guards were there to attack, and Johnson fought in SD
5. But have to go back → the question is the incident report – not whether the door was in fact open or closed
6. Have to link incident reports to the fact that the door was closed
7. So the question is whether the incident reports were likely to mention the open or closed status of the food port doors
    a. Does the presence or absence of the food port door in the reports have a bearing on whether or not the door was in fact open or closed?
    b. If the incident reports didn't mention Johnson hitting someone, then that would be pretty good evidence that Johnson didn't hit someone
        i. Some things that are expected to be in the incident reports
        ii. The question is whether this is one of those things
8. Dealing with a weak connection between what the guards write down on the pieces of paper that they file with respect to this particular detail
9. Probably a non-frivolous argument that prosecution could make that this particular line of questioning is irrelevant
    a. Probably would lose, and that's why this line of questioning was allowed
    b. This is not as remote of a connection as the prosecution's argument in *Knapp*

ii. Johnson: Prosecution asked inmate Butler whether he was a gang member, and whether D Johnson was a gang member (that answer didn't get in); Butler answered that he was Cripp and he didn't know whether Johnson had any hang affiliation

1. Would evidence of gang affiliations be relevant?
    a. Evidence is always relational to the essential elements, to background information, and to other evidence in the case
2. The only possible relevance would be to Butler's credibility → Butler there to testify that Johnson is right – other guards came in and beat him
    a. Because Johnson's testimony is relevant, anything that goes to Butler's credibility is relevant
3. If you have as your background assumption that gang members are more likely to lie than people who are not hang members, then there's a perfectly logical connection between Butler's gang membership and his credibility
    a. But is this a reasonable assumption?
        i. In all likelihood, as a pure matter of 401 and 402, this is probably enough to get in
        ii. Maybe out on other grounds, but in on relevance
4. If Johnson were a gang member also, would that be relevant?
    a. Relevant to whether or not Butler's testimony is credible, NOT to whether or not Johnson is a bad guy
    b. Unless you could show that gang members always stick together
    c. Would have to have to add that they are in the same gang, and that gang members of the same gang lie for each other
        i. If prosecution could show that they were in the same gang, there would be no objection to the relevance of that testimony
5. **Always need to be clear exactly which proposition in the case evidence is being introduced to establish**

iii. Johnson: Prosecution asked Officer Houston whether inmates in transition from Special Unit were housed in Facility B. Houston answered yes
    1. What would be the relevance of the facility that Johnson was in at the time, and where he was recently?
    2. D was worried about the following inference:
        a. Know from the fact that these people are at Pelican Bay that they're not nice people
        b. Three places where they're kept
            i. General Population
            ii. Special Housing Unit
                1. There because they're such problems that they're put in solitary
            iii. Intermediate Facility B
                1. Between Special Housing back to General Population
        c. Why might have Johnson been in Special Housing Unit? Was bad, so aggressor
            i. This would be excludable on all sorts of other grounds
    3. But could also argue flip side → guards expected him to be more dangerous to they would attack first
    4. Also could infer that someone who is moving their way back from the high security area would be on their best behavior
    5. Therefore, does meet relevance threshold → makes it marginally more likely that Johnson was aggressor, and also marginally more relevant that Johnson was not
        a. Relevant to both parties
        b. Not much of a case to say that Johnson's status is irrelevant
    6. What the competing inferences do is to suggest that any particular side that wants that evidence in, the fact that you can draw competing inferences weakens the ability for either side to say that this is an important part of the case
        a. If the degree of evidence matters to anything, the fact that there are competing inferences that you can draw weakens the quantum and therefore weakens the implications for other doctrines
        b. But from a relevance standpoint, can't argue that it's not relevant

b. 3.2: Bus driver hits a kid; kid is in the hospital; kid's parents sue driver and school for negligence
    i. Driver's Testimony: Quit because she didn't have the heart to go back
        1. In evaluating whether this has an tendency to make anything more or less probable, judge doesn't decide whether this was a staged set of lies
            a. That would go to credibility of witness, which is a decision for the jury
            b. So for deciding on relevance, we have to assume that reasonable jury could believe this person
        2. Putting aside that it's excludable on other grounds, does it meet requirements for relevance?
            a. Essential Element
                i. Negligence
            b. Fact of Consequence
                i. Careful driving on day of accident
                    1. This would defeat claim of negligence
            c. Evidentiary Fact
                i. Driver loves kids
                    1. Assuming this to be true, is there any way to connect that up to anything relevant in the case?
                        a. Driver loves kids → Diver takes care of things she loves → Driver takes care of kids she drives → Driver did so in this case → Driver was carefully driving at the time of the accident → Driver wasn't negligent
                    2. Not the world's greatest argument, but 401 and 402 don't require the world's greatest argument
                    3. Would be enough to meet the requirements
            d. Counter argument would be that this is too long of a chain

ii. Exhibit A: Having lost their star driver, the school board writes a letter urging her to return ASAP – always has been a safe driver and the accident doesn't change that
    1. Essential Element
        a. Negligence
    2. Fact of Consequence
        a. Careful driving on date of accident
    3. Evidentiary Fact
        a. School Board thinks she's a good driver
        b. How to connect?
            i. School board has good judgment about drivers → good drivers in general drive well → this was a general case → on this particular occasion, driver was driving well → no negligence
        c. Same as driver's own testimony, this would probably be in for *relevance* (would not be admissible on other grounds)
    4. Counter-Argument
        a. Again, could argue this is too long of a chain – this is a stretch
            i. If relevance means ANY chance, however tiny, to make something more or less likely, then this probably would make it
        b. School board is also being sued, so what is the likelihood that school board would say anything but this?
            i. Goes to credibility, not relevance

c. 3.3: Insider trading – CEO of Rundown Corp charged with insider trading . . . trading on material, nonpublic information without disclosing
    i. March 16, 2004 Ray sold 1000 shares of stock; at that time, the 2nd Q results had not been publicly disclosed
    ii. Claim of prosecution is that Ray got report of 2nd Q results and sells the shares before information goes public
    iii. Take as given that Ray sold the stock → what prosecution had to prove was that he sold knowing that the company was going downhill
    iv. Auditor sent memo to CFO on March 14, so CFO knew on March 14 that bankruptcy was looming; on the afternoon of March 14, auditor sent email to CFO saying that he should probably tell CEO; Ray's claim is that he didn't get told this until two days after he traded
    v. Prosecution wants to introduce the email sent by the auditor to the CFO
    vi. If email had been sent directly to Ray, there wouldn't be much of a problem for relevance
        1. Wouldn't conclusively prove prosecution's case, but would be relevant for proving that
    vii. But here, email went to CFO
    viii. CFO is not going to testify at all, so government has no direct way of proving that CFO went to CEO's office and told him → so they're trying to establish indirectly
        1. Inferential chain is that CFO's, when told by auditors, that company is going downhill, would go do that, rather than wait 4 days
        2. Pretty easy case for relevance
        3. Could make arguments that it's not decisive or conclusive, but it's very hard to make an argument that it's not relevant

403 BALANCING

1. RULE 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence

2. Deals with the situations in which the chains of inference are TOO REMOTE
    a. Not impossible (and therefore pass 401 and 402 barriers), but seems to be stretching it
    b. If all trials were costly, and you could introduce an infinite amount of evidence in an infinite about of time, and all decision-makers were perfect, there wouldn't be a problem with a system that says if it's relevant let it in
    c. BUT this is not the case, so 403 is the catch-all to capture this problem

1. BOTTOM LINE
    a. Trial judge is vested with the ultimate discretion
    b. The chances of getting a trial judge's decision overruled on appeal is remote at best
    c. No systematic things about kinds of consideration taken in . . .
    d. Classic balancing test → only instruction is to put a thumb on admissibility by saying exclude only if probative value is *substantially* outweighed
3. HOW PROBATIVE
    a. Strength of underlying inferences and strength of starting point
        i. The weaker the evidence, the less sense it makes to let the parties consume resources
    b. Need for evidence
        i. No numerical measure for how probative evidence is
        ii. "Need" comes in through advisory notes (have considerable weight)
            1. Balance probative value and need for evidence against harm likely to result from its admission
                a. Suppose that evidence that you're introducing has a remote, tangential chain, but what if it's all that you have?
                b. If judge says it's out on 403, you've lost your case
                    i. Might not be a horrible result → if the only way you can win is through this remote chain
                    ii. However, also an argument that this should go to jury
            2. If you have other ways of showing the same thing that would be more efficient and less prejudicial
                a. Not obligated to use the MOST efficient source
            3. Trial judge considers
                a. If there are alternative means of proving what you need to prove
                b. If the other evidence already introduced already establishes what you're trying to bring
                c. How badly do you need this evidence?
4. HOW PREJUDICIAL
    a. Paradigm case for exclusion of evidence under 403 is not where evidence is wasteful, unnecessary, etc., but where evidence is unfairly prejudicial
    b. Any evidence that a party thinks will weaken its case is prejudicial to that party
    c. 403 only allows exclusion when it's really going to disrupt the decision process in a fundamental way
    d. Things that would lead a decision-maker to decide on something other than the evidence
        i. i.e., gang membership
        ii. Suppose prosecution could actually prove that Johnson was a gang member
            1. Relevant b/c would help discredit Butler
            2. But weigh against that whether when jury hears "gang member" they tune everything else out
    e. <u>Confusion of the Issues</u>
        i. <u>Example</u>: If, in order to support Johnson's claim that he knew that one of the guards was dangerous from the other prison, the defense brought in 20 inmates from the other prison to corroborate this
            1. Highly relevant
            2. But would confuse the jury as to the actual issue in the case at hand
            3. This is about a battery in the current prison, NOT the reputation of the guard
        ii. Trial judge decides whether this evidence goes too far
        iii. When an issue is called collateral, concede that it's relevant, but it's sideways relevant, not directly relevant
            1. Probative value balanced against various things, including whether the jury would focus on it too much
5. LIMITING INSTRUCTIONS
    a. If trial judge is concerned that jury may misuse the evidence, can give jury specific instruction about what not to do with it
    b. Not clear if instructions really serve their purpose in reality, but courts behave as though instruction do effectively exclude improper evidence from the jury's consideration

6. PROBLEMS
    a. Back to bus driver . . . trying to introduce evidence of the driver tearfully describing that she viewed the children as diamonds
        i. Relatively minimal probative value
            1. Even if you believe that she dearly loves every kid on the bus, then what does that have to say about her negligence on that particular day anyways
            2. Might even flunk rule 402 because so attenuated
        ii. Danger under 403
            1. Potential prejudice to the jury – probably introducing the evidence to tug at the hearts of the jury
        iii. Doesn't take much prejudicial possibility to push the scale if the probative value is small, but if a judge let it, it would almost surely not be let in on appeal
    b. Letter from the school board saying that she's a safe driver
        i. Again, not sure about probative value because small connection between the school board's opinion and her negligence on that particular day
        ii. Not a whole lot that you can put on the other side of the scale
        iii. Probative value must be *substantially* outweighed by risk of harm, and this is not substantial so probably would be let in
7. <u>*OLD CHIEF v. UNITED STATES*</u>
    a. ISSUE: CAN THE COURT COMPEL THE GOVERNMENT TO ACCEPT A STIPULATION?
        i. Normally the law does not tell parties how to go about proving their cases
        ii. But can do so in certain circumstances
            1. This was in a public court system, using public resources, so more willing to take control over the process
            2. Rule 403 allows for these kinds of considerations – unfair prejudice, waste of time
    b. FACTS
        i. Old Chief was arrested in 1993 under a statute that made it unlawful for anyone who had been previously convicted in a court for a crime punishable by imprisonment for more than one year to be in possession of a firearm in or affecting commerce
        ii. Old Chief had spent over a year in prison for assault causing serious bodily injury → prepared to stipulate to this
        iii. Prosecution refuses to accept the stipulation – want to introduce evidence and authenticate it . . . BUT WHY?
            1. Want the jury to know exactly what crime it was – want them to think that he's a violent man so he should be put away
            2. (Can't technically argue this, but assuming jury will infer)
    c. OLD CHIEF'S ARGUMENT UNDER 403
        i. Compare the two ways of proving the prior crime:
            1. Probative Value
                a. Old Chief saying he did it OR prosecution bringing in the documents saying that he did it
                b. Seems like a wash – neither is more probative
                c. There is an advantage to the prosecution by bringing in the documents, but it is an advantage the prosecution cannot use
            2. Prejudicial Risk
                a. Old Chief's confession will not prejudice the jury, waste time
                b. HOWEVER, prosecution bringing in the evidence WILL prejudice the jury
            3. So, if there's no difference between the two in terms of probative value, but there IS a difference in prejudicial risk, then use the less prejudicial method
                a. <u>*NOTE*</u>: if Old Chief had not been willing to stipulate, then there wouldn't be an argument under 403 → would need the evidence to prove an essential element
    d. SCOTUS DECISION
        i. The availability of alternative means of proof is something that the court is supposed to consider when it's making its Rule 403 decision
            1. Makes government take advantage of neater cleaner way of proving the same thing

ii. 5-4 decision
iii. *Dissent*: O'Connor, Scalia, Thomas and Rehnquist
1. Before telling the government that it must accept the stipulation, the majority opinion goes through an elaborate description of why parties should be able to shape the process of proof in any way that they want to
a. NARRATIVE
i. Although the law structures its analysis under proving discrete elements of a cause of action, there's very good reason to think that much of the time people don't really reason this way → actually reasoning from the narrative to the specifics
ii. Effect on probative value
1. In terms of essential elements, stipulation doesn't really change things
2. BUT, if prosecution is trying to illustrate a story, then it's important to have the whole story → probative value of the conviction is higher than the stipulation
b. INFERENCES BY JURY
i. The prosecution might be worried if the jury does not know what the actual crime was, may infer that the crime was minimal and prosecution was railroading D
c. LEGAL EFFECTS OF STIPULATION
i. In a criminal trial, the jury does not HAVE to accept the stipulation
ii. Can't guarantee that a jury is going to accept a stipulation
iii. Jury could decide the case for D, based on finding of no prior crime after ignoring the stipulation and prosecution can't appeal because of double jeopardy
iv. Government can be concerned about this and think that bringing in the court documents of the prior conviction would minimize this problem
2. But then majority ends up compelling stipulation nonetheless . . .

e. TAKEAWAYS
i. Probative value is a more complicated idea that it may see
1. If you accept probative value as something that may go towards establishing a more persuasive narrative then there's more probative than you'd think
ii. Balancing tests by their nature are very hard to do
iii. Actual effect of the Old Chief case on practice appears to be decidedly mixed – 403 analysis is based on particular facts so it's difficult to make generalizations about balancing tests

FOUNDATIONS

1. Two categories of things that need to be authenticated
2. WITNESSES

a. RULE 601: Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law

i. Primary rule
ii. Competence viewed against the backdrop of CL 100 years ago
iii. Saying that you're competent to appear means that you can get up and starting talking (doesn't mean that people have to believe what you say)
iv. Systematic dismantling over the last century of the limitation on who can be a witness
v. ***Every person is competent to be a witness except as otherwise provided in these rules***
a. Only two places where it's "otherwise provided" in the rules – judges and jury members cannot testify as witnesses

b. <u>RULE 605</u>: The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

c. <u>RULE 606</u>

i. (a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

ii. (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about

1. **(1) whether extraneous prejudicial information was improperly brought to the jury's attention,**
2. **(2) whether any outside influence was improperly brought to bear upon any juror, or**
3. **(3) whether there was a mistake in entering the verdict onto the verdict form.**

vi. ***However, in civil actions and proceedings with respect to an element of claim where state law provides rules of decisions, the competency of witnesses will be decided by state law***

1. i.e., in diversity cases, look to state law for competency rules
2. State rules are not that different, but there is a marginal difference
3. General thrust is that a fair number of states still have rules about competence of young children
4. STATE CRIMINAL TRIALS
    a. Might be constitutional problems with refusing to allow witnesses based on state law
    b. <u>Example</u>: D wanted to introduce hypnotically refreshed testimony and state did not recognize this as competent → SOCTUS in 1987 said this violated D's rights
5. DEAD MAN'S STATUTE
    a. Situation in which, in an accident, one person dies and one person lives, and the surviving party sues the other's estate (or vice versa)
    b. Clearly the dead party can not introduce his side of the story, so the law takes action to mitigate the unfairness that results
        i. Many states either limit the extent to which the surviving party can testify in a situation in which the other party is dead or can't answer, OR
        ii. Sometimes fudge the other rules of evidence and let things in that normally would not be allowed, OR
        iii. Raise the standard of proof

6. LITTLE TRIAL JUDGE DISCRETION HERE
    a. Even if trial judge thinks witness is babbling fool, has to let him in and leave it to the jury to agree or disagree
    b. Potential Rule 403 Runaround
        i. Trial judge says that even though 601 says that witness must be allowed, makes decision that every word that comes out of his mouth has such little probative value that it will be substantially outweighed by unfair prejudice and waste of time
            1. Functional equivalent to ruling that witness was incompetent under 601
            2. Very rare to do this
            3. BUT, consensus of opinion is that notwithstanding the categorical language of 601, if trial judge makes that finding he can exclude under 403
    c. Some courts just say that ability to exclude a witness is there, but not sure where they're getting it

vii. As a threshold matter, Rule 601 does NOT have any age limitations, and there is no categorical exclusion of classes of people

b. <u>RULE 603</u>: Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so

i. Have to acknowledge that there's some fundamental responsibility in a court of law to tell the truth
ii. No formal procedure specified (i.e., doesn't have to be getting sworn in with hand on Bible)
iii. People can have quirky objections to all sorts of oaths, and courts are indulgent
iv. Have to be able to declare that you have your conscious awakened and have your mind impressed with the duty to testify truthfully
    1. Determined by judge – whether the person can understand the nature of being a witness
    2. If there's a question about the ability of a witness to so declare, judge will hold a hearing and figure this out
    3. <u>This is where kids can be excluded</u>

c. <u>RULE 604:</u> An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation

d. <u>RULE 602</u>: A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony

i. Not to prove that the witness saw what he said he saw, BUT RATHER that a reasonable person would believe that the witness saw what he said he saw
ii. Doesn't apply to experts
iii. Consider proximity to the offense, how actively engaged the witness was, personal characteristics of the witness that may affect ability to see
iv. <u>Example</u>: Accident; liability depends on what color the light was; next to the accident were four people
    1. Witness #1: Stevie Wonder
        a. Is not going to qualify as a witness to the color of the light
        b. If there were sounds that were relevant to the liability, then he would be able to
        c. No set of facts that one can bring into evidence that would lead a reasonable person to conclude that he had personal knowledge about the color of the traffic light

2. Witness #2: apl.de.ap (90% vision impaired); assume that he was not wearing any vision enhancement devices
    a. Is there any set of facts that can be brought in that would establish that a reasonable person to conclude that he had personal knowledge about the color?
        i. Bring in vision specialists, etc. at a hearing to show that a reasonable person could conclude that he was in a position to see the light
3. Witness #3: Meatloaf (red/green colorblind)
    a. Possibly – although he could not establish red from green, he could possibly say that the bottom light was lit . . . then on trial bring evidence about the configuration of the light
    b. At hearing could bring evidence about his potential to distinguish which light is lit even though can't see actual colors
4. Witness #4: Lindsay Lohan on drugs
    a. Would that go to her ability to function as a witness as a case? Or does this go to credibility on cross-examination?

v. Sometimes tricky with things like medical info
1. Officers testified as to injuries through scuffle with Johnson – Did Officer Van Burg have personal knowledge that he had a bone chip in his thumb?
    a. NO – he was in a position to have personal knowledge that his thumb hurt like hell, and 602 would allow him to testify
    b. But how would he know that he had a bone chip? Does not have any medical training
    c. Concluded that he had a bone chip because someone at the hospital told him
        i. Has personal knowledge as to what the people in the hospital told him
        ii. If someone asked him what the people at the hospital told him, then he has personal knowledge
        iii. Hearsay . . . testifying from someone else's personal knowledge

vi. Recalling past events
1. Goes to the weight given to the testimony, not admissibility
2. Witnesses constantly have problems remembering things – constantly testify to things that happened in the past
3. <u>Example</u>: Asbestos claim; did asbestos giving rise to P's deceased-husband's position was established by OCF
    a. Deceased gave deposition that he had worked with OCF material that was later established to have asbestos; also testified that he's taking morphine that he says is messing with his brain
    b. D moved to strike b/c there's not enough evidence to show that decedent was in a position to know what he worked with (claiming morphine made him unaware)
    c. This was a real case – judge let it in
        i. Person didn't start taking morphine until later (at time of dep he had been taking it)
        ii. But at the time that he was working, his brain was fine
        iii. At that time, he would have been in position to identify what he was working with
        iv. Giving deposition and saying that his memory is going in and out, but sometime in the past he would have been capable of identifying the product
        v. If, at the time that the relevant events happened, he was on morphine, then you'd have the LL question – was he so screwed up that no reasonable person could conclude that he was in the position to identify the source of asbestos

vii. Possible to view 602 as authentication – establishing that the supposed witness to the matters was in fact a witness to the matters
viii. Usually when we think about authentication, we're thinking about items (i.e., bloody knife), not people

3. OTHERS – DOCUMENTS, EXHIBITS, ETC.
   a. **<u>RULE 901</u>:**
      i. **(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.**
      ii. **(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:**
         1. **(1) *Testimony of witness with knowledge*. Testimony that a matter is what it is claimed to be.**
         2. **(2) *Nonexpert opinion on handwriting*. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.**
         3. **(3) *Comparison by trier or expert witness*. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.**
         4. **(4) *Distinctive characteristics and the like*. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.**
         5. **(5) *Voice identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.**
         6. **(6) *Telephone conversations*. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.**
         7. **(7) *Public records or reports*. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.**
         8. **(8) *Ancient documents or data compilation*. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.**

9. **(9) *Process or system*. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.**
10. **(10) *Methods provided by statute or rule*. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.**

iii. Could be based on identifying factors
    1. i.e., something carved into a gun
    2. Don't have to show beyond reasonable doubt that this was the same gun, just show that a reasonable person could conclude that it was the same gun (as long as distinctiveness is enough that a reasonable person could conclude that it is the same one)
    3. Example: Coast Guard confiscates navigation charts in conspiracy to import marijuana problem from book; CG official to testify that he recognized the charts b/c of drawings of Bob Marley on each one
        a. Whether this is enough to support a finding of authenticity depends on the uniqueness of the charts – could be standard practice to draw Marley on maps

iv. Generally, with evidence confiscated at arrest, authorities bag it, put marker on it, etc. and maintain records of chain of custody (people have to check it out and keep a log of everything that happens to it)
    1. Still doesn't necessarily mean that the jury believes it, but presumably could establish a chain of custody believable by the jury
    2. Example: Crime is possessing unregistered saw-off shotgun; agent finds case under the bed where D is sleeping containing sawed-off shotgun; shotgun is introduced at trial as Exhibit 2
        a. Large amount of time between arrest and trial
        b. Agent comes in to trial with sawed-off shotgun – if prosecution is going to introduce this as the product of the crime, has to authenticate that this is the one found earlier
    3. Questions of how tightly the chain of custody must be kept
        a. Example: CG problem . . . have to prove that leafy substance was in fact marijuana, do so by introducing bag of leafy substance; CG agent testifies that he put a bag in safe with the charts – not sure if it's the same bag but looks the same
            i. THIS IS NOT ENOUGH. A reasonable person could not necessarily conclude that Exhibit C is more likely than not the same stuff the CG agent took off the boat.
            ii. EVEN if there was something to signify the specific bag (if the CG agent had doodled on the bag)- even that might not be enough to establish the stuff IN the bag is the same as the stuff taken from the boat…
            iii. To some extent, it is up to the trial judge to decide how specific the chain must be to be enough
        b. What if CG agent testifies he went into the safe and the same place he got the nautical charts, there was a leafy green bag… IS THIS good enough, with CG agent's testimony?
            i. Probably, depends on the trial judge…
            ii. Technically, it's still possible it is a different bag- someone could have replaced it… many things could have happened since the bag went into the safe
        c. *Depends on background assumptions: how likely is it that something is going to go amiss between the bag getting collected on the boat, going into the safe, and then coming to court?*

i. It is always open to the defense to point out to the jury all the ways an exhibit could be discredited
ii. BUT, the question is whether it is strong enough to GET IN in the first place – whether there is so little likelihood that it's the same bag that the judge thinks it shouldn't go to the jury
1. Possibility that a reasonable finder of fact could conclude that it's what it is claimed to be
iii. Could depend which unit of government you're talking about- is the CG reliable?

ii. VERY FUZZY LEGAL STANDARD
1. No clear answers. Lots of trial judge discretion
2. Very unlikely to get reversed on appeal
3. Example: Prosecution is trying to introduce two bullets into evidence; crime was "felon knowingly in possession of bullets"; Assume D is willing to concede that he was a felon—leaves the question of tying the bullets in the exhibit to the D… not easy.
a. The detective who seized the bullets testifies that he seized bullets from the D's apartment… did not look at head stamps- put the bullets into a small envelope, then that envelope into a larger envelope… bullets then go into central office ballistics unit, which writes down on the log: one of the bullets has a little "B" stamp… somewhere between that time and trial, the seals on the envelopes are broken (seems reasonable to think someone was in the envelopes) – taped closed… government agent later notices an "X" marked on each bullet… (there was no "X" recorded when the bullets went into the unit)… at some point, those bullets went missing for six days
i. Lawson would probably NOT let them in
ii. The fact no "X" was written and now there are "X"s seems questionable, especially b/c they DID take the trouble to record the "B" that was on them… But it's not conclusive
iii. He would be surprised, but not *shocked* if a trial judge let them in

b. DEMONSTRATIVE EXHIBITS
i. Problem: have a high risk of prejudice because seeing is believing – up to trial judge to exercise discretion in the courtroom

c. DEMONSTRATIONS IN COURT
i. i.e., OJ Simpson trial – glove doesn't fit
ii. Things that actually happen in the courtroom have a BIG impact
iii. Question is whether the events that party is recreating are sufficiently similar to the events that happened in real life such that it is WORTH submitting to a jury
iv. Example:
1. You have a guy/wife and a female friend goes into their house; the wife gets shot to death… what happened? Two different stories:
a. Story 1 (female friend) – when they got home, the D, the guy, started to beat his wife; friend tried to intervene; D threw plants at her then kicked her in the chin; D got pistol, tried to shoot friend; wife intervened – he shot window instead; took another shot at friend, missed, then shot wife in head
b. Story 2 (D's story)- yes, he and wife started to argue when they got home; wife attacked him and hit friend with frying pan; wife then took revolver from bedroom, threatened to shoot D; they all got into scuffle; wife comes out with the gun, says "watch this" and shoots herself in the head
2. Wife is not there to testify → prosecution wanted to try to show that it was impossible for the wife to have held the gun in a way to have shot herself, consistent with the ballistics report… (to show D's story is not true) HOW WOULD THEY SHOW THIS?
a. Prosecution brings an expert who testifies that the gun had to be 18 inches from the wife's head when fired

b. We knew the wife was 5'2", 171 lbs… QUESTION: how LONG were the wife's arms?
    i. You could probably come up with some type of reenactment to duplicate what would have had to exist for such a shooting to happen…
c. Expert testifies that he can estimate the length of the wife's arms, based on his experience with such people of such height/weight, but there is no exact measurement
    i. He also had two women in office of similar height/weight and he measured their arms
    ii. Estimated ~20 inches
d. Gov't sought to demonstrate that someone of that height/weight could not have shot themselves in the way consistent with the ballistics

3. QUESTION: was the demonstration introduced by prosecution –where they scoured the courthouse for a woman w/20 inch arms who then was showed to not be able to shoot herself in that way – Is that ADMISSIBLE?
    a. Trial court *let it in*
    b. QUESTION: was that an abuse of discretion subject to reverse on appeal?
        i. A trial court's decision to admit or exclude such evidence—abuse of discretion standard
        ii. D's primary challenge to govt's use of demonstrative evidence was that there was insufficient evidence of victim's arms' length
        iii. 10th Circuit holds that the expert was competent to estimate the victim's arm length based on his medical experience (but not measurements of the women in his office)
            1. The fact that there were no actual measurements speaks to evidentiary *weight, not admissibility*… becomes the D's job to dispute the expert's testimony…
        iv. D also challenged the relevancy of the demonstrations… 10th Circuit agreed w/the district court that they were relevant: if they were correct, of COURSE they were relevant
            1. AGAIN- weight/credibility can be challenged BUT it is admissible
    v. TRIAL judges have one whole big heaping lot of discretion

d. SIMULATIONS (computer-generated)
    i. Pose even greater danger tan demonstrations
    ii. Same problem – Q of determining if it's too far removed from what happened to go to the jury

e. ARTICLE X: CONTENT OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

i. Rule 1001. Definitions

1. (1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation

2. (2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

3. (3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

4. **(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.**

ii. RECORDINGS AND PHOTOS
   1. Extremely important, but law is fairly straightforward
   2. One little twist: If what you're introducing is a motion picture and not a still photograph, things like camera angle/lighting/etc. could make a difference in how an event is presented… (NFL instant replays for example)
      a. Allen et al- says it fits into the legal structure and doesn't have special rules despite this

iii. WRITINGS

iv. Various problems when a party introduces a document – relevance, hearsay, etc.

v. Narrow problem of ensuring that the thing introduced as a writing really IS the thing that it claims to be
   1. VERY important topic, w/out a lot theoretically to be said
   2. Special case of the same problem we've been discussing
      a. And same thing: once admitted, the jury can decide *how much* to weigh it
   3. Long catalogue of means to prove a doc is what it claims to be
      a. 901(b): nonexclusive list of methods long recognized in the law

vi. EMAILS – the Federal Rules have not systematically crafted unique rules to deal with electronic communications
   1. Presumably techies may be able to trace an email to a specific machine
   2. But it's also easier to forge things electronically than to do so on paper
      a. BUT arguing that an email was forged won't necessarily impact admissibility

vii. <u>RULE 1002 (The Original Documents Rule)</u>: To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

viii. <u>RULE 1003</u>: A duplicate is admissible to the same extent as an original unless
   1. **(1) a genuine question is raised as to the authenticity of the original or**
   2. **(2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.**

ix. This is NOT a requirement that you bring forth the best evidence to prove something… it IS a requirement that if you are proving something through a writing you must put forth the original document
   1. <u>Example</u>: D lies under oath at congressional hearings; subsequent criminal proceeding for perjury; prosecution has to establish what person said at hearings; there was a *transcript* of the testimony that was the subject of the perjury trial
      a. The government at the criminal trial does NOT introduce the transcript, but puts on the stand, the chief council of the congressional committee who *relates* what the perjury D said to the Congressional committee.
      b. D challenges this and says "there was a stenographer- MAKE them introduce that because it is the best evidence"… GOOD DEFENSE?
         i. NO. There is NO legal requirement that you always use the most reliable evidence you've got.
         ii. The government was not trying to prove the contents of the transcript (if so they would have had to present the transcript) –

just trying to prove what someone said and there are several available ways to do that

iii. No legal requirement they present the presumably more reliable transcript

x. The ACTUAL "best evidence rule" – aka original documents principle

xi. CONCEPT: when you are trying to prove something about a thing- it is better to look at the actual thing (or replica or re-creation), rather than have someone testify about it

xii. <u>Rule 1004</u>: The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

1. **(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or**
2. **(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or**
3. **(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or**
4. **(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.**
    - **a.** *Most important exception: the writing/recording/photograph is not centrally important (if no one really cares, then there's not a lot of sense in requiring the original)*

xiii. Applies only when the CONTENTS OF THE DOCUMENT are at issue

1. Many times a document is important for what it is, NOT for precisely what it says
    a. i.e., articles of incorporation – don't care about precise details, but want to know whether an entity is incorporated
    b. In these situations, original documents principle does not apply
2. No clear lines to determine if a document is being introduced for its existence or for its content
    a. *US v. Sliker*: in order to get federal criminal jurisdiction, bank that was robbed had to be FDIC insured
        i. Government didn't have FDIC certificate to show that bank was insured (not sure why they didn't have the original)
        ii. Instead had someone from the bank testify that he had seen the FDIC certificate in the bank
        iii. Does testimony violate original documents principal?
            1. If the only issue is whether such a certificate exists, then suppose not
            2. But if you unpack this, it can't just be an FDIC certificate – it has to an FDIC certificate for this bank, had to be current, etc.
            3. All sorts of things that involved the content
            4. BUT, most people in current law don't have an issue with this – if all we're trying to show is that there was a certificate then it's not really the contents . . . not the details or precise wording
    b. Not a hard and fast rule, and there's really no way to tell
    c. Ton of discretion to trial judge and very unlikely that you're going to get an appellate court reversal
3. Interesting and difficult problem that DOES NOT have a doctrinal solution

xiv. *Syler v Lucasville* (1986): Syler says that he had an idea before the Star Wars movie was produced, but he just says he had drawing – doesn't present those drawings and the movie had been out for awhile
    1. Illustrates why it makes sense to have the rule
    2. Syler didn't have the original (the drawing were held to be "writing, recording, photograph"), so wanted to testify about the idea that he had
    3. POSSIBILITIES
        a. Could be that he never had them in the first place (he made up the whole thing); Lucasville didn't necessarily think this
        b. He had them, but the dog ate them
            i. RULE 1004(1) situation → Other evidence of a writing/recording/photograph could include a reconstruction IF originals are lost or destroyed
            ii. UNLESS they were lost/destroyed *on purpose*
            iii. There was a finding by the trial court in this case that the originals WERE lost/destroyed in bad faith
        c. "I had the originals, I lent them to my cousin, who now lives in Algeria" – and the courts don't have jurisdiction to subpoena Algerians
            i. Rule 1004(2) situation → original not obtainable (by judicial process or procedure) is legitimate ground for not producing original
        d. Lucas film might have had the original and didn't produce it
            i. Rule 1004(3) situation
        e. Writing/recording/photograph is not centrally important
            i. NOT the case here- the original drawings WERE central to the *Syler* case
    4. Syler lost originals in bad faith – so he can't present reconstructions; doesn't have evidence to prove he came up with the idea before Lucas SO HE LOSES

xv. Drawings/Sculptures
    1. To get drawing into that language required a fair bit of judicial creativity (the court in *Syler* stretched that language very far)
    2. COULD you stretch the language far enough to include objects?
        a. PROBABLY NOT
        b. If you included objects it might not be an "original writings" rule, but really a true "best evidence" rule
        c. It is fairly clear *the original writings rule DOES NOT APPLY TO OBJECTS* (even if the objects are representations of things that could have been put down in writing/recording/photograph).
    3. Sculpture: No possible way to jam it into terms of 1001 so it is NOT subject to the original documents principle
        a. Syler *would* have been perfectly free to come in and testify about the sculptures he made and then that testimony probably could have gone to the jury
        b. Not COMPLETELY clear this is definitely would have happened
    4. HYPO: Suppose a case hinged on a T-shirt that said a specific phrase. To testify about the phrase, would you need to bring the original T-shirt?
        a. The T-shirt is an object, so it is not technically governed by 1001
        b. BUT the key aspect *is a writing*
        c. 1001 doesn't actually answer that question
            i. 1001 strongly implies objects are not covered, but if something could be realistically categorized as both- 1001 doesn't specify
            ii. The LAW does have an answer: LET the trial judge decide… and then the appellate courts will leave it alone
            iii. Either determination would survive on appeal
        d. Similar issue if police officer is testifying that beer bottles found on D's car seat were Bud bottles (vs. Bud Light) and the specific type of beer is crucial for something like alcohol content

i. Would prosecution have to have the original bottles? Introducing if for what it is (beer bottle) AND for the writing element
ii. Would be up to trial judge to classify

xvi. APPLICATION: Dentist indicted criminally for tax fraud – claim is that the dentist was concealing assets from the IRS; one of the operative facts that the IRS would like to use comes from the dentist's divorce proceeding – said something about concealing assets in and interview with his ex-wife-s lawyer

1. Potential Sources of Information
    a. Dentist
    b. Lawyer
    c. Lawyer's Notes
    d. Tape Recording of Interview
    e. Transcript of Interview Made by Lawyer's Assistant
2. The law does NOT specify which of these forms the government must use, OR which order it must try them in
    a. Tape recording is probably the best account, but there is no requirement to use the "best" evidence
3. Concerned only if the form of evidence used constitutes a "writing"
4. Tape recording
    a. Tape introduced for its contents → recording under 1001 → contents of recording at issue → 1001 requires original tape (can't have testimony by someone who listened to the tape about what was on the tape instead of introducing the actual tape)
    b. Recording made of the tape
        i. 1ST QUESTION: Is this a duplicate?
            1. 1003: Duplicates acceptable to the same extent as the original
            2. 1001(4) defines duplicate – includes electronic re-recording → this is a duplicate
        ii. 2ND QUESTION: Is it nonetheless excluded?
            1. 1001(1) & (2): Duplicates are presumptively acceptable UNLESS
                a. Duplicate isn't accurate reproduction of original
                b. Would be unfair to admit duplicate instead of original
                    i. Could be unfair depending on how the process of duplication changes things
                    ii. Even if it is an accurate reproduction of the features that it reproduces, it doesn't reproduce everything (i.e., having the front side of a check, doesn't give you signature)
                    iii. In the recording context – if there's a sound removal program that reduces background noise or something like that
5. Lawyer's Assistant's Notes
    a. This is one step removed – just like assistant listening to the tape and testifying about what she listened to
    b. Trying to prove the contents of a recording by some means other than the original, so would violate the original documents rule
    c. UNLESS something in 1004 allows it:
        i. Must have some legitimate reason why the original tape can't be produced, AND it must not be done in bad faith
        ii. Once you have a reason under 1004 for nonproduction of the original, can use any appropriate secondary evidence that you want

1. i.e., tapes were erased in the ordinary course of business, lost notes, and doesn't remember the contents of the conversation → can use the transcript
2. Going to be less persuasive but doesn't go to admissibility problem

xvii. REMEMBER FOR WRITINGS, RECORDINGS, ETC. MUST MEET ORIGINAL DOCUMENTS RULE <u>AND</u> MUST HAVE SOME AUTHENTICATE IT

1. i.e., someone has to verify that the tape introduced into evidence IS in fact the tape that the lawyer made of the actual interview
2. <u>APPLICATION</u>: Importing marijuana problem . . . CG finds GPS looked through it and saw that they were in Kingston, Jamaica
    a. FOUNDATION
        i. Generally, the more important the evidence is to the case, the stricter judges tend to be about requiring good foundations (*not in the rules, but generally the case in practice*)
            1. If it's minor matter, they might let you get away with weaker chain of custody, or weaker foundation
        ii. Here, the GPS is probably central to case, so might be more likely to look askance to chain of custody issues
    b. ORIGINAL DOCUMENTS
        i. The contents of the screen on the GPS is what is at issue here – no one cares that there was a GPS, what brand, etc. – therefore it's a writing
        ii. Government would have to have original or a duplicate
        iii. Coast Guard did not seize the GPS or obtain any record of any data that he observed
            1. So the only way to allow him to testify about what he saw on the GPS screen is to get past 1004 – need to show why original couldn't be reproduced
                a. Tough case here . . . what reason could government possibly give?

<u>CONDITIONAL RELEVANCE</u>

1. Certain preliminary determinations about admissibility of evidence made by the judge and certain ones made by the jury
    a. Rule 104 basically divides the universe of preliminary questions into two:
        i. Those where foundational or preliminary facts involved go to whether the evidence introduced is relevant, or
        ii. Whether the preliminary facts go to something other than relevance
            1. Policy determinations to establish certain prerequisites, etc.
            2. Something that the law is trying to accomplish besides determining whether the evidence is relevant

2. <u>RULE 104</u>: PRELIMINARY QUESTIONS

a. (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

b. (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

3. 104(a) questions are decided by the judge by a <u>PREPONDERANCE OF THE EVIDENCE</u>
    a. Basically a mini bench trial every time something like this comes up

b. Factual findings decided by the trial judge
c. Evidence itself doesn't have to conform to the rules of evidence
d. Almost always standard practice to resolve as many of these issues as possible pre-trial

4. 104(b): CONDITIONAL RELEVANCE
    a. Law primarily charges the jury with the task of finding the facts in case based only on facts that the law finds appropriate for the jury to consider
    b. BUT, the determination of what evidence they're supposed to consider always depends on facts
        i. Someone the facts are so obvious that no one tests them
        ii. Sometimes the facts that determine whether or not the evidence is admissible is the only thing in dispute in the case
            1. In these situations, would not make sense to have the JURY decide which evidence the JURY is allowed to hear . . .
            2. Therefore federal law came to the conclusion early on that it's the judge's job to decide what the jury is going to hear
                a. CL actually gave the trial judge more power to make those determinations than the federal rules
                b. Trend is to expand the range of questions of this preliminary nature
    c. Judge is asking the familiar question of whether a reasonable fact finder could make the determination that the condition could be fulfilled
        i. Classic Example: *Johnson* case where prosecution tries to introduce gang member affiliation (they were hoping to establish that Butler had a specific motive to lie in favor of Johnson b/c they were members of the same gang) – had to prove that Johnson was also a member of the same gang as Butler → So the relevance of Butler's gang status was conditional upon Johnson's gang status
            1. If the prosecution couldn't establish Johnson's gang membership, getting Butler's gang membership IN would raise a relevance objection
                a. Judge can allow in evidence of Butler's gang association ONLY IF prosecution brings enough evidence to support a finding that Johnson was in the same gang
    d. In this situation, allowing the judge alone to decide if the condition exists by preponderance of the evidence would give the trial judge unconditional power
        i. Judge has less power here than he has in 104(a) situations

5. SCOPE OF CONDITIONAL RELEVANCE
    a. PROBLEM: Conceptually, separating 104(a) and (b) is difficult
        i. Relevancy is a relational concept (ALWAYS relational to substance elements of the case, background judgments, and other evidence in the case)
        ii. There is NO possible distinction between relevancy in the abstract and "conditional relevancy" because relevancy is ALWAYS dependent on fulfillment of conditions of fact
    b. It seems that the legal system has solved this by identifying certain categories of determinations to which the legal system seems to use conditional relevancy
        i. One of which is when the purpose of evidence is to establish notice on someone's part
            1. A document can only shows that party had notice of it if there's evidence to show that the party received or heard it
                a. Condition is evidence that the document was received, heard, had access, etc.
        ii. Whether or not something pertains to a particular person or particular thing – have evidence about the characteristic, but relevant only if characteristics are linked to thing in question
            1. Whether motor had a design defect, and have evidence of the specific defect in the case, but relevant only if a design defect in the thing at issue in the case
        iii. Things are the basis for expert testimony
            1. Expert testimony is only going to be relevant if underlying foundation of the testimony is relevant to the particular case
    c. It's not clear that 104(b) is limited to these categories
    d. Example: CEO accused of insider trading, auditor on the 14th sends memo to CFO that company is going downhill and you should tell the boss, 2 days later the CEO sells 100,000 shares of the

company's stock, and claims that he didn't know until 2 days later (14th: notice to company, 16th: CEO sells, 18th: CEO claims this is when he got info)

i. Government wants to introduce a copy (conceded to be exact copy) of memo from auditor to CFO, with handwritten initials of BR (CEO)
    1. Testimony from assistant:
        a. Each workday place incoming mail in the inbox
        b. At 830 take all initialed documents from outbox into files
        c. Ray always reads and initials everything in his inbox
    2. Assistant authenticates initials

ii. CONDITIONAL RELEVANCE ISSUE
    1. Memo is relevant ONLY IF CEO read and initialed it before the 16th
    2. Trying to prove <u>notice or knowledge</u> (typical 104(b) category)
    3. Trial judge let document in only if there's evidence to support a finding that CEO got it before the 16th
        a. Nothing in the assistant's testimony about a practice that has to do with timing about when things go from inbox to outbox
        b. All that gov't could prove is that the document was put in the mailbox on 3/14
            i. Lawson – not enough to support a finding that it was read and initialed before 3/16
    4. If we add in a piece of evidence from the assistant saying that 97% of the time, things came out the same day that they came in, this would be a different story
        a. Still not decisive because this could be part of the 3%, BUT this would be sufficient to support a finding

6. PROBLEMS
    a. CONDITIONAL ADMISSIBILITY
        i. Situation in which the trial judge admits a piece of evidence, provisional upon additional evidence coming in that will prove its admissibility, but then the condition is never established
        ii. (not strictly a conditional relevance issue – occurs in other situations; i.e., document meets best evidence rule based on other evidence that will be produced later)
        iii. Rule 611. Mode and Order of Interrogation and Presentation
            1. (a) *<u>Control by court</u>*. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
            2. Sequence in which parties bring evidence or conditional evidence is basically up to the trial judge – can require everything makes evidence admissible at once, or can allow it later
        iv. PROBLEMS
            1. <u>Practical Problem</u>: Sometimes the order of proof has a certain logical sequence, and it may be destructive to the trial process to require all the connecting-up stuff to come first
            2. <u>Theoretical Problem</u>: All relevance is reciprocal – whichever you start with, is only relevant conditional upon the later production of the other → there are always going to be circumstances in which evidence will have to be admitted whose relevance is determined upon things yet to come
        v. REPERCUSSIONS
            1. <u>Motion to Strike</u>: Can have the judge strike the previous evidence
            2. BUT, *psychologically,* difficult to say how effective it is to tell the jury to "disregard" something
                a. May even have the opposite effect and make the jury focus on the evidence more

3. Striking DOES take the evidence off of the record so that it is no longer available on appeal
4. Rare to see a mistrial granted

vi. INCENTIVES FOR LITIGANTS
1. Whole concept of conditional relevance therefore creates a powerful incentive for litigants to "accidentally" turn back the gas meter . . .
2. Only restraint on this incentive is "ethics"
3. ENORMOUS opportunities for gamesmanship – things are always going to come in with the expectation that it will be "clear" later on

b. 104(b) AND 401
i. 401 standard is LOOSER than 104(b) standard, BUT if all questions of relevance can be categorized as conditional ones (which they can) wouldn't that mean every single question of relevance IS one of conditional relevance?
ii. Everything could be decided as Q of 104(b) (and judge would have to find the condition fact evidence sufficient enough to warrant admission) and 401 WOULD BE OBSOLETE
iii. <u>TWO WAYS OUT</u>
1. <u>Practical</u>: Although 104(b) has the *conceptual* capability of taking over the entire law of evidence, the law has *actually construed* the universe of things s/t 104(b) to be relatively narrow (i.e., identification evidence, background)
a. REASONING that justifies limiting 104(b) to such circumstances
i. These are areas where the evidence that is going to come in has relatively low benefit compared to the cost of bringing it in
ii. Providing the connecting-up foundation adds to the reliability and probative value of this kind of evidence
iii. Should be relatively possible for proponents of evidence in these areas to come up with something
2. <u>Theoretical</u>: The effect of 104(b) in the classes it has coalesced around is to raise the standard for those classes – which can be a good thing
a. Idea is that 401 is a mistake, and 104(b) is fixing that mistake to some extent
b. Low-value evidence tends to crowd out high-value evidence so something that seeks to weed out the low-value evidence is a good thing
c. (whole problem would go away if 401 had a higher threshold for relevance)

iv. Could imagine a universe in which every question of relevancy would be turned into a 104(b) question
1. Operative standard would be evidence sufficient to support a finding of relevancy
2. This particular theoretical (that conditional relevancy = relevancy) puzzle has had absolutely zero impact on the actual law
3. Huge change in allocating this authority – how is it that all of the scholars agree on this and the world just doesn't care?
a. Legal conundrum → legal world manages by not considering these theoretical problems and going along with its business

v. Can be plenty of evidence that is relevant under 401 that will not it through the screening process of 104(b)
1. <u>Example</u>: Grace sued and part of the claim is the Grace knew or should have known the dangerousness of asbestos at the time it was using it in its product – failure to warn case
a. No failure to warn unless manufacturer has reason to know what he's supposed to warn you about
b. At some point, Grace figured out that asbestos is a problem, but the question is when did Grace or acquire, or should have acquired that information
c. In Grace's files, find one page of a 5-page document saying asbestos is dangerous
i. If in 1990, one looked through Grace's files in discovery, would encounter this piece of paper

1. September 1968 is the operative date when warning should have happened

d. 401 INQUIRY
    i. Grace would say that if the point is what we knew in 1968, a document that we got in 1987 or something is meaningless because everyone knew this in 1987
        1. The only thing that would be relevant would be something that showed that before 1968, they knew that asbestos was dangerous
    ii. If the only issue is 401, the Plaintiff's comeback would be – no, this may be weak evidence, and would be stronger if it had an early date stamp or something, but 401 doesn't require evidence to be strong, it just requires the evidence to have SOME tendency, however small, to make the claim more likely
        1. Comparing two states of the world – one with this piece of paper in Grace's files and one without it – the one with the paper does make it SLIGHTLY more likely that Grace knew
e. 104(b) INQUIRY
    i. Whether the document meets the 401 relevance test IS conditional on when it was received
        1. Change the example to say that it's a document dates 1974 – would fail even the minimal requirements of 401 (post-1968)
    ii. Therefore 104(b) applies → Let it in IF it is accompanied on the part of P by sufficient evidence to allow a reasonable jury to determine that it was in Grace's files prior to 1968
        1. Jury doesn't even get to see the document – even if just to dismiss it – unless P brings enough evidence to make it reasonable to conclude that the evidence was there in 1968
        2. If you add in certain other facts
            a. 4 of the 5 other pages of the document were dated 1966
            b. then would have to introduce the other 4 pages so that the jury could have the opportunity to infer that the fifth page was also in 1966
            c. Not a slam dunk – jury wouldn't have to conclude that the page was written in 1966, but this would be sufficient
f. Makes the relevancy of the document subject to a higher threshold for proof than 401 prescribes

vi. Could be unclear whether 104(b) or 401 applies:
    1. <u>Example</u>: Wrongful death claim against the city b/c police shot someone; the police admit this, but their claim is that when they entered his residence to execute a search warrant, victim got a gun and charged at them with it, raised the gun at them, so when they shot him three times it was justified
        a. P's medical expert said that victim was surrendering when he was shot in the three places
            i. Can tell from the placement of the arms that he was not going after the police but surrendering
            ii. Also, if he was shot in the right forearm, the gun would fall out of his hand and he would no longer be threatening the police with the gun, and the police would have no reason for shooting him twice more
        b. Trial judge will admit this only after evidence that shows that the victim was holding the gun in the right hand

i. Is the expert testimony relevant only conditioned on prior evidentiary funding that the gun was in the victim's right hand?
1. Could go either way – could be treated as 401 or 104(b) question

c. SIDE NOTE: What sort of evidence would you need that the person was holding the gun in the right hand?
i. Law does not generate liability on statistical findings alone – can't just have expert testify that 99% of the population is right-handed
ii. Would need something more – i.e., friend that's known D for 20 years and knows he's right-handed

CHARACTER EVIDENCE

1. **RULE 404(b): Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.**

2. RULE 404 GENERALLY
   a. The extent to which it is appropriate or permissible to introduce into evidence things that D has done or not done in the past that are thought to bear on the issue in the present
   b. Testimony as to someone's character that is introduced by D is treated differently than character testimony introduced by P
   c. Using what happened in past occasions to establish a pattern of activity from which we make our routine judgments about the kind of people we're dealing with, as a juror, you would want to know that
      i. Trying to figure out what happened in a set of events about human conduct
      ii. Or even events about an objects
         1. i.e., particular staircase
            a. If every week for the past ten years, someone walking down falls and hurt themselves, it's something you'd want to know
            b. Might be coincidentally the people and not the staircase, but still want to know
   d. 404 deals with past acts that the people have performed or general evidence of the people they are
      i. If the 401 relevance of the evidence is to try to show that it's more likely in this particular instance the operative events of the litigation happened in accordance with the past events, then it can not be brought in
      ii. No permissible inference that a person acted a certain way because of who or what they are, or because of how they acted in the past

3. CIRCUMSTANCES IN WHICH IT'S OKAY TO BRING IN EVIDENCE OF PAST BEHAVIOR OR CHARACTER TRAITS
   a. 404(b): May be admissible for purposes other than action in conformity therewith – such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident
   b. Most obvious is MOTIVE/INTENT
      i. i.e., evidence that Johnson was in special holding unit b/c he previously punched guards
         1. Can't introduce it to say that because he's the type of prisoner who punches out guards, he punched out these guards
         2. BUT, could be Johnson's motive in this particular instance – to get back at guards from before
      ii. One of the only ways to show intent is through past acts

iii. From the defense standpoint, the trick is to distinguish cases where intent is at issue and cases where it is not
    1. Suppose defense is that I concede that the thing happened, and that whoever did it had a motive, I'm just not the one who did it
        a. When the only issue in the case is identity, the law seems to say that prosecution cannot introduce its evidence on motive, intent, etc.
    2. Nothing in the logical structure of 404 that talks about how important the evidence is – the need for evidence that is sought to be introduced does seem to affect the decision to allow the evidence in practice
        a. Perhaps this is encompassed in 403

c. Most important is EVIDENCE THAT IS ESSENTIAL TO THE NARRATIVE OF THE CASE
    i. If in fact psychologically decision-makers construct a story and the deduce specific elements, it's important to tell the story in fashion that people's cognitive ability to understand, and if you leave large gaps, then it's impossible to get the narrative out
    ii. What if it's not just random background information of the world, but happens to be past crimes or wrongs of D, or things that cast on the character of D
        1. Very difficult to imagine a criminal case in which this is not part of the story
        2. *Old Chief*: The general way that the case has played out since is a focus on the part that says that the prosecution gets to present the case any way that it wants to
            a. i.e., if prosecution wants to bring in evidence under 404(b) for intent, and D prepared to stipulate that intent is not relevant, prosecution does not have to accept stipulation
            b. Could argue that Rule 403 would come in, and the fact that there is a less prejudicial means of presenting the evidence should outweigh probative value
                i. BUT, Does not appear to be the way that the law is developing
    iii. Clearly within 404 because the evidence of the past act is NOT being introduced to prove conformity therewith
        1. The list of permitted uses in 404(b) is not exclusive
        2. Therefore, really becomes a 403 problem and not a 404 problem
    iv. <u>Example</u>: Garven charged with illegal possession of firearm discovered in caddy parked outside his house, caddy belongs to aunt, Garven frequently uses it
        1. Prosecution wishes to introduce evidence that Garven has been previously arrested for robbery, police at his house to look for proceeds, and discovered the key to caddy, aunt admitted that she was owner of caddy and consented to search
        2. Want evidence as to why they were at his house in the first place, and what made them look in the caddy for anything
            a. Nothing about prior robbery conviction would even be 401 relevant to the elements of possession of a firearm
            b. Presumably prosecution could show possession of firearm without explaining why they were searching his car
            c. All the robbery explains is why they were there
        3. Suppose one could use it technically as his motive to illegally possess a gun (possessing a gun because he's a robber)
        4. More probable reason would be: <u>Even though this isn't relevant to the elements of the crime, supposedly permissible purpose for introducing this evidence would be to tell the narrative</u>
            a. Want to tell the jury a compelling story
            b. Worry would be that jury would think – why are the police nosing around in this guy's car? Police must have been doing something wrong
            c. Is this an acceptable reason under 404(b)?
                i. DC Circuit Court of Appeals let it in
        5. Once you have the 404(b) threshold passed, also the 403 problem
            a. Whatever narrative relevance that this evidence might have is pretty thin, and the prejudicial risk is probably intense
            b. However, the trial judge found it was okay and the court of appeals almost never overturns this

v. While there IS a line of cases that says that this is okay but Lawson would EASILY not let this type of evidence in because of it's prejudicial impact

d. RELEVANT STATE OF MIND
   i. More broad than motive
   ii. Evidence of intent in a typical criminal case – infer intent from conduct . . . point to what happened and say 'oh come on, you have to know what he was thinking'
      1. But need enough evidence to make that argument and infer into state of mind
      2. Hard to imagine doing this just sticking to the facts of the particular crime

e. IDENTITY (who this person was)
   i. May very well be that the only way to show that the identity of D (i.e., in a ski mask) is by reference to past acts

f. Example: Wisconsin 1977 – Defendant, Martha Spagan, charged and ultimately convicted of "intentionally aiding and abetting in the delivery of a controlled substance" (trafficking heroin); based on a phone call, an undercover agent arranged for an $8000 transaction, transaction occurred near but not in Spragan's home; Spragan was not the seller of the heroin; in the course of the arrangement by the agent, he had occasion to speak with a woman called Martha; at 4 AM, he made the purchase and arrested the seller; following the arrest, the police searched D's house – found her in the garage with a loaded .38 caliber pistol on the floor, in the house they found a distinctive TV set, numerous weapons including two sawed off shotguns, two bags of pot and a scale
   i. At trial, the prosecution introduces into evidence the guns, the pot, and the scale – was that evidence admissible?
      1. If the point of the evidence was to prove that b/c she violated gun and marijuana laws, she was therefore more likely to engage in heroin trafficking, that is exactly the move that 404(b) says that you cannot make
      2. Clearly that particular move wouldn't work, so what was the theory that the prosecution was going to use
         a. Argument with the guns was, in the experience of the states agents, people who engage in heroin trafficking often have guns → empirical connection between guns, scales, and heroin trafficking
            i. Shows motive, preparation, plan, ability
               1. These are permissible grounds under 404(b)
         b. TV set was also stolen, so agents testified that in their experience stolen goods are frequently associated with schemes and plans to engage in distribution of heroin
         c. Marijuana – possession of marijuana is particular probative in the question of intent in the crime of aiding and abetting of a controlled substance
      3. Trial judge admitted all of this evidence under all of the exceptions to 404(b)
      4. Supreme Court of Wisconsin reversed
         a. Although arguments were framed in a way that were within the exceptions, it seems to be stretching them thin
         b. Dissent: All of this triggered by a phone call between the agent and Martha setting up a $8,000 heroin buy . . . what is it that led them to search her house as opposed to others in the area?
            i. Turns out phone call was from Martha's house, and she admits to having the conversation with the agent in which she agreed to the $8000 heroin buy outside her house, but her claim is that it was a joke
            ii. Throwing this into the mix doesn't change anything other 404
            iii. This might or might now affect a Rule 403 assessment (prejudicial risk outweighs probative force?)
            iv. Probably why majority didn't think it was necessary to admit this
         c. Very hard to avoid the inference that the primary purposes for introducing this evidence was to show that we had a bad person as a defendant

4. STANDARD FOR ADMISSION
    a. Relevance issue – prior acts, assuming that they meet one of the criteria for admissibility, relevant only if we can show that the "past event" actually happened
    b. Possible Standards
        i. BEYOND REASONABLE DOUBT: One possible answer is to say that if the crime charges has to be established beyond a reasonable doubt, and prosecution is using prior crime to prove its case, then it has to prove the prior act beyond a reasonable doubt as well
            1. This is the standard in TX
        ii. CLEAR AND CONVINCING EVIDENCE: Another possibility is to not go that far because we're talking about admissibility of evidence, not guilt or innocence
        iii. SUFFICIENT TO SUPPORT A FINDING
            1. SCOTUS (1988) found that this was a conditional relevance question, so under 104(b) trial just needs to make sure that there's sufficient evidence to support a finding that the past act occurred
5. PROCESS:
    a. 404(b): Does the prior bad act evidence fit into one of the acceptable categories for admission?
    b. 104(b): Is there evidence sufficient to support a finding by the jury that the prior bad act in fact occurred?
    c. 403: Is the probative value of introducing the evidence substantially outweighed by the risk of unfair prejudice, etc.?
    d. Example: Greg Simpson charged with armed robbery and burglary, Able (victim) describes a knife wielding man wearing jeans, a t-shirt and a ski mask coming in through the window, slight limp, probably over 6 ft tall, says "give me your money, call the police and I'll kill you"
        i. Prosecution wants to bring evidence from something that happened a week ago, from Pam Wellington
            1. Person that she identifies as D (no mask, jeans and t-shirt, 6 ft tall) came to her door and said that his car had broken down and asked to use the telephone, before she could respond he pushed his way into the house and pulled out a knife and demanded Wellington's money and jewelry, as she was doing that, the dog bit Simpson on the leg (could cause limp), Simpson fled out the front door
                a. Happened at the same time, and in the same neighborhood
                b. Everything matches up except for the ski mask (prosecution argues this is probably because he got smarter the second time)
        ii. Simpson objects to Wellington's testimony as impermissible character evidence, 403 objections, and also should be excluded because he was acquitted of the Wellington robbery
        iii. 404(b) INQUIRY
            1. Evidence goes to establish the identity of the person in the principle case
            2. Same height, clothing, some reason to explain why a week later he's limping
            3. Not making the argument that because he did it once, he did it again → rather saying that someone did it here, and it looks the same
        iv. 104(b) INQUIRY
            1. Is there sufficient evidence to support a finding that Simpson performed the first robbery?
            2. Simpson was acquitted of the first robbery .
            3. BUT, all that the acquittal says is that the jury in the previous case did not find *beyond a reasonable doubt* that Simpson robbed Wellington
                a. Had the jury in the Wellington trial been asked that on balance, do you think *there's evidence to support a finding* that Wellington committed the robbery
                b. Nothing in an acquittal that makes it remotely less likely
            4. If the prosecution successfully brings this evidence in (reasonable jury could conclude that this was Simpson based on eye-witness account), UNCLEAR UUNDER 401 whether Simpson be able to introduce evidence of his acquittal by the jury
        v. 403 INQUIRY

1. Big argument is going to be that prejudicial impact of admitting testimony of a prior event outweighs any potential probative value
2. Probative value cannot come from the inference that b/c he did it once so he did it again
3. Probative value can only go to identity
    a. Not a bad case for identity
    b. One of the issues here would be that there are a lot of factual questions that would have to be resolved to determine the extent of the probative value and prejudicial impact
        i. How many people in area 6 ft tall?
        ii. How many people wear jeans and t-shirts?
        iii. How many people get bit by dogs?
        iv. The more common these things are, the less probative
    c. Factual questions decided by trial judge
4. This problem raises big time the question of whether the game is worth the candle
5. Trial judge is going to have to consider all these little issues – not going to hold mini trials with expert testimony on all this stuff

vi. Suspect that at the end of the day, the evidence would come in

6. DOCTRINE OF CHANCES (AKA ANTI-COINCIDENCE THEORY)
    a. Notion that there are certain patterns of incidents, that if they occurred, make it extremely unlikely that they did not occur as a result of the deliberate conduct of D
    b. Although evidence of past acts is not supposed to be introduced to prove conformity therewith, there does come a point where it is persuasive evidence (maybe even MOST persuasive evidence) that frequency of SAME past act is not an accident/coincidence
        i. i.e., addresses the type of situation when someone is arrested for possession of stolen property because the property was found in the trunk of their car, and it happens that on 5 different occasions police have found stolen property in the trunk of this person's car
            1. Presumably, could have happened that 6 times someone just put stolen property in the trunk of this person's car and he doesn't know about it
            2. Can't introduce the evidence from the 5 previous times to show that the person has the propensity to drive around with stolen property in the trunk of their cars
            3. BUT, the anti-coincidence theory is designed to negate the suggestion that is just was happenstance
            4. NOTE: Jury decides under 104(b) whether prior events occurred and whether they were actions of D
    c. Lawson – can't conceptually make the distinction between reasoning from past behavior that there's a propensity to act that way on the one hand, and reasoning from past behavior that this couldn't have been an accident or mistake on the other
        i. If it was actually allowed to run wild through the legal system, it would basically undue 404
    d. BUT, the law is quite firmly established that there is a distinction and that the latter come in, and a few things keep it in check
        i. Only comes into play *<u>when D puts something into issue like intent or mistake</u>*
            1. ONLY THEN is it open to prosecution in rebuttal to raise the anti-coincidence events
        ii. Also, have to have enough events that are suspicious enough connected that it's plausible to make the claim
            1. There is a question of how many times must the event recur:
                a. Logically would seem that judge should be the one to decide whether there are enough events (Lawson), cases seem to leave it to the jury
                b. Presumably could let it in even after just one time, and the fact that it happened only once before goes to weight rather than admissibility
                c. Ends up turning on 403
                    i. Does this render 404(b) irrelevant?
                        1. Seems to be outcome, but there usually seems to be something more specific under 404(b)
                    ii. If this all comes down to 403, then the key question is:

1. What is the likelihood that this particular person is caught at the tail end of the probability distribution where someone gets caught with stolen goods in his trunk 6 times that he did not steal?
2. Not going to have expert witnesses come in (i.e., statisticians) to testify to what the probability distribution is, so leaves it to snap judgments

7. SITUATIONS IN WHICH 404(b) DOES NOT APPLY:
    a. (Past behavior is openly admissible for purposes of arguing that the person acted in conformity with the character that the evidence describes)
    b. <u>HABIT</u>
        i. When the things that the person does in the past are so consistent that it goes beyond simply describing a propensity, it becomes a habit
        ii. <u>Rule 406</u>: Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice
        iii. Must distinguish between habit and propensity
            1. Must be something automatic
                a. Good driving vs. wearing a seatbelt
                    i. Good driving is not something that can be a habit
                    ii. Wearing a seatbelt would be considered a habit
                        1. BUT, cannot use evidence of habitual seatbelt wearing to show that D is a cautious person – that goes to character
                        2. Would only be able to use to show that was wearing his seatbelt in this particular instance
                b. Store providing customers with receipts vs. store "always" cleaning up spills in the aisle immediately
                    i. Providing receipts would be a routine practice of an organization
                    ii. Cleaning spills is not the kind of routine, everyday practice this rule addresses
            2. <u>Example</u>: CEO insider trading problem
                a. Testimony of secretary's mal-sorting practices
                    i. Incoming mail in inbox three times a day
                    ii. 8:30 AM: take docs from outbox, make sure CEO initialed, and file
                    iii. CEO always reads, initials and puts in outbox
                a. To show what?
                    i. If it's trying to show that secretary has certain character trait, and therefore we should assume that she behaved that way on this occasion, can't do it
                    ii. If it's trying to show that Ray has certain character trait of reading and initialing docs, can't do it
                    iii. BUT, if those past acts rise to a habit or routine practice of organization, then in they come
                b. Habit or Routine Practice
                    i. SECRETARY'S TESTIMONY ABOUT HER OWN PRACTICES → YES
                        1. Three-time deposit of mail and collection and same time every day
                        2. Sequence of things that has the type of regularity that the law has in mind that distinguishes a character trait from habit
                    ii. SECRETARY'S TESTIMONY ABOUT CEO'S PRACTICES → MAYBE
                        1. CEO always reads the mail the same day that secretary puts it on his desk
                        2. Probably would qualify as a habit for the CEO

3. But the question is whether the secretary has enough first-hand knowledge to testify foundationally

iv. Habit or routine practice does not necessarily prove that the person/organization acted that way in the particular situation, BUT evidence is allowed in for the jury to consider

v. Extremely useful admissibility rule because many times it's the only way to prove something – especially in organization case

c. 404(a) CHARACTER EVIDENCE

i. **404(a): Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:**

1. **(1) Character of accused - In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the prosecution;**
2. **(2) Character of alleged victim - In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;**
3. **(3) Character of witness - Evidence of the character of a witness, as provided in rules 607, 608, and 609.**

ii. CIRCUMSTANCES COVERED

1. Criminal D can introduce evidence of his own character
2. Criminal D can introduce evidence of the victim's character (if it's to see who was the first aggressor)
3. Prosecution then can rebut

iii. FORMS OF EVIDENCE

1. The only way that this can be done is to have someone testify about:
    a. That person's OPINION of D
    b. That person's perception of D's REPUTATION in some sort of community (doesn't have to be a geographic community)
2. CANNOT prove character by introducing evidence of past things that D has done
3. Seems strange
    a. Cannot say: here are the nine violent things that D this year, so you should infer that he's a violent person
    b. BUT can say: I think that D is violent person, or D has a reputation in our community for being violent
    c. *Essentially allowing the LEAST accurate form of providing evidence of someone's character*
        i. *BUT as a practical matter, avoids having to go through nine mini-trials about whether those nine events really happened*

iv. Sometimes the best argument that D is going to have is that he's being railroaded, and he's really a good guy

1. Particularly pertinent when the prosecution's best case is where D is on a probability distribution (doctrine of chances situation)

v. PROSECUTION'S REBUTTAL
    1. Prosecution can ask character witness if he was aware of previous convictions, etc. to see if witness was informed of those when making opinion
        a. Gives the prosecution a backdoor to introduce character evidence that otherwise would not be allowed to bring in
        b. Example:
            i. In Johnson case, prosecution could not introduce evidence that Johnson previously attacked guards
            ii. BUT, if Johnson introduced evidence that he converted to Gandhi-ism when he first entered prison and doesn't even kill roaches anymore, THEN it would be okay to rebut with assaulting other guards
    2. Prosecution does not have to prove the truth of the past acts in order to ask questions
        a. Just has to have a good faith belief that convictions or bad acts are real
    3. Therefore, strategically D does not want to put on character witnesses unless he knows that nothing bad will come out in the rebuttal
        a. As soon as defense raises character issue, prosecution can rebut with things defense probably wants to keep out
vi. MAKE SURE 1) FORM OF EVIDENCE IS CORRECT, AND 2) THE ALLOWABLE PARTY IS BRINGING FORTH THE EVIDENCE

d. PRIOR SEX ACTS CRIMES
    i. **Rule 413: Evidence of Similar Crimes in Sexual Assault Case**
        1. **(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.**
        2. **(d):For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—**
            a. **(1) any conduct proscribed by chapter 109A of title 18, United States Code;**
            b. **(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;**
            c. **(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;**
            d. **(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or**
            e. **(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).**
    ii. **Rule 414: Evidence of Similar Crimes in Child Molestation Cases**
        1. (Child defined as younger than 14)
    iii. **Rule 415: Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation**
        1. These rule are NOT as radical as they seems
            a. Prosecutor can usually get this stuff in creatively anyways
            b. Already movements in the states

i. Overwhelming prosecutions for sexual assault as state prosecutions
ii. Turns out that almost all of the federal prosecutions that involve these evidence rules happen on native American reservations – small universe of people that are affected by these rules

c. *Looks like a more dramatic consequence than it is*
i. Not to say that it's not a substantial change → this is very different from normal rules

2. 403 INQUIRY
a. 413 only says that prior sex acts evidence is RELEVANT – NOT NECCESARILY ADMISSIBLE
b. 403 then requires an assessment of probative value → <u>Raises two questions</u>:
i. Should the trial judge take the enactment of Rules 413-415 as a signal that prior sexual assaults should be treated as having a relatively high probative value?
1. Basically know that each time prosecution introduces evidence under these rules, defense is going to raise a 403 objection, so should the trial judge treat this evidence as having been deemed by Congress as being relatively probative as these things go?
ii. Assuming that we're NOT taking the enactment of these rules as directly bearing on how probative the evidence is, then how probative is it?
1. Usually figuring out prejudicial impact is not that difficult
2. But what goes into figuring out probative value?
a. How clear is it that past acts happened?
i. Don't have to show that there was a conviction for past acts
ii. Just have to sufficient evidence of past acts under 104(b) to allow reasonable trier of fact to conclude that they occurred
3. If you're a trial judge, do you have to be an amateur social scientist? Do you have to make a judgment about likelihood about recidivism for this kind of crime?
iii. Doesn't seem to be a good crisp theory as to how 413 is applied
1. One school of thought that says that judges are letting everything in
2. Another school of thought that says they're doing exactly what they're doing in other contexts
3. Another school that says that they're excluding things that if you read 413-415 correctly, you'll see should be admissible
4. Page 301: perhaps because of the variety of approaches to 403, the results in particular may have more to do with nature of case then w/what the court articulate about the relationship between 403 and 413-415

iv. <u>Rule 412</u>: Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

1. (a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

a. (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

b. (2) Evidence offered to prove any alleged victim's sexual predisposition.

2. (b) Exceptions.

a. (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

i. (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

ii. (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

iii. (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

b. (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

3. One of the frequent tactics in sexual assault cases used by defendants was to try to reverse the focus of attention
4. 412 is manifestation of another long-developing trend –Rape Shield
5. Key is 412(a) → Designed to take off the table a whole series of lines of questions about the victim's past acts or character, subject to narrow exceptions
6. ***Key exception is 412(b)(1)(C):*** **Evidence the exclusion of which would violate the constitutional rights of the defendant.**
7. What essentially 412 does (over-simplification) is say that we're going to limit these types of lines of questioning to the extent that the Constitution permits it
    a. Any line of questioning about the victim that is not a constitutionally-mandated part of D's case is out
    b. Example: a successful banker with no known history of sexual misconduct, accused of sexually assaulted teenage daughter of neighbor, D claims that she's making it up because he threatened to tell parents that she was having affair with his son
        i. Looks to be squarely within prohibition of 412(a)
        ii. This seems to be the kind of evidence that if D wasn't allowed to bring it in, there would be a constitutional Due Process claim
            1. There would be nothing left to the defense
            2. His defense is that she was lying and she has a motive to lie
                a. And rules would take away opportunity to offer evidence that she has motivation to lie
        iii. Some defenses that constitutionally D must be able to make

v. Examples

1. D is charged with intentionally have sexual contact with a minor; during its case in chief prosecution introduced evidence that D lured 3-yr-old into home using piece

of candy; D takes the stand and denies is; prosecution counters with 12-yr-old that says that a week prior D offered her $20 to expose herself

a. Is the 12-yr-old's testimony going to be admitted?
    i. With 413-415 → OF COURSE it comes in with current rules, because this is exactly the type of thing that was designed to come in (within Rule 414 squarely)
    ii. Without 414
        1. Under Wisconsin equivalent of 404, Wisconsin court had no trouble letting it in as evidence of intent, plan, all the usual stuff
        2. Pretty much clearly admissible under 404
b. Moral of the question is that most of the time it's going to come in anyways

2. Attempted sexual assault and battery; victim at bar, met someone who she identifies as D, followed her to car and grabbed her and attempted to assault her, screams brought rescue and he ran away, D claims that he was not the guy (has an alibi)
    a. Prosecution seeks to rebut with the fact that 5 and 7 years ago, this guy followed two other women out of a bar and sexually assaulted
        i. Claim is sexual assault → doesn't have to be a conviction or arrest, just need substantial evidence to support a finding (witness may be enough)
            1. Easy case under the new rules
        ii. Interesting question is whether they come in under old federal rules
            1. Probably yes
            2. D says that it wasn't he → present case is identity
                a. Isn't it probative for identity that the person that the victim identified is the same person that two other people identified within the last 7 years doing the same thing
                b. Defense is going to make propensity argument under 404, but prosecution will argue that this goes to help establish identity, which is the issue put into controversy
                c. Almost surely seems that this comes in under 404
    b. Defense can ALWAYS make 403 objection (even under 413)
        i. Going to be a tough argument because the described events are so similar → the thing that makes them prejudicial is what makes them so probative
3. 21-yr-old college student charged with rape of classmate, D admits to the act but claims consent
    a. Testimony of 16-yr-old that she had recently had consensual sexual intercourse with D
        i. 414 isn't going to work here because 16 > 14
            1. 414 get in anything with 14-yr-old and under even if there was consent
        ii. But here we have a 16-yr-old, and we're assuming that sexual relations with D were consensual . . . can prosecution get it in anyways?
            1. Depends on definition of consent
                a. When the rule says without consent, does it mean in the ordinary language sense, or does it mean in a legal sense

i. Is it possible that there are certain states where the age of consent is greater than 16?
ii. If there's any state anywhere that say that having sex with someone even at 16 is statutory rape, means that this violates a law of a state, which means that it comes in under 413, which says that anything comes in if it violates the law of every state
iii. Therefore can say that this was not consensual even if she said yes
b. Better view is probably that when the law says consent it means legal consent
2. Without legal understanding of consent, or without 413, going to be very tough to get that in
iii. Even with 413, this is going to be tough to get past 403
b. Testimony of another student that on her first date, D was extremely aggressive and ripped some of her clothing before she could stop him
i. Come in under current rules?
1. 413: 5 – attempt or conspiracy to engage in conduct prescribed in 1-4
a. If ripping clothing and aggressive behavior can be described as an attempt to sexually assault, then it would come in
b. Otherwise it would not
ii. Maybe could get it in to show intent under 104(b), but much easier once you can categorize it as an attempted sexual assault

4. Charge is rape, victim says they met at a bar and talked, went to second bar, drank more, went in a car ride, he stopped along the way, she said no and he raped her
a. Defense is consent, and in order to help establish consent wants to admit testimony from D that he and victim had consensual sexual relations on several prior occasions
i. 412: seems to say the following evidence is not admissible
1. (a)(1): Evidence offered to prove that alleged victim engaged in prior behavior
ii. HOWEVER, exceptions 412(b)(1)(B)
1. Evidence of specific instances of sexual behavior between D and alleged victim used show consent
iii. THEREFORE, he fits the exception, and can get the evidence in
iv. First has to meet 401 and 403
1. Relevant
2. Probative value is not substantially outweighed by prejudicial impact
v. Rule 404 Problem?
1. Is D arguing that she has a propensity to consent so that she consented in this particular occasion?
b. Testimony from three men that they had met the victim at bars and had consensual sex
i. This is PRECISELY the type of evidence that 412(a) takes out and there is nothing in 412(b) that allows it
ii. If you didn't have 412, could you get it in under 404?
1. 404(a): evidence of character is not admissible to show conformity therewith
2. EXCEPT in criminal case, evidence of pertinent trait of character offered by accused
a. Probably would have been allowed before 412

b. Could have had a 403 issue anyways

c. Testimony that she has a reputation in the community for promiscuity
   i. Pre-412, solves the form problem (can't try to prove character by specific acts, but you can by reputation)
   ii. HOWEVER, 412 specifically takes it off the table, unless it's constitutionally required that D be able to make that argument and that's a tough sell

d. Testimony of friend of D that at first bar, the victim told friend that she was attracted to D and wanted to have sexual relations with him
   i. Before 412, would be a decent chance that this would have gotten in
   ii. Post-412:
      1. What is precisely 412 forbidding the introduction of
         a. Sexual behavior or evidence offered to show sexual predisposition?
         b. Tough call whether this would qualify

e. <u>IMPEACHMENT</u>

i. <u>RULE 608</u>: EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

1. (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the <u>form of opinion or reputation</u>, but subject to these limitations:

a. (1) the evidence may <u>refer only to character for truthfulness or untruthfulness</u>, and

b. (2) evidence of truthful character is admissible <u>only after the character of the witness for truthfulness has been attacked</u> by opinion or reputation evidence or otherwise.

2. (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness

a. (1) concerning the witness' character for truthfulness or untruthfulness, or

b. (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

ii. Argue that the person has been untruthful in the past, and therefore its permissible to infer that they are being untruthful in the present

iii. Not the only way that you can try to impeach or reduce value of witness's testimony

iv. FOUR FEATURES THAT MAKE TESTIMONY PERSUASIVE OR UNPERSUASIVE

1. ***Capacity to Observe/Process***
   a. Have to have personal knowledge
   b. Once witness passes that threshold, can still question how persuasive the trier of fact should find the witness's testimony
      i. Was the witness in the position to witness/observe what he or she is testifying about?
2. ***Capacity to Recollect***
   a. Gap in time between the events that witness is testifying about and his appearance in court
3. ***Capacity to Relate/Communicate/Convey***

a. Is what you're saying on the witness stand translating what you saw accurately?

4. ***Accuracy (Credibility/Believability)***
    a. Includes honesty, bias (could be something witness is completely unaware of), interest
5. *None of these features disqualify someone as a witness unless the capacity issues are VERY extreme*

v. Attacks on TRUTHFULNESS are fundamentally different from attacks on ability to perceive, etc.
    1. RULE 608 does not reach 1-3 above → CAN bring extrinsic evidence to question witness's capacity to observe/process/relay information – even could use specific instances
    2. Even accuracy – someone could have a bias or be an interested party, and that does not necessarily go to <u>truthfulness</u>
        a. If someone brought in evidence pointed out that witness was the cousin of the plaintiff, in the narrow sense of "truthfulness," would not be limited to bringing witnesses to testify about only positive reputation in community
        b. Cases in which it is arguable whether something goes to truthfulness or bias
            i. Judges decides – judgment of law interpreting the terms of the statute
    3. Past acts of bribery
        a. No clear answer about whether or not bribery goes to truthfulness
        b. Editors think yes; Lawson thinks it's an open Q and hasn't found definitive case law
    4. <u>Example</u>: Witness against criminal D is owner of liquor store pointing out person that robbed the store
        a. D wants to introduce witness that say liquor store owner has reputation for not remembering faces and misidentifying people
        b. Why wouldn't it be admissible?
            i. Reputation evidence is hearsay
            ii. BUT 803(21) exception
        c. Suppose you're trying to prove evidence that witness has bad eye sight
            i. 608 only talks about character for truthfulness
            ii. So can ABSOLUTELY introduce evidence about eye sight
                1. Ability to perceive/remember/narrate/*bias* governed by 401-403
        d. This particular evidence isn't really about truthfulness
            i. Not saying that liquor store owner is a LIAR
            ii. If the testimony was that he was known to intentionally point people out to cause trouble
            iii. He sincerely thinks this is the person who robbed the store
            iv. SO seems to be perfectly ok because it's going to testimonial quality other than truthfulness

vi. NO ISSUE
    1. When same kind of evidence that would be useful for raising these kinds of issues is also independently relevant for some other reason
        a. Already admissible, so can be used for impeachment purposes as well

vii. PROBLEM
    1. When the evidence that would be useful for impeachment purposes either:
        a. Has NO independent substantive relevance to the case (doesn't even pass 401 barrier), OR
        b. Is excluded by something else
    2. Give a limiting instruction to the jury
        a. Creates an opportunity for strategic gamesmanship, where parties try to introduce evidence for impeachment of a witness hoping that the trier of fact will misuse the evidence

viii. APPLICATION OF RULE 608(a)
    1. D prosecuted for armed robbery of liquor store, the victim makes a positive ID of D as the robber; D wants to call a witness to testify that the witness has a reputation in the community for lying
        a. This is exactly what 608 allows both in substance and in form
            i. SUBSTANCE: Evidence is attacking truthfulness
            ii. FORM: Evidence is in the form of opinion or reputation
                1. Prosecution's witness can't come in and say here are nine different times that I knew that this person lied (can't use specific instances)
        b. Also has to be an appropriate foundation for which this witness would have knowledge about the victim's reputation in the community
        c. After D calls character witness to challenge reputation of eye witness, prosecution can ask that witness about specific instance where eye witness told the truth
            i. 608(b)(2) → once party challenges truthfulness of witness, specific instances can be brought in (discretion of the court, so we're assuming the specific instance is probative of truthfulness)
    2. D charged with perjury, testifies, prosecution cross-examines, and D sticks to story, D wants to put witness on stand to say that D has great reputation in community for truthfulness
        a. Trick question
            i. Under 608 seem to have a problem– no attack on D's character for truthfulness yet (other than charge for perjury which by itself is not enough)
                1. So probably not okay under 608(a) to bolster D's credibility when it has not yet been questioned
            ii. The trick is that you only worry about this stuff if there's not other substantive way to get the evidence in
                1. Here have 404(a)(1) because DEFENDANT can always put defendant's own character into issue
                2. If D's whole defense is that I'm a sweetheart, then he can bring in his own character witnesses

ix. APPLICATION OF 608(b)
    1. Can ask about specific acts IF
        a. They are specific acts of the witness on the stand, and
        b. They pertain to the witness's truthfulness
    2. PROBLEM: In order to ask questions about specific acts, attorney must only have to have <u>good faith belief</u> that they actually occurred
        a. Doesn't really mean a whole lot
        b. If party does not have good faith belief and asks anyways, other side can object
            i. BUT, if the only consequence is that the question gets withdrawn and stricken from the record, the damage has already been done
            ii. Suppose judge could declare mistrial but that's not going to happen
            iii. Lawyer could get disciplined
                1. Assuming discipline is not disbarment, could be good thing for lawyer to develop reputation has hard-ass
    3. EXAMPLES
        a. D prosecuted for sale of heroine, have two alleged purchasers and arresting officers as witnesses for prosecution; defense wants to discredit prosecution's witnesses by introducing specific instances that call into question credibility
            i. Evidence that one of the alleged purchasers has threatened and intimidated individuals that could offer evidence against him

1. FIRST, ask if attorney has good faith belief that witness actually committed offense to warrant asking the Q in the first place
2. NEXT, ask if it goes to truthfulness – hard question
    a. Doesn't really seem to have to do with honesty, but in actual case trial judge let it in
3. LAST, 403 balancing

ii. Evidence that the other purchaser committed perjury 13 years ago
1. NOT conviction, but evidence
2. FIRST, ask if attorney has good faith belief that witness actually committed offense to warrant asking the Q in the first place
3. NEXT, ask if it goes to truthfulness – lying under oath goes to truthfulness
    a. The fact that it happened 13 years ago, and therefore may have low probative value, goes to 403 motion
4. LAST, 403 Balancing
5. In actual case trial judge let it in

iii. D says arresting officer took $1400 when he arrested him
1. FIRST, ask if attorney has good faith belief that witness actually committed offense to warrant asking the Q in the first place
    a. Here, D is telling his lawyer what happened, so probably enough for good faith belief
2. NEXT, ask if it goes to truthfulness
    a. Some sort of financial crimes involving dishonesty like embezzlement or fraud go to truthfulness
    b. Robbery almost certainly does not go to truthfulness or untruthfulness (not deceitful if you're just holding someone up)
    c. BUT, using your position as an officer to be deceitful and take the money might go to truthfulness or untruthfulness
3. LAST, 403 Balancing
4. In actual case trial judge let it in
    a. Although it's not obvious that stealing things goes to truthfulness or untruthfulness, in practice trial judges let things in that are further from truthfulness than pilfering, kleptomania, etc.

x. CONNECTING EXAMPLE
1. D charged for murder, D going to testify and wants to call witness to testify that D has good reputation for peacefulness
    a. Prosecutor has good faith belief that:
        i. Defendant:
            1. Three years ago was involved in bribery scheme
            2. Assaulted his wife but was not charge
        ii. Witness: Filed incorrect income taxes
    b. <u>D's Testimony</u>:
        i. Can bring extrinsic evidence of bribery scheme (i.e., other witnesses, documents) b/c bribery scheme goes to untruthfulness
        ii. Can't bring extrinsic evidence of assault
    c. <u>Witness's Testimony</u>

i. Prosecution can't ask witness if he knows about bribery scheme, but can ask about assault
    1. Witness is not there to testify for Browning's reputation for TRUTHFULNESS, but rather his reputation for PEACEFULNESS
ii. Prosecution can ask witness if he intentionally filed incorrect income tax returns last year
    1. Asking witness on the stand
    2. Question goes to credibility/truthfulness

xi. <u>RULE 609</u>: Impeachment by Evidence of Conviction of Crime

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

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

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

2. (b) Time limit.

a. Evidence of a conviction under this rule is <u>not admissible if a period of more than ten years has elapsed since the date of the conviction</u> or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, <u>unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect</u>.

3. A fair amount of the time, prior convictions are what parties will want to use for impeachment purposes
4. RULES
    a. 609(a)(1):
        i. Witness other than criminal D:
            1. If crime was punishable by death or imprisonment for >1 year
            2. Subject to 403
        ii. Criminal D
            1. If crime was punishable by death or imprisonment for >1 year
            2. Probative value must outweigh prejudicial effect
                a. This is very different from normal 403 balancing, where evidence comes in UNLESS prejudicial risk *substantially* outweighs probative value

b. Here it is a straight-up even call: probative value vs. prejudicial risk
c. Telling judges to be careful about letting this type of evidence in

b. 609(a)(2)
i. Crime involves dishonesty as central element
1. COME IN WITHOUT 403 BALANCE!!!
2. The one place in the law that Rule 403 does not overarch
3. Even if judge thinks it's highly prejudicial and not very probative

c. 609(b)
i. Period of more than ten years has elapsed since later of conviction or release
1. Generally not admissible
2. UNLESS the court determines that in the interest of justice probative value substantially outweighs prejudicial effect

xii. INTRODUCING EVIDENCE TO CORROBORATE RELIABILITY OF YOUR WITNESS
1. General proposition expressed by the rules is that a party cannot introduce evidence about how great their witness is until the other side calls into question veracity of that witness
2. MANY CIRCUMSTANCES IN WHICH GENERAL RULE DOES NOT APPLY
a. General strategy of narrating events
i. Important aspect of background how this particular person came about to be a witness
ii. i.e., traffic accident – someone about to testify that light was red
1. Perfectly sensible for lawyer to ask where that person was standing to get the info that says that they were standing right in the direct view of the light
2. Want to set up why it is that this person among all of the other people that you could have picked is your witness
a. Staring right at the light, wearing glasses, sunny, no glare no truck in the way, etc.
3. Part of the ordinary setup and the law generally allows this
iii. Enhancing credibility of witness without questions being raised
iv. If you push it too far, maybe could say under 403 we're wasting our time
v. But generally not seen as violation of prohibition of 608

b. Know your witnesses are not going to come off well
i. i.e., prior conviction, OR just not good speaker, eye contact, sweatiness
ii. Want to ask why this person is sweating profusely → have a sweating disorder; or why person isn't looking at you → cultural issue where it's rude to look at someone in the eye
1. These questions you can ask
iii. If there are previous convictions, confident that if you don't mention them, then the other side will, so might as well get it out of the way
1. Law allows you to do this as well for the most part

SPECIALIZED/LIMITED RELEVANCE RULES

1. Series of policy driven decisions made by the rules of evidence
2. Specific circumstances in which evidence that would unambiguously meet the 401 relevance requirements cannot be admitted *for a specific purpose*
a. (pretty much always another purpose for which you can get it in)

3. **<u>RULE 407</u>: Subsequent Remedial Measures. When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.**
    a. Designed primarily for tort cases – idea is that after an injury has happened, if D does something to change or alter or fix the condition that can be construed as a remedial measure, evidence of the subsequent measures is not admissible to prove liability
    b. i.e., gas tank blows up, company spends $270 million to redesign gas tanks, it's going to be hard to prove that this wasn't b/c something was actually wrong with the gas tanks to being with
    c. Don't want to discourage the company from spending the money – law does not want to penalize people for trying to fix things
    d. Therefore, the fix-up cannot be introduced to show negligence
    e. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.
        i. Just like prior acts of people are *generally* not allowed for propensity, but allowed for other reasons, the evidence of the $270 million spent to re-design the gas tank may be introduced for another purpose
        ii. Question then becomes if you are the person trying to get the evidence in, how creative can you be in finding some other reason for letting this in?
        iii. IMPEACHMENT
            1. Have to be careful with the witnesses that you call because evidence of remedial measures can come in to impeach witness
            2. Judge give jury limiting instruction to use the evidence only to question credibility of witness and NOT as evidence of negligence, etc.
                a. BUT, not sure how effectively limiting instructions are
                b. Probably better to not call the witness to begin with
            3. Depends on the witness that you call
            4. <u>Example</u>: Ladder falls down while P is using it; P sues ladder company for personal injuries – claim is that ladder was produced with cheap plastic tip (defective design); D claims that plastic tip is just fine, and the fact that it broke had nothing to do with the ladder, but with some other force/collision when the ladder fell
                a. P wants to introduce evidence that after the accident, the company substituted strengthened plastic tip on all ladders
                    i. Seems to fall squarely into Rule 407 – can't argue that they fixed the ladders so jury should infer something was wrong to begin with
                b. D has expert witness to testify that tip was good for its purpose
                    i. P wants this to fit into exception for impeachment – using evidence of remedial measures to question credibility of expert → how do remedial measures jive with expert's testimony that this is a good plastic tip? Does he know a good plastic tip when he sees one?
                    ii. If in fact you can introduce evidence of remedial measures to impeach an expert, then this would take away purposes of the rule to begin with
                    iii. Judge rules that this does not impeach expert and therefore couldn't be brought in
                    iv. 407 bars the backdoor use
                c. D's expert is an employee who authorized the change in the design
                    i. Now there's an interesting impeachment problem – direct action of that person that was contrary to the testimony that they gave
                    ii. Could still say that design was fine, but they redesigned regardless to avoid frivolous case like this (but that would go to weight)

iii. Here P probably could get the evidence in with a limiting instruction

5. So putting an expert on the stand does not necessarily open yourself up to the run-around 407, BUT if you put the wrong expert on the stand, then you might
    a. Evidence is usable only if the expert being impeached was personally involved in the subsequent remedial measures
6. Also, can raise 403 objection – prejudicial impact of introducing remedial measures significantly outweighs any minimal impeachment value there might be
7. Same idea as when D introduces character witnesses → don't bring it in if there's a risk that it will allow the prosecution (or plaintiff) to ask questions that it would otherwise not be allowed to ask

4. <u>Rule 408</u>: Compromise and Offers to Compromise

a. (a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

i. (1) furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim ; and

ii. (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

b. Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

c. Want people to enter into settlement negotiations
    i. Settlement is meant in the formal sense and in the context of litigation
    ii. i.e., car accident between two people, one sends $ to the other and says sorry about the accident
        1. Not considered a settlement because payer doesn't know that for sure that there will be subsequent litigation
d. Not allowed in the lawsuit to say – well they offered to settle, and therefore they must have been liable
e. Small exception for matters that occur in front of government regulatory agencies

5. <u>Rule 409</u>: Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

6. <u>Rule 411</u>: Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

7. <u>Application</u>: PP suing DD for assault and battery for hockey game altercation, in mediation discussing settlement; P's lawyer says we'll settle for medical expenses + $5000 if D apologizes, D apologizes, then offers expenses but not $5000, to prove how sincere apology was, wants to introduce diary entry that says I feel awful this was completely my fault; can't get around $5000, negotiations break down and they go to trial; P says hand over diary
    a. D's statement at mediation that says he was sorry and will pay med expenses → pretty clearly will NOT come in

i. Formal mediation session so there's a dispute/liability issue not like someone spontaneously after the accident handing over $ and saying sorry

b. DD's willingness to cover PP's medical expenses
   i. Out under 408 as settlement negotiation
   ii. Out under 409 as offer to pay med expenses

c. Diary entry
   i. Not clear how D is going to get out of that one
   ii. Once you have that particular document at hand, it's going to qualify as an admission and not hearsay
   iii. Not an offer to pay med expenses, not made during settlement negotiations
   iv. P will get this in
   v. D will say it's really prejudicial, BUT it's also very probative

d. Evidence that DD's homeowner's insurance denied coverage for assault on the ground that it didn't cover intentional wrongful acts
   i. Is it being used to prove fact of liability insurance?
      1. NO, being used to help establish wrongfulness of D's conduct
      2. Therefore, doesn't seem to run afoul to 411
   ii. D would be entitled to have judge give jury limiting instruction
      1. Not allowed to use info for the fact that D was insured

e. Would any answer be different if this was criminal prosecution for battery?
   i. None of the statements made to official government representative, and therefore nothing is going to change

HEARSAY

1. **RULE 802: Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress**
2. **RULE 801: DEFINITIONS**
   a. **(a) STATEMENT. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion**
      i. *Definition turns on communicative intentions of the person whose statement is at issue*
      ii. *Though we can't ASK what communicative intentions are . . .*
   b. **(b) DECLARANT. A "declarant" is a person who makes a statement**
   c. **(c) HEARSAY. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted**
3. Can have hearsay if you are testifying as a witness about something that you said in the past when you were not testifying as a witness
   a. Example: D is in Honda SUV; question is whether she ran red light, pedestrian sues D; Pedestrian calls police officer who arrived at the scene shortly after the accident (did not witness the accident no first-hand knowledge)
      i. Police officer testifies that she filed accident report after interviewing all witnesses that said that driver failed to stop at light
         1. This IS a statement
         2. Made by the person who is now the witness, BUT NOT MADE WHILE THE PERSON IS TESTFYING AS A WITNESS, and therefore still part of definition of hearsay
         3. And it IS introduced for the truth of the matter asserted – that D ran the red light
      ii. Therefore report is hearsay
      iii. But if it was introduced just to prove the police officer filed a report, independent of content, then it would NOT be hearsay (although why a party would need that is unclear)
4. LEVELS OF HEARSAY WITHIN HEARSAY

a. <u>Rule 805</u>: Hearsay Within Hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

b. In order to be admissible, must get through EVERY SINGLE LEVEL of hearsay, either by establishing that it's not hearsay or by finding an exemption/exception that allows it in

c. <u>Example</u>: Officer pulls someone over – saying "I got him doing 75 in a 45," the partner writes that down, then that goes to the office

i. By the time that the actual speeding ticket shows up there are four level of someone reporting what someone else communicated

5. "HEARSAY" STATEMENTS INTRODUCED FOR PURPOSE OTHER THAN TRUTH OF MATTER

a. The mere fact that something is a statement, a communication, other than one made by the witness testifying while they are currently testifying: NOT ENOUGH to make something hearsay. It must ALSO be offered to prove the truth of the matters asserted.

b. When there is a non-truth related reason for introducing something that would otherwise be hearsay, it is allowed in (as long as it is not excludable on other grounds)

c. Can request a limiting instruction to jury – use evidence for its existence NOT for the truth of the matter asserted

i. Likely that the jury will misuse the evidence

ii. D could argue that likelihood of misuse is so high that prejudicial impact substantially outweighs minimal probative value

1. But probably won't succeed

2. May be a good idea for D to stipulate to the matter in certain situations

a. <u>Example</u>: Mechanic tells D that breaks are not in good shape, and someone hears him tell D this, but D drives off anyways and gets into accident

i. The person who overheard cannot be put on the stand to if the point was to prove that the breaks were in fact in bad shape

ii. BUT, the person could be put on the stand if the point was to prove that the mechanic spoke those words → namely that D had notice of the dangerous condition

iii. The testimony would likely be allowed so it might be better for D to stipulate that he had notice

d. Some categories where the fact that something itself was said could be legally relevant

i. Notice

ii. Libel/Slander

iii. Possible things that involve identification of an item

e. NOTICE

i. <u>Example</u>: Slip and fall in Jones Deli, the source of the slip and fall spilled ketchup near the food takeout counter (taking as given that there was a bunch of ketchup on the floor and Sandra slipped and fell on it), question is whether it was N for employees to leave it there

1. Sandra claims that ketchup had been there for a while → if no one had reason to know about it, then they were not negligent

2. In order to show that they knew about the ketchup and did something else instead of cleaning it, Sandra calls BB who offers to testify as follows:

a. About half hour before accident I was walking past takeout counter when I overheard someone exclaim loudly "there's ketchup on the floor!"

3. Question 1: Does this meet definition of hearsay?

a. Statement

b. Declarant is whoever said "ketchup on the floor" – NOT BB

i. Even f it was BB still declarant because it's not something she said on the stand

c. Offered to prove the truth of the matters asserted?

i. If the point was to prove that there was ketchup on the floor, then yes this is offered to prove the truth matter asserted

ii. BUT not really the case here → no one is arguing that there was ketchup on the floor

iii. The reason for introducing this is for showing that the employees of the deli had reason to know that there was ketchup on the floor
iv. Therefore NOT HEARSAY, because it's not being introduced to prove the truth of the matter asserted

4. POLICY
    a. In this situation not concerned about the testimonial qualities about he unknown declarant
        i. Things could possibly go wrong – if the person was red/green colorblind then the person could have mistook relish for ketchup, OR could have been totally wrong (could have been looking at other empty aisle)
        ii. BUT, the mere fact that she said that there's ketchup on the floor – even if completely wrong – would still help to establish the plaintiff's case
            1. Only the fact that the words were said that helps to establish the plaintiff's case that it should have put the employee's on notice that they should go around looking for ketchup

f. Could introduce evidence to explain why witness is acting strangely
    i. i.e., witness looks uncomfortable, ask him if D threatened witness if he testified
        1. NOT being introduced for the truth of the matter asserted – irrelevant whether D actually called threatening witness . . . could have been someone pretending to be D
        2. All that is significant is whether witness thought that it happened
            a. Just trying to explain his apparent uneasiness on the witness stand
        3. 403 QUESTION
            a. Probative Value: Helps prosecution show why witness is nervous, etc.
                i. Don't want jury to think that witness is lying because of his nervous tendencies
            b. Prejudicial Risk: Jury may infer that because D threatened witness, he committed crime that he's being charged with
            c. Difficult question

g. Legally operative statements → some "statements" don't really have a truth value
    i. i.e., note to broker to authorize a sale, I hereby offer to buy your iPod for $20
    ii. For these, it's the operation of the act, rather than any truth value that we can extract from the statement, that is relevant
    iii. NOT hearsay

6. 801(a) PROBLEMS WITH DEFINING "STATEMENT"
    a. TRYING TO FIGURE OUT WHEN IT IS SOMEONE IS MAKING A STATEMENT
        i. <u>Verbal or Written Assertions</u>
            1. Most of the time, by speaking or writing, people mean to convey information, but not always
            2. Can have verbal acts that ARE NOT statements
            3. <u>Example</u>: If someone just screams out "oh oh oh"
                a. Not communicating anything, just making sounds
                b. Could construe those sounds to have communicative content → like meaning good job etc.
                    i. But probably not what they're trying to do
            4. Something like this would be a verbal act that does not constitute a statement under 801
            5. Therefore could not possibly constitute hearsay
        ii. <u>Nonverbal Conduct</u>
            1. Could have nonverbal acts that ARE statements
            2. <u>Example</u>: In Jaws, no one going in the water for fear of shark, mayor takes wife and children and walks into the water

a. Usually don't think of people walking into the water as intending to communicate anything
    i. So if someone testifies that they saw someone walking into the water, then this would not be hearsay
    ii. Performative aspect (getting into the water) would be the important part
b. BUT, in this case, the mayor intended an assertion
    i. Equivalent to him picking up a megaphone and saying that he believed that there was no shark in the water and that the water was safe
    ii. Presumptively could be s/t the hearsay exemption
    iii. In this case, very clear that this intended to be an assertion → communicative act

3. Sometimes silence can function as an assertion
    a. i.e., trying to figure out why there's milk all over the counter, find my 12-yr-old and say did you knock over the milk and he doesn't respond → this is the communicative equivalent of yes
        i. Also quite possibly the case that in this exact scenario communicates nothing → maybe playing a game, or in his own head, and just not paying attention at all
    b. Ask about if there was any communicative intent
        i. i.e., the fact that no customers reported spilled ketchup would not be the type of silence that constitutes assertion
            1. Customers do NOT mean to assert that there is no ketchup by not saying anything to manager, just mean that they have better things to do
4. APPLICATION: Stevens prosecuted for bank robbery, witnesses of the robbery say whoever did it wore loud Hawaiian shirt, one of the prosecution's witnesses
    a. Officer Emily James: day after robbery was following leads, went to Stevens home and Mrs. Stevens was there, asked her to give me the shirt her husband wore the last day, she gave me a Hawaiian shirt, I watched her as she entered the bedroom and saw her conceal a leather bag under the bag, after she gave me the shirt, I did a search for the leather bag and found it filled with $$
    b. Defense objected to
        i. The shirt, and
            1. Declarant, if any, is the wife because the witness is testifying about what wife had done/shirt
                a. If wife had said "my husband wore Hawaiian shirt yesterday. Let me see if I can find it"
                    i. The statement would obviously be an assertion, and made by a declarant, and the prosecution's reason for introducing it would be to prove the truth of the matter (that husband wore Hawaiian shirt), and therefore would meet requirements for hearsay
                b. BUT, she didn't do that
                c. Isn't his perfectly obvious that this is just like mayor getting into water, or nodding head yes
                d. Therefore, nonverbal act of picking up shirt in response to question of what husband wore yesterday, is tantamount to verbal statement
                    i. Could potentially somehow come up with argument about how this is not a statement – maybe she gives everyone shirts when they walk in

ii. Judge would have to decide → clearly would say that this was intended as an assertion

ii. The money
1. What about kicking the bag under the bed? Looks like an attempt to conceal, so not trying to communicate something to the police officer
2. Not intended an communicative act, even though it has implications
a. Can attach propositions to the action – "I think I better hide this bag." "I don't want the police officer to find this bag"
i. All sorts of things attached to this action
ii. HOWEVER, if none of these things were intended, then they DO NOT count as assertion
3. Not an assertion, therefore not communication, therefore testimony about her kicking the bag under the bed would not be hearsay
4. People testify about other people's conduct all the time, and we don't think about it as hearsay because we're not focusing on communicative content but on the action

iii. The answer that the Federal Rules provides is to classify something as a statement if it is intended by the person as an assertion
1. However, most of the time the asserter is not on the witness stand, so can't ask what intentions were
2. Judge decides under 104(a)
a. How would judge decide this?
i. Could have mini-trial → evidence brought in to the judge that doesn't have to conform to rule of evidence, and judge would have to take evidence about thoughts or intentions were of someone who did something, to figure out if they did it meaning
ii. Consequences of making this determination are quite significant
iii. Nasty questions getting into the heads of people who most likely are not there to testify about what is in their heads
3. Example: D writes a check to victim of accident to pay to fix his car – is there a hidden assertion?
a. Nasty, 104(a) question – if this was not assertive, if all you have is a check for $5000 to pay for the truck, then it's conduct, not hearsay, and therefore admissible
b. Lawson would probably let it in, but whatever a trial judge does would be affirmed by an appellate court

b. WHAT EXACTLY IS THE CONTENT OF THE STATEMENT – ARE THINGS IMPLIED BY THE STATEMENT PART OF THE STATEMENT
i. When there is something that everyone agrees is a statement, must ask what the person actually intended to communicate
ii. Is content determined by the literal meaning of the statement (objective interpretation)? Or is content determined by what the person intended to communicate?
iii. Example: Someone calls the phone line – Is Keith there? Does he have any stuff?
1. Implied meaning is that this would be a good place to score some drugs
2. Not stated, or translated, but it's sort of subtext
3. Question is whether this is part of the assertion
a. If so, it would be hearsay to introduce this statement to show that his a place where drugs were dealt
b. If not, then not hearsay because the "this is a good place to get drugs" part would not be part of the assertion, and therefore would be able to be introduced

iv. Rule 801 does not define an assertion, so doesn't directly answer this question
v. The applied answer seems to be that we also look to the communicative content to figure out what people mean

7. DEFINITION OF DECLARANT
    a. Animals and machines are not declarants
    b. Therefore something like video machines cannot be declarants → can't be the product of hearsay
        i. Law covers this with foundation requirements – have to law appropriate foundation to get machine in
            1. Working properly, no one messed with it, etc.
        ii. If a tape caught someone saying something and you're introducing the tape into evidence to prove what the person said, then it's no longer the tape that's the declarant but the person
    c. Person making a film
        i. Presumably cinematographer could say that he's making a statement with every shot (through camera angles, etc.)
        ii. Maybe hearsay because you're accepting as true implicit statement by the person who took the picture
        iii. Nothing in the structure of the federal rules that precludes this
8. HIDDEN HEARSAY
    a. In trying to figure out whether there's a valid hearsay problem, have to take what looks like the testimony of one person that does not expressly make reference to the statements of anyone else, and look beneath it and through it, to see if what's going on is hidden hearsay
    b. Like the speeding ticket example
    c. No set of rules to possibly tell you when you have to do that
    d. One crucial lesson: ALWAYS start by asking what the evidence is in court to try to show
    e. <u>Example</u>: To prove that Darcy had been using drugs, testimony of one of Darcy's friends is offered – last Dec 31 I visited Darcy at state drug rehab center where he was a patient
        i. Initially does not look like report of out of court declarant → Darcy's friend on witness stand reporting what he did
            1. If what you're trying to show is that the friend visited Darcy, then the witness has perfectly capable first-hand knowledge that he did in fact visit
                a. i.e., if he's needing an alibi because he's being accused of committing a different crime – would be fine because friend would be testifying about first-hand knowledge
        ii. BUT, the question is what is the prosecution trying to prove
            1. The only reason that friend's testimony is relevant is for proof of the proposition that Darcy used drugs (otherwise he would not be at the rehab center)
            2. When friend gets on the stand and says that Darcy was at the rehab center (implying that he was a drug user) what Darcy's friend is doing is relating indirectly statements that other people made about Darcy's necessity to be in the rehab center
                a. Someone had to get Darcy admitted there – screening physicians, etc.
                    i. Could have even been himself if he checked himself in
                    ii. Getting into the facility is always going to be based on something that someone said to someone else
                    iii. ALSO doctors are checking him out and making sure that he has a drug problem, etc. so that also goes into it
                b. These people had to have made statements that resulted in Darcy being at the rehab center
        iii. Clearly hearsay – can't use friend as a conduit to report the testimony of other people about Darcy's drug use
    f. EVIDENCE OF ARREST
        i. If the goal is prove that the person actually committed the underlying act for which he is arrested, then the arrest itself is classified as hearsay
            1. Arrest is basically a report of the statements of people, etc. that led to the crime
        ii. Arrest record itself is obviously hearsay because it is reporting the statements of the arresting police officers while based on their own personal knowledge or not

iii. Same thing for drivers license revocation
1. If all that you're trying to do is prove that the license was in fact revoked, then can probably do that without invoking hearsay problem
a. Could have someone with first-hand knowledge – i.e., someone from BMV who saw the piece of paper and can validate its content
2. BUT, if you're introducing it to prove that the person drove like a maniac and caused the accident (i.e., in a tort case)
a. License was revoked because of something that someone said; the someone who said something was probably a combo of investigators, officers, interviewing witnesses → all of the statements that those people make are what ultimately gets wrapped up into this piece of paper at the BMV that says that the license was revoked
b. The problem is that you don't get tort liability from getting license revoked → have to move from revocation to negligence
i. Just like arrest is only relevant of the underlying actions if you take the statements that went into the arrest as true
ii. Really THOSE people that are the witnesses and that's why this is a hearsay problem

9. Just because something is classified as hearsay, DOES NOT mean that it will not be admitted → between exemptions and exceptions on the one hand, and Rule 403 on the other, when there is a close call, the evidence usually fits in to one of the two easily

EXEMPTIONS TO HEARSAY RULE

1. 801(d)(1): *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
a. (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
b. (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
c. (C) one of identification of a person made after perceiving the person; or
d. CONCEPTUALLY
i. If a person has previously said something about the matter in question, why not just ask about prior statements?
1. Once you have witness on the stand, even though prior statements made about the subject are technically hearsay, don't you solve the problem by just asking the person the same things NOW, on the stand, with cross-examination, and under oath?
2. Even more weird once you realize that you can ask witness about statements that are inconsistent with what the person is saying now without worrying about the limitations of 801(d)(1)(A) *for the purpose of impeachment*
a. The only cash value of meeting requirements of 801(d)(1)(A) is that those statements can be used not only for impeachments, but as substantive evidence of the truth of their prior statements
b. Once you have evidence in as impeachment (although you tell jury not to use the statements of evidence of the truth of that they're saying) it will probably be used by jury for other things
e. REQUIRMENTS COMMON TO ALL THREE SUBSECTIONS
i. Declarant testified at trial or hearing, and
ii. Declarant is subject to cross-examination concerning the prior statement
1. Not Subject to Cross-Examination
a. Invoking privilege

b. Unclear whether there are other situations in which the witness is so spectacularly unresponsive that you'd have to conclude that the witness is not subject to cross-examination
    i. SCOTUS has clarified that assertion of memory loss is not enough
    ii. Seems like statutory language mandates some circumstance other than privilege
        1. *The only reason for mentioning the "subject to cross-examination" part is that there is something more required than just being on the stand*
            a. *Mandates an interpretation that there has to be circumstances where someone is not invoking a privilege, but the questioning is so ineffective that the witness is not actually s/t cross-examination*
        2. Not that many circumstances in which someone is on the stand and SO unresponsive that it may not count as cross
            a. Suppose theoretically possible – i.e., witness remembers NOTHING about what he said in the past

f. REQUIREMENTS SPECIFIC TO EACH SUBSECTION
    i. **A**: Limits inconsistent statements based on how they were made
        1. Statement inconsistent with declarant's testimony, and
        2. Given under oath subject to penalty of perjury at trial, hearing, or other proceeding, or in a deposition
            a. Free-standing affidavits don't count as "other proceedings" although they are made under oath s/t penalty of perjury
            b. May be possible to have broad enough understanding of what counts as other proceeding to include things attached to summary judgment motions
                i. That would not be an insane interpretation in a state
                ii. But under standard understanding in federal courts, this does not count
            c. Also, the fact that deposition is listed separately in the rule cuts against broad interpretation of other proceeding
    ii. **B**: Limits consistent statement based on what they're being introduced for
        1. Statement consistent with declarant's testimony, and
        2. Offered to rebut an express or implied charge against declarant of
            a. Recent fabrication, or
            b. Improper influence, or
            c. Motive
        3. In this case, the form doesn't matter – don't have to have been made under oath, etc.
        4. MAKE SURE TIMING IS CORRECT
            a. Statement has to be made before the event that constitutes fabrication, etc.
            b. <u>Example</u>: D (man) pays victim of car accident to fix his truck; victim then testifies that woman was driving car; prosecution introduces payoff as evidence of improper influence; D wants to rebut with evidence that victim told coworker two days after payoff that woman was driving car
                i. Seems like prior consistent statement that shows that the victim was not just making it up that woman was driving
                ii. BUT, doesn't work because corroborating statement to coworker happened after the payoff
                    1. Doesn't really rebut an accusation of improper influence
    iii. **C**: Statement of identification of a person made after perceiving that person
        1. Split in courts (and evidence teachers) about whether this refers only to a second identifications of a person

a. PURPOSE: The provision was put in the rule to contemplate situations in which a witness identifies D in a lineup and then a year later on the stand says that he doesn't know who committed them crime
    i. Allowed prosecution to introduce prior evidence of identification in lineup
    ii. Don't want situation in which people have time to get to the witness and turn him
    iii. Editors of book take this view
b. TEXT: The rule itself does not say anything about a lineup, and it doesn't even say that witness has to perceive the person a second time
    i. Therefore straightforward identifications should count
    ii. i.e., witness tells police officer after accident that driver was a man
    iii. Lawson takes this view
    iv. COUNTER
        1. Perhaps the trick to understanding the rule is not interpreting "perceiving" but interpreting the term "identification"
        2. Could argue that "identification" is a term of art that means things like lineups, etc. that refer to a second opportunity to see the person
        3. Nothing in the legislative history of the statute to either support or exclude this
c. CASES
    i. U.S v. Brink
        1. Statements that robber had dark-colored eyes
        2. Appears to be squarely within non-hearsay definition
    ii. BUT, second case excluding statement describing assailant as black male missing every other tooth with BO
    iii. Lopez case in 3d Cir 2001: Is there something in nature of 801(d)(1)(C) that requires that identification is a reviewing of the person?
        1. Says that there's nothing in text of the rule that says only second time you see the person, and therefore statements are non-hearsay if person shows up at trial and is s/t cross-exam
    iv. Two years later, district court in WI rejects that view and says that the reason why this exists is to admit prior statements made in lineups and photo ID's etc. Would be a twisting of the policy reasons for the exclusions to allow anything that someone says identifying the person

2. <u>801(d)(2)</u>: *Admission by party-opponent.* The statement is offered against a party and is

a. (A) the party's own statement, in either an individual or a representative capacity or
b. (B) a statement of which the party has manifested an adoption or belief in its truth, or
c. (C) a statement by a person authorized by the party to make a statement concerning the subject, or
d. (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
e. (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

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

f. *Broad and sweeping* so it's an incredibly important exemption
g. *CRUCIAL POINTS*
    i. Just how sweepingly broad it is
        1. No preconditions – does not need to be under oath, prior proceeding, testimony, etc.
    ii. Unlike almost everything else in evidence, the prior statement is not one that was made with personal knowledge
        1. Does not matter if there is no reason to believe that at the time the person made the statement, he had some reason to know what he was talking about
    iii. It can be a rank conclusion – i.e., yes it was all my fault
        1. Normally we want testimony to be statements of fact
        2. Conclusions generally come only from experts
        3. Not the case here
    iv. Theoretical rationale for this is more complicated than it may seem
        1. Understate the extent to which there is no theoretical rational for this
        2. Parties should take responsibility for their statements
        3. Reliability kinds of arguments, convenience and necessity
    v. The only question is whether it is offered against a party
    vi. Problems in the doctrine come with whether the 5 kinds of statements are satisfied
        1. Foundational Questions
            a. Usually going to be easy to tell if the party made a statement
                i. Party has manifested a belief
            b. Statement made not by the party, but that the party has adopted as his own
                i. Could be an interesting factual Q
            c. Statement made by agent concerning scope of employment
                i. Person has to be agent
                ii. Statement has to be concerning the agency
                iii. Has to be during the agency
            d. Statement of co-conspirator
                i. Has to be co-conspirator making the statement
                ii. Has to be statement pursuant to conspiracy
                iii. Have to make determination about when conspiracy is actually over
        2. These threshold determinations raise 104 problem
            a. Courts seem to conflict about whether these questions are decided by 104(a) or 104(b) – uncertainty in this area
                i. 104(a): Overwhelming weight of authority says that these should be treated as 104(a) question decided by trial judge on preponderance of the evidence standard
                    1. Perhaps because this is seen as a hearsay problem and ordinarily things that go to hearsay policy are 104(a) questions
                    2. Another reason for leaving this to the trial judge is that letting the jury decide would expose the jury to the information that you would not want the jury to hear
                        a. Even with limiting instructions, if this is highly prejudicial evidence, then there's something to be said for not letting the jury be the one to decide whether it's going to come in

ii. 104(b): Lawson thinks that a statutory interpretation matter, there's a VERY strong case for making this a 104(b) question
1. Circumstances described by the 801(d)(2) provisions are basically solving the relevancy problem
a. Adoption, authorization, agency, conspiracy all seem to be conditional relevance questions
b. Without those relationships, the admission would be kicked out through 401 because the person's opinion would not be relevant
1. Example: Suppose I say that BP was negligent in their construction
a. In the trial, someone tries to offer that as an admission
b. How is my opinion about BP relevant?
i. Well I'm a lawyer for BP and therefore authorized to make this statement then it might be relevant
ii. Or if I'm an agent or employee, then it might be relevant
iii. But if I'm just a random person saying this, then it's not relevant
c. Therefore, the 801(d)(2) categories are establishing HOW my testimony is relevant under 401

h. SO-CALLED BRUTEN PROBLEM
i. Suppose that you have the government prosecuting a drug conspiracy (6 people involved in conspiracy to import heroine from Afghanistan and sell it in NY); arrest all 6; one of them makes statements to a police officer incriminating himself that would count as admission under 801(d)(2)(A) – my 5 buddies and I have 2 shipments due on March 24
1. No question that this statement is an admission
2. It is simultaneously a statement that implicates 5 other people
3. Government has a habit of trying all defendants at same trial
a. Having one trial is cheaper than having 6
b. Problem that this raises is that it's perfectly possible to have evidence that admissible against one party but not admissible against others
i. In order to have this D's statement come in as admission against 5 other guys, government would have meet co-conspirator requirement 801(d)(2)(E)
1. Suppose that the government cannot do this
2. Suppose that the person admitting the shipment was not authorized to make this statement, they didn't adopt it, there was no agency relationship → basically no way to get admission of D #1 against D #2-6
ii. Therefore judge gives limiting instruction telling the jury that the statement can be used only against D #1, and not against #2-6
iii. SCOTUS said that this is not okay → constitutional problem
1. Confrontation problem: D #1, whose hearsay statement (not hearsay because of exemption) is being made by police officer
2. Due process problem
c. Straightforward solution to this problem is having separate trials
i. No one wants to do that
ii. SCOTUS is not going to say that there is a constitutional requirement that defendants must be tried separate when there's evidence against one that can't be used against the others
d. Body of doctrine that determines when it's okay to let this stuff in
i. Nasty underlying criminal procedure problem

i. STATEMENTS BY ATTORNEYS
    i. Attorneys file a lot of pleadings – motions, responses, briefs, etc. authorized by the clients
    ii. What you can have is attorneys saying things in one context that they think are going to be favorable in that context that end up being unfavorable in another context
    iii. Classic example – when you having something that involves property (conversion, or taking) and you have to value the property, and then there's a property tax case later
        1. In the first case, want the value of the property to be as high as possible
        2. Then in the subsequent case, that you may not have anticipated, you want the value for the property to be as low as possible
        3. Turns out at the valuation in the first case counts as an admission for the second case
    iv. Pleadings may all be found to be within attorney's scope of authority even when there isn't specific authority to make the particular statements
        1. One thing, for example, to hold someone to a statement that they made in a trial motion dealing specifically with evidentiary issue
        2. Little bit different when you're talking about appellate briefs when you have a different category of arguments being made
        3. And different still when you're talking about opening and closing statements
            a. Could involve potentially colorful statements, statements of hyperbole
            b. Doesn't make sense to treat statements made here should be treated in the same way that you treat as a statement in a complaint
                i. Cases are attune to these differences, but we don't have time to go through the case law
                ii. Much bigger problem than it seems
j. Remember that just because admission is allowed in, does not mean that jury has to believe it
    i. Defense could ask all kinds of questions to call into doubt the content of the testimony
    ii. Also could attack credibility of out-of-court declarant
k. ADOPTIVE ADMISSION
    i. D not explicitly making a statement against his interest
    ii. Responding to a statement by another person, and thereby adopting the language of that person
    iii. 104 determination of whether D intended to adopt the statement of the other person
    iv. Example: A senior VP says, "I heard the company is going to take a beating. I assume that you're going to dump all of your holdings." CEO responds, "Don't worry about me. I'm all set."
        1. Some ambiguity → "all set" could mean that I'm about to take a beating from THIS stock, but my portfolio is adequately diversified so it's not going to hit my personal portfolio that hard, I have multiple offshore bank accounts, etc.
            a. Wouldn't have that much probative value
        2. Adoptive admission
            a. Would have more probative value if it was treated as adoption of the accounting VP's statements
                i. If it's an adoption of the statement "I assume that you're going to dump all of your holdings" then it's more probative
                ii. Raises preliminary foundational question – did CEO manifest an intention to adopt the statement of the VP
                    1. 104(a) – or 104(b) – question given to the trial judge/jury
        3. In either case, it's surely coming in but it may make a difference to CEO HOW it comes in
l. COMPREHENSIVE EXAMPLE
    i. Mother of the kid testifies for the plaintiff that Paul's teacher told her several weeks after the accident that driver's supervisor had told teacher that in his opinion driver was not keeping a proper lookout before the accident
        1. Mother on the stand saying that teacher told mother that supervisor told teacher

a. Clearly out-of-court statement by declarant and being introduced for proof of matter asserted → presumptively hearsay, and actually two different levels of hearsay
b. Under 805, EACH LEVEL has to fall into an exemption to be allowed in

2. Ultimate statement – the one by the supervisor saying that driver was not keeping a proper lookout
    a. Probably that's going to count as an admission, AT LEAST against the school (have the driver and school as defendants)
        i. Surely the supervisor was either authorized to make that statement, or more likely, was an agent of the school and was dealing with a matter concerning the course of employment (801(d)(2)(C) or (D))
        ii. Doesn't matter that supervisor had no personal knowledge
    b. Getting it in against the driver is going to be a tougher problem
        i. Was no a statement of the driver, not authorized by driver, not agent of the driver
        ii. Just like corporate minutes
3. Now we're down just to school board . . . So now we're looking to statement by the teacher to the mother
    a. Is it an admission for the teacher to tell the mother that the supervisor told her that in his opinion driver was not keeping a proper lookout before the accident
        i. Almost surely not authorized to make that statement
        ii. Agent of school board; statement made while agency was in place; BUT was the statement to the mother concerning the scope of employment of the teacher?
            1. Interesting 104 question
            2. If it was a statement about Paul's math core, then it would clearly by within scope of employment BUT is it part of the teacher's scope of employment to talk about what goes on on the bus??
                a. Depends on the school district . . . where does the teacher's responsibility begin?

803 EXCEPTIONS TO HEARSAY RULE

1. RULE 803 – 23 exceptions, EVEN THOUGH DECLARANT IS AVAILABLE AS WITNESS
2. Really no difference between exemptions and exceptions, BUT can say that exceptions, if justified, are based on some level of reliability, whereas exemptions can be wildly unreliable
    a. Theory is that there is a certain category of statements that are hearsay that have a good enough chance of actually counting for something that the law is willing to let them in (s/t other exclusionary rules)
3. **(1) PRESENT SENSE IMPRESSIONS & (2) EXCITED UTTERANCES**
    a. (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
    b. (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
    c. DIFFERENCES
        i. TEMPORAL
            1. Present sense impression has to be WHILE you're seeing something or immediately after
                a. "Immediately after " must be VERY close
            2. Excited utterance just limited to the time period during which you are under the stress or excitement of the event

a. Much more complicated temporal judgment
b. Can argue that some events cause stress for a LONG time after they occur (PTSD)
c. Case law recognizes the ability for recurring stress particularly with kids, but not exclusively with kids
i. Example: Kid sees bus driver two days after accident, starts crying and screams "that's the bus driver that hit Paul on the side of the road!"
1. Can be the case that the kid was so young that seeing the driver two days later brought about stress from the actual event
2. 104(a) factual question for trial judge

ii. CONTENT
1. Present sense impression must be describing the event
2. Excited utterance does not have this limitation

d. Example:
i. D charged with being a felon in possession of a firearm; routine traffic stop; D runs away; Officer 1 chases him for 150 yards waiting for backup to come; within 5 min Officer 2 arrives and watches Officer 1 handcuffing D; Officer 2 describes Officer 1 as panting, out of breath, and excited; Officer 1 informs Officer 2 that he saw D throw a firearm about 70 yards from the arrest; Officer 2 looks around and finds a .38 and Officer 1 says yeah that looks like the one he threw
ii. At trial, Officer 1 is out of state and therefore can't be subpoenaed and therefore can't be witness (not essential for purposes of 803, but just explains here why we're putting Officer 2 on the stand)
iii. So we just have Officer 2 on the stand to say that Officer 1 said to him: I saw D throw a gun, and when I showed him the gun Officer 1 said yeah that looks like the one I saw him throw
iv. Classic instances of hearsay
1. Officer 1 telling Officer 2 that he saw D throw a gun
a. Present Sense Impression – NO
i. If at very instance in time that Officer 2 shows up Officer 1 says "Look he's throwing a gun!" but that's not what happened
ii. Officer 1 tells Officer 2 that he saw D throw a gun some time in the past – the question is how LONG in the past?
1. Know that the time period is between 0-5 minutes, and unless this is VERY close to the 0 mark it's not going to count as present sense impression

b. Excited Utterance – MAYBE
i. Officer 2 giving first-hand testimony about Officer 1 being panting, out-of-breath, and excited (although this seems a little conclusory)
ii. Questionable whether this is enough of a foundation to establish that this was an excited utterance - If he was in fact excited, it's because of the chase and arrest and he was making a statement about that
1. This is a nice 104(a) question
2. If Officer is a 22-yr grizzled veteran waiting for his pension probably not going to be excited about chasing someone down after traffic stop
3. But if he was a rookie maybe he would be

2. Officer 1 telling Officer 2 that the gun that Officer 2 found was the gun that he saw D throw
a. Present Sense Impression – PROBABLY YES
i. Descriptive statement ("I see the a gun that D threw away") being made while Officer 1 is looking at the gun

b. Excited Utterance – NO
i. D is handcuffed, chase is over, etc.

v. D will probably question
1. Whether Officer 2 was relaying what Officer 1 said correctly
2. Whether Officer 1 was capable of identifying the gun

4. <u>(3) STATE OF MIND</u>

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

b. One of the most interesting exceptions
c. BUT not that much evidence actually gets in as part of this exception (admissions doctrine is more important)
d. As written, 803(3) is quite broad – not exclusively limiting
i. Pain and bodily health bit is interesting because there is a separate exception made for statement made in the course of medical treatment and diagnosis
ii. Here it's ANY pain and bodily health statement, so it could be made to anyone
iii. This lets lots of things in
e. PROBLEMS
i. DISENTANGLING STATES OF MIND FROM EVENTS
1. Things that describe what you are thinking or feeling at the moment (part of exception), VERSUS events you remember or believe EVEN IF those things are what cause you to feel the way you do (NOT part of exception)
2. People in their ordinary language do not conform their language to such precise requirements
3. There are all sort of statements that people can make that are straightforward descriptions of what's going through their head/body at that particular moment
a. BUT when people say things, often they are a mix of statements that are direct announcements of their mental/physical states and indirect implications of what those states are/were
4. <u>Example</u>: SUPPOSE Carrie Underwood comes along: lyrics about keying car "before he cheats"… but at no time do the statements include anything about her state of mind – she didn't have to say b/c anyone hearing her words would instantly figure out the state of mind suggested by them
a. You could NOT use those words to establish that she in fact carved up the truck, or that she smashed the headlight, NOR could you use it as proof that he cheats
b. BUT it is POSSIBLE you could take those words and tease out the unstated, implied proposition that she is pissed as hell at the guy and it would presumptively NOT be hearsay under 803(3) for that limited purpose
c. ANYTIME you have that kind of mixed message, there are issues
i. SUPPOSE it turns out to be important to the case, whether she really did smash the headlights/key the truck… BECAUSE the statement is admissible to prove the state of mind, there is an obvious risk of misuse by the fact finder to prove the other things
1. D would be entitled to have a limiting instruction
2. Would also be free to make a 403 argument to the trial judge that there is no way to disentangle the permissible use from the permissible one, so the risk of the impermissible inferences should keep it out
ii. GOING FORWARD/BACKWARD IN TIME – "THEN EXISTING"
1. Rule devised only to create an exception for statements that are pretty much immediate descriptions (as the condition happens)
2. NOT: "six years ago I was really really mad at you"

3. "Six years ago I was really really mad at you and NOW I'm even madder" → that is ok
4. BUT, sometimes when you only have evidence of how the person felt before or after the event, it is possible to project feelings forward or backward in time
    a. Inferential chain ("if they felt that way two days later, maybe they felt that way at the time")
    b. Appropriate when plausible to think that there is some consistency between state of mind/body
        i. Given the nature of the statement, and
        ii. Given the time period
5. Trial judge makes the call
    a. Six years probably NOT going to cut it
    b. Entirely fact-specific/case-dependent on the state represented by the statement

iii. MAKING AN INFERENCE FROM THE STATE OF MIND TO ACTUAL CONDUCT (OF THEIRS AND OF THIRD PERSONS)
1. Doesn't show up too often – VERY ugly
2. ***Mutual Life Insurance v. Hillman*** (SCOTUS CASE PRE-FED RULES)
    a. FACTS
        i. John H had life insurance policy w/wife Sally as beneficiary; S says J is dead and she wants to collect on policy; insurance company reluctant to pay b/c J is not dead
        ii. In actuality J and friend conspired to kill someone else (Walters), pretend the body was J, have S collect on insurance policy, and split the proceeds between the conspirators
        iii. S brings action to collect on insurance policy, and insurance co.'s defense is that J is still alive
    b. HOW DID THE INSURANCE COMPANY PROVE ITS DEFENSE?
        i. J is nowhere to be found; W is nowhere to be found
        ii. Insurance co. has a letter from W to his sister-in-law
            1. "Dear Sister-in-Law, letting you know I expect to leave Wichita on or about March 5 w/a certain Mr. H . . . to go to CO . . . to see the country . . . Love, Fred Walters"
        iii. W not there to testify, so presumptively hearsay, but state of mind exception recognized pre-fed rules
            1. At least the part "I expect to leave Wichita one or about March 5 . . ." would be admissible to show that at the time that W wrote the letter, W was planning on going to CO w/J
                a. Straightforward statements about the thought in W's brain at that point in time
        iv. PROBLEM is that the thoughts themselves don't make the case – have to place W at the scene of the crime in CO
            1. Insurance co. claims that they are admitting the evidence only to prove W's state of mind → to get to the fact that W had the idea to go to CO w/J in the record to show that maybe he really did
                a. COURT LETS IT IN
                    i. As a matter of ordinary life, people often do what they intend – not always but sometimes (sometimes is enough for a plausible foundation – more probable than not that W ended up in CO)
                b. Counterargument would be that the law is very concerned with letting evidence in for one purpose and having it used for another – and THIS looks like bootstrapping

i. If the letter had has "I was in CO a week ago" there obviously would be no 803(3) exception – and this is essentially what the insurance co. is trying to do here
ii. Leveraging a statement about what someone was thinking to what actually happened

c. *Hillman* court justified this by saying that the jury could still reasonably conclude that the letter was not accurate reflection of what W was thinking
    i. *Also saying that it's okay to take the next step and make the inference that W was more likely to actually be in CO*
d. Seems kind of off that *Hillman* case came out the way that it did – seems to be anomalous in terms of the overall policy of hearsay doctrine

3. ***Federal Rules***
    a. When Federal Rules were drafted, said nothing about inferring conduct from state of mind
    b. Advisory Committee notes say they are leaving the *Hillman* doctrine intact
    c. Legislative history ambiguous, BUT the prevailing presumption is that the Federal Rules DID NOT overrule the *Hillman* Doctrine
        i. Controversial and criticized, but PART OF THE LAW
    d. It continues to be ok under 803(3), once you have evidence of one's state of mind to argue that it is a permissible inference that they acted consistent with that state of mind AT LEAST where that inference is reasonable.
        i. If for example, you have someone in a criminal case heard saying "I plan to go meet with my dealer and pick up the kilo tomorrow"→ it is a statement about their state of mind AND permissible to use it as an inference that the person did go pick up the kilo the next day
        ii. Because someone thought something at a particular time, maybe they acted upon it, and you can therefore infer that the action occurred.
4. SCOPE OF *HILLMAN*
    a. SCOTUS has ruled that *Hillman* represents the outer boundaries
    b. Can say that it is permissible to infer from a statement about intent/thought/plans that the person actually carried out the plans, BUT NOTHING MORE
        i. Just the line from the person's express intended action to the person's conduct
        ii. Otherwise would be very hard to think of anything that would be kept out
    c. (in SCOTUS case, husband prosecuted for murder, defense was that wife committed suicide, prosecution wanted to introduce statement by wife to nurse "Dr. Shepherd (husband) poisoned me" to prove wife's state of mind that she didn't want to kill herself → SCOTUS did not allow it)
5. THIRD PARTIES
    a. ***Hillman***
        i. Integral part of the letter was that W was going to CO "*with a certain Mr. Hillman, a sheep trader . . . "*
        ii. Placing W in CO is not enough for insurance co. to prevail – crucial to show that they were together
        iii. SCOTUS willing to allow jury to infer from W's expression of his own thoughts that he actually carried out his own thoughts, AND to infer from W's own thoughts what a *third party* did
    b. ***Federal Rules***

i. All that Advisory Committee notes say "we don't mean to overrule *Hillman*" without specifying how far they thought *Hillman* extended
ii. The House Judiciary Committee said they were only applying Hillman as it would apply to the conduct of the declarant, BUT NOT other people
1. BUT it is JUST a committee report – not conclusive
iii. <u>OPEN QUESTION → CASES ARE SPLIT</u>
1. BUT a rather large majority of courts ALLOW the inference to the conduct of third parties once the evidence in admitted under 803(3)
2. Additionally, if there is other proof supporting the inference, there is much less of a problem
a. Sometimes if it's all you have, then there will be a directed verdict
iv. (remember that we aren't talking about getting the evidence in – talking about the inferences that are permissible to make → RELEVANCE)

iv. <u>Example</u>: Negligence Action: B is the defendant; B's car hit an auto, allegedly B was driving 100 mph between the country and city; witness, not B, testifying that on the morning of the accident B said "I love to drive my car at 100 mph"
1. Text of 803(3): broad- statements pertaining to state of mind, emotion, sensation, physical condition → framed that way "I love to drive 100mph" does seem like a statement of B's thoughts/feelings/sensations… the sorts of things 803(3) excepts from hearsay
2. RELEVANCE: Once we have that state of mind, we CAN infer they act in accordance with that state of mind
a. YES. That is an accepted inference where there is a logical question
b. D can argue under 403 that the connection between random thoughts and actual actions is too attenuated and so prejudice should outweigh probative value

5. **<u>(4) STATEMENTS FOR MEDICAL DIAGNOSIS OR TREATMENT</u>**

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

b. Overlaps with 803(3) but broader; overlaps with admissions (broader in the sense that you don't have to be a party)
c. Doesn't have to be the statement of the person being diagnosed or treated
d. Could include statements about present thoughts; also could include statements about past thoughts → anything pertinent to diagnosis or treatment
e. When physicians testify, Federal Rules do not draw distinction between diagnosis made specifically for testimony at trial (expert testimony issue)
f. CRUCIAL ISSUES
i. Foundational matters
ii. 104(a) questions about whether statement WAS made in the course of diagnosis or treatment
g. LEGAL ISSUES
i. When people are talking to medical staff, don't always confine yourself to the specific facts that are pertinent to medical diagnosis or treatment; all sorts of things can come in
1. i.e., can say that I have a headache and my neck really hurts and it's all because that idiot ran into me with his red car
a. Statements about diagnosis would be headache, neck hurts, because of car crash
i. Does matter for diagnostic purposes WHY you're feeling the way that you do – that it's from a car crash

b. But statements about the specific person that ran into him not admissible here
2. But people don't talk in a way that separates the two

ii. Paradigm case contemplates medical diagnosis of physical symptoms – BUT what about statement made to psychologist or psychiatrists, where medical diagnosis is about psychological concerns
1. Can be tied up with physical symptoms but can also stand alone
2. To the extent that 803(4) has potential to include this, it has potential to be VERY broad
3. Can become really problematic in domestic or child abuse
a. Someone comes in on behalf of the child and says that there has been abuse by X
i. The fact that there was abuse is pertinent to diagnosis or treatment
ii. Identity of X can also be important – depending on how big/strong X is
iii. At that point could also say it's important that it happened over the past 4 years
b. Based on what Lawson has seen thus far, basically it comes in

h. Example: Someone going to the doctor for treatment – physician consulted for testimony
i. I have severe headache
1. Clearly okay under 803(4)
2. Probably also admissible under 803(3)
3. If you're a party, it's going to be admissible by the opposition if they want to bring it in
ii. Yesterday, I had a sever headache
1. Wouldn't make it under 803(3)
2. But would make it under 803(4), provided that it's pertinent to diagnosis or treatment
iii. I was hit in the head with a baseball bat
1. 803(3) wouldn't work because it's a description of a past belief
2. But this is a statement pertinent to diagnosis or treatment so ok under 803(4)
iv. John Jones hit me in the head with a baseball bat
1. Pertinent to tell doctor that you were hit in the head
2. Could be pertinent to treatment that John Jones hit you, depending on how big and strong John Jones was
a. If someone wouldn't be able to swing the bat with much velocity
b. Or if someone was ridiculously strong
c. Editors say that this isn't pertinent, but Lawson says that this is at least something interesting for 104(a) preceding

6. (5) PAST RECOLLECTION RECORDED

a. (5): A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

b. Addresses the situation in which person cannot recall a past event, but at the time that the event occurred, the person made record of it
i. i.e., done everything you can, but can't remember what you loaded on the truck – BUT at the time that you loaded it, you wrote down everything that you loaded

c. REQUIREMENTS
i. Record is of issue over which witness has personal knowledge
ii. Exhausted all avenues of getting the person to recall
1. Can show the witness the document and ask if it helps witness remember

a. Witness says yes, and testifies
a. BUT, question is whether witness is testifying based on what they actually remember, OR are they just reciting what they read from the document?
i. Therefore getting the evidence in through the back door without 803(5) requirements
b. Have a 104(a) hearing and the trial judge decided by preponderance of the evidence whether the witness has actually had his memory refreshed, or whether what's really happening is that the document is doing the testifying, in which case it would have to be introduced through 803(5)
c. This is really the only major legal question that's going to come up here

iii. Person has accurate record
1. Can imagine scenarios that someone would go out of their way to create a record, expecting years later to use it → always POSSIBLE, but have to decide through 104(a) hearing whether this is actually what happened in particular case

iv. Record was made when events were fresh in witness's memory
1. Plausible time frame depends on situation
2. Example: Wrongful discharge case based on sexual harassment; defense is that she was a poor employee
a. Employee took notes about specific instances of harassment that she cannot recall – made the notes at home, usually but not always on same day as incident reported
i. Within a day or so of comments is pretty good
ii. If she said every month, may have a problem
iii. Seems like a plausible time frame – unless you're recording the supervisor, going home and writing it down is probably the best you can do
b. Supervisor made notes about employee's poor performance as auditor – made notes in 2004 about incidents dating back to 2001
i. If he's writing notes in 2004 about job performance in 2004, that should be fine
ii. Questionable when going back to 2001
1. Possible that auditor would have recollection of auditor's performance in 2001
2. Could be based on how dramatic her failings were
a. i.e., if it was something that led to SEC investigation and imprisonment of CEO, then would make perfect sense for supervisor to remember it three years later
c. Supervisor wrote memo evaluating auditor's job performance 5 months after she was fired – memo based on supervisor's views and interviews with other employees; created for impending litigation
i. Report is NOT coming in
1. Not written down at the time – 5 months after the fact
ii. Doesn't mean that the notes that the report was based on wouldn't come in – 2004 notes might be okay, but report that was based on those notes and interviews with others is another story

d. Rule 612: Writing Used to Refresh Memory. Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—

i. (1) while testifying, or

ii. (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in

evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

e. Deals with attempts to introduce the document, where you have witness on the stand, or preparing them for testimony in pretrial process, and show them something and ask if it jogs their memory
    i. Not necessarily something introduced into evidence
f. Adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness
g. If it happens pretrial then it's up to the trial judge to decide whether the other side gets the document
h. Includes documents that would otherwise be protected by work product privilege
    i. If you show document to witness, then privilege is waived
    ii. If you show document pretrial, the cases are split as to whether the privilege is waived

7. <u>(6), (7) & (8) BUSINESS RECORDS & PUBLIC RECORDS</u>

a. Probably the biggest exceptions
b. (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
    i. VERY BROAD
    ii. PRECONDITIONS
        1. Kept in the regular course of business activity
            a. All has to be done pursuant to a process that gives some modest assurance that it's a reasonably accurate record of what was kept
                i. Looks at the ways that particular types of documents are produced
                ii. Must be done on relatively routine basis
                    1. Can be done on relatively routine basis *in anticipation of getting sued a lot* – as long as it meets the trustworthiness requirement
        2. Person that makes it must be qualified to make report
            a. Must have some reason to think that the people that create the documents actually know what they're talking about

i. Might get tricky when there's a flow of information going through multiple people

b. CRUCIAL THING – must be the sort of thing that you do as part of your job, must have some responsibility to assure that what you're writing down is moderately accurate

3. Explicit qualification:
   a. UNLESS the source of information or the method or circumstances of preparation indicate lack of trustworthiness
      i. Might be certain categories of documents that are produced in such a fashion that they are so unlikely to be accurate that we're going to keep them out
      ii. Possible to structure an enterprise where you're making documents specifically to create a record for litigation
      iii. Allows judge under 104(a) to decide to leave them out
      iv. If the other side is trying to introduce them, then they'll probably come in under admission

iii. PERSON MAKING REPORT/DESCRIBING PROCESS
   1. Can have people testify ***generally*** about how the process is supposed to work - doesn't have to have first-hand knowledge that it was followed in practice every time
   2. 803(6) standard is loose in this respect
   3. Jury can then take into account that maybe the process was not always followed, and discount the evidence accordingly
   4. Example: D is being charged with multiple crimes for allegedly running a crime rig from prison; prosecution wants to introduce evidence of log book to show who was visiting him within days of the crimes being committed
      a. What's crucial to the case is the *identity* of the visitors – that the visitors were the gang member that committed the murders
      b. Names in the log books match those names, but is that proof that the people that came to visit D were actually the people whose names were in the book . . . ?
      c. The coordinator at the prison who maintains records of logbook testifies that visitors must sign the logbook in the lobby and must show identification to the lobby officer; coordinator testifies that she doesn't have personal knowledge as to whether everyone shows ID, but these were procedures that were supposed to be followed
         i. *Although the coordinator is not there all the time checking the books, she has basic knowledge of the procedure based on 8 years of employment → this is sufficient*
         ii. *If knowledge were required about each particular entry, document custodians were rarely satisfy 803(6)*

iv. OUTSIDE PROVIDED INFORMATION
   1. Some situations where records are maintained by business but someone else is providing the information
   2. i.e., HOTELS
   3. Have employee sitting behind the desk at the hotel, but the person providing the information about who is actually checking in is the customer, NOT the hotel itself
   4. And the customer is not part of a chain of employment that has the duty to report accurately
   5. BUT, these types of records are let in regardless
      a. (Same idea as prisoner log book – the signatures are really the relevant pieces of information that the prosecution wants to admit into evidence, and the people signing their names have no duty to provide info accurately)
   6. Hotel is generally going to check the identities of its customers
   7. Jury can discount the value of this evidence

8. If there's absolutely NO procedure for checking on the validity of outside provided information, then it doesn't count

v. Example: P suing manufacturing co for use of household cleaning product, ER doctor writes "burn appears to be 2nd degree, 6 inches in diameter, caused by Chem Clean cleaning products according to patient" in report
   1. First, look to 803(4) to see if you can get in statement by patient that says: I was burned by Chem Clean product as statement of diagnosis or treatment under 803(5)?
      d. Maybe – if diagnosis or treatment concerns chemicals within the product
   2. Then, look to 803(6) to introduce doctor's report
      a. "Burn appears to be 2nd degree"
         i. Regular Course of Business Activity
            1. YES – Sort of thing that ER regularly make, pursuant to their business
         ii. Qualified Person
            1. YES, reports routinely made by the doctor, doctor in position to have first hand knowledge about what they're reporting
      b. "Covers area approx 6 inches in diameter"
         i. Same thing – also a part of description
      c. "Burn caused by Chem Clean cleaning product according to patient"
         i. Part of business duty of ER doctor to report burns, location, severity
         ii. BUT which manufacturer patient thinks is responsible for the burns? Probably not . . .
            1. Could make argument that ER routinely, as a part of course of business, wants to know manufacturer of the product
         iii. Tricky . . . MAYBE could come in under 803(4)
         iv. Lawson could see it going either way – 104(a) question to trial judge

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

i. When something is not in the records that you would expect to be there, the fact that it's not there is implication that it didn't happen

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

a. VERY BROAD
b. PRECONDITIONS
   i. Only requires that document be one of:
      1. Setting forth activities of office or agency

2. Matters observed pursuant to duty imposed by law, and duty to report those matters
3. In civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law

c. Just because public record is admitted, DOES NOT necessarily make every statement within the public record admissible to prove the truth of the matter asserted
   i. Record could contain things like recollections, etc. that still have to pass other hearsay hurdles
   ii. If there are people who are not under duty to report, and their statements were in the report, that would not be allowed in
   iii. Every level of hearsay must be exempted

8. **(9) RECORDS OF VITAL STATISTICS**
   a. **Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.**
   b. Tell you things like dates
   c. But also make statements about things like maternity, people attending, etc.
      i. Not sure how reliable this is
   d. Deals with the hearsay problem of someone testifying about the circumstances of his own birth – i.e., when and where he was born
      i. HEARSAY:
         1. Does not have first-hand knowledge → The only way that someone would know these things is if someone told them, or if they read it somewhere (so when saying "I was born in Hawaii" really saying "my mom told me I was born in Hawaii"
         2. Reporting out-of-court statement for its truth
      ii. BUT, exception lets it in
9. **(10) ABSENCE OF PUBLIC RECORD OR ENTRY**
10. **(11) RECORDS OF RELIGIOUS ORGANIZATIONS**
    a. **Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization**
11. **(12) MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES**
    a. **Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.**
12. **(13) FAMILY RECORDS**
    a. **Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.**
13. **(14) RECORDS OF DUMENTS AFFECTING AN INTEREST IN PROPERTY**
    a. **The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.**
14. **(15) STATEMENT IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY**
    a. **A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.**
15. **(16) STATEMENTS IN ANCIENT DOCUMENTS**
    a. **Statements in a document in existence twenty years or more the authenticity of which is established.**
    b. If it has been around long enough, the chance that it has been created specifically for litigation is relatively small and let the jury decide what to do with it

c. If it's more than 20 years old then it doesn't have to meet business record exception, just comes in under (16)

16. **(17) MARKET REPORTS, COMMERICLA PUBLICATIONS**
    a. **Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.**
17. **(18) LEARNED TREATISES**
    a. **To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.**
18. **(19), (20) & (21) REPUTATION**
    a. **(19) REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY**
        i. **Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.**
        ii. Deals with situation in which a person has to establish, for example, that he is the child of X, and therefore gets X's inheritance
    b. **(20) REPUTATION CONCERNING BOUNDARIES OF GENERAL HISTORY**
        i. **Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.**
    c. **(21) REPUTATION AS TO CHARACTER**
        i. **Reputation of a person's character among associates or in the community.**
        ii. One of the few instances in which the law allows you to argue propensity is reputation testimony for a witness
        iii. Person who is testifying about someone's reputation for truthfulness is testifying about what other people say about the witness (i.e., hearsay)
19. **(22) JUDGMENT OF PREVIOUS CONVICTION**
    a. **Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.**
    b. Applies only to felonies
    c. Subject to impeachment rule
20. **(23) JUDGMENT AS TO PERSONAL, FAMILY OR GENERAL HISTORY, OR BOUNDARIES**
    a. **Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.**

804 UNAVAILABILITY EXCEPTIONS TO HEARSAY RULE

1. Precondition is that you tried to get the out-of-court declarant to testify but couldn't
2. **804(a): Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—**
    a. **(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or**
        i. Can be physically there in the courtroom but as long as you have a valid claim of privilege, you are deemed unavailable for one specific aspect of your testimony
    b. **(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or**
        i. On the witness stand, asked, asserted claim of privilege, court overrules and says no privilege, witness disagrees

ii. Witness is risking contempt citation BUT makes sense that witness is unavailable for that one specific aspect of testimony
iii. Court has to order the witness to talk, and the witness has to refuse in order for him to be classified as unavailable

c. (3) testifies to a lack of memory of the subject matter of the declarant's statement; or

i. Witness is on the witness stand and says "I just don't know. I can't talk about it because I don't remember."
ii. Judge makes determination as to whether declarant actually does not remember
iii. Declarant himself must testify that he does not remember the events – can't just submit affidavit that says that witness has no memory
    1. Affidavit could be okay if the declarant is legitimately absent under (5)
iv. Witness persists in refusing to testify b/c of no recollection
    1. Witness says I don't remember, judge doesn't believe him, but person refuses to answer because keeps insisting that he does not remember
    2. Similar to (2) but not invoking any type of privilege – just saying can't testify because he has no memory of it
    3. Treated the same way –
        a. In both contexts, the witness thinks that he cannot answer the question, and in both contexts the judge disagrees
        b. From the standpoint of the party that wants to introduce the otherwise hearsay evidence, judge can think that the person remembers everything, but if the witness is not answering, there would otherwise be no way to get the evidence in
            i. Therefore could always be a strategic move to just say you don't remember
        c. Whether the judge believes them or not does not determine that question; what determines that question is whether or not they're going to give an answer
    4. If the judge really believes that the witness is lying, then can hold the witness in contempt, or may refer to matter to local prosecutor for perjury

d. (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

i. Question becomes how infirm does the infirmity have to be

e. (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

i. Tried to find them and we can't
ii. Have to use reasonable means to try to find the person
    1. Up to trial judge to decide what reasonable means are
iii. Being in another jurisdiction alone is not enough if you can easily get them back

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence <u>is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.</u>

f. If the reason that the witness is not here is because you shot them to keep them from showing up, you can't claim unavailability
g. Don't lose unavailability exception JUST because you were the one who made the witness unavailable
    i. If you shot witness for some other purpose, then language of the rule makes it seem like they would still be unavailable
        1. i.e., shot witness because he stole the cocaine, NOT because he was going to testify
    ii. Criminal D asserts 5th Amendment privilege, and then offers his own prior testimony
        1. Criminal D is creating unavailability by invoking privilege

2. Does not lose unavailability exception
    a. Lawson thinks case law is wrong here – should lose unavailability
3. Once you establish that someone is unavailable, categories of evidence otherwise clearly hearsay become acceptable

4. <u>804(b)</u>: Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- **a. (1) *Former Testimony***
- **b. (2) *Statement Under Belief of Impending Death***
- **c. (3) *Statement Against Interest***
- **d. (4) *Statement of Personal or Family History***
- **e. (5) [Transferred to Rule 807]**
- **f. (6) *Forfeiture by Wrongdoing***

5. <u>FORMER TESTIMONY</u>

- **a. (1) <u>*Former testimony.*</u> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.**
- b. Actually quite a limited set of former testimony
- c. Most complicated textually of all of the provisions
- d. REQUIREMENTS
    i. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or other proceeding
        1. Would be REALLY broad if this were the end of it
        2. Although there's a sensible policy ground for allowing a rule that broad (reliable evidence), actual rule goes on . . .
    ii. If the party against whom the testimony is now offered, or in a civil action, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination
        1. Only prior testimony in which the person or a proxy for the person against whom the hearsay testimony is now sought to be admitted, had a prior opportunity and motive and reason to examine or cross-examine when the prior testimony came out
- e. PROBLEMS
    i. LAW GOVERNING DEPOSITION
        1. This is the largest problem because the most common source of prior testimony sought to be introduced when the witness is unavailable is going to be a deposition
        2. There is a LOT of law governing the taking of depositions (Fed Rules of Civ Pro and Crim Pro)
            a. Very elaborate rules, including when deposition testimony is admissible
    ii. CONFRONTATION CLAUSE
        1. In the criminal context, this hearsay exception is going to be the biggest one that gets reconsidered with respect to Confrontation Clause
    iii. OPPORTUNITY AND SIMILAR MOTIVE
        1. Look at where prior testimony took place to find out if there was opportunity and similar motive for direct, cross, or redirect examination
        2. Range of circumstances
            a. <u>Previous Trials</u>
                i. Can have full criminal trial, mistrial declared, one of the witnesses from Trial 1 becomes unavailable, want to introduce prior testimony from the first trial (which would otherwise be hearsay)
                    1. Criminal D very clearly had opportunity and similar motive to bring out testimony from witness

2. PROBLEM is that most of the time this is not the case – usually former testimony is from pretrial hearings or proceedings (including depositions)

b. Pretrial Hearings and Proceedings
   i. Law very frequently treats testimony that comes from pretrial hearings and proceedings (including deposition) as former testimony in which D had opportunity and similar motive
   ii. At preliminary hearings, people are sworn in, therefore count as hearings and proceedings, but not quite like full dressed trial
   iii. Lawson DOES NOT agree with this → Do not treat the witness in the same way that you would if it were the actual trial
      1. Opportunity – Yes
      2. Similar Motive – No (not as intense of a cross-examination)
         a. Strategic Reasons: Don't want to give away too much info to the other side in depositions or preliminary hearings (slim to no chance that D will prevail at preliminary hearing so want to hide tactics)
         b. Cost: In terms of both money and time - # of depositions is going to be much much larger than # of trial witnesses – makes more sense to invest a lot of resources in preparation for trial witnesses, but NOT nearly as much so in preparation for depositions . . . Sometimes the only reason for taking someone's deposition is to figure out if they know anything that is worth pursuing – many times it's a dead end

3. The law seems to be quite generous in finding opportunities and motive, and therefore generous in allowing prior testimony to come in
   a. Example: medical malpractice case for failure to diagnose; D found test negative; next day P's expert found P positive
      i. D called discovery deposition to depose P's expert – wanted to discover P's expert's opinions and the reasons for the opinions, asked open-ended Qs to send back to their own experts to double-check
      ii. Were not there to assault credibility of P's expert, etc. or compare results of their experts
      iii. Now, at trial expert is unavailable to testify and P wants to introduce former testimony at deposition
         1. Did the party against whom the deposition is now offered have an opportunity to examine or cross-examine expert?
            a. YES, they're the ones that called the deposition
         2. Did they have a similar motive – similar motive to the one you would have if the person was testifying a trial
            a. Obviously NO
            b. But the ruling in the case was obviously yes – that's the law
4. Does not change actions at depositions – people are not going to come into depositions with guns blazing just because there's a chance that the person being deposed will become unavailable and they'll be stuck with deposition testimony
5. Not ALWAYS the case that a court will not look carefully at the circumstances and find that the proceedings were too different to constitute "similar motive"
   a. *De Napoli Case*

iv. PREDECESSOR IN INTEREST
   1. Comes up only in civil context

2. Doesn't have to be the party himself that had opportunity and similar motive for examination – can also be a predecessor in interest that had the opportunity
3. THREE POSSIBILITIES FOR DEFINITION
    a. *Privity*
        i. Predecessor in interest could be meant to be a codification of CL doctrine of privity – direct legal successors to rights and claims of one another
            1. Would be a perfectly sensible interpretation of the terms
        ii. Remotely plausible
    b. *Slightly Broad Than Privity*
        i. Extend CL to some things that don't quite meet privity, but where people are very closely tied to one another
            1. i.e., parent and sub
        ii. Stretching it b/c they're temporally equivalent – not one after the other
    c. *Same Legal Consequences*
        i. Even if there are no legal connections between the parties whatsoever, facing the same legal consequences and therefore would have the same motivation to stand up for their rights
        ii. i.e., someone suing Exxon and Exxon had a chance to cross-examine, testimony could be used in case against Shell (if relevant, of course)
            1. Seems crazy, but that seems to be where the trend is going
        iii. Or something like a car crash with 3 parties, and 2 are trying to hold the third responsible – not in privity, or in close connection, just trying to do the same thing
        iv. Seems like a huge stretch – if that's good enough then it's not clear just how limiting the provision is
            1. Lawson doesn't like this

f. EXAMPLE
    i. Civil Action: A and B (husband and wife) are suing insurance company for loss when jointly owned warehouse burnt down; insurance company refuses to pay b/c claim is that A arranged to have friend, C torch the building
    ii. Collateral Criminal Action: C admits that this is what happened, and pleas guilty to arson; A then put on trial for arson; C testifies against A; hung jury; C convicted but A is not
    iii. Issues
        1. Insurance company wants C to testify in civil proceeding for insurance proceeds, but C not available b/c he's in prison (*note: merely being in prison is not enough special subpoena that gets people out of prison to testify)
        2. Therefore wants to use properly authenticated transcript of C's testimony against A in A's arson trial
    iv. Application
        1. Testimony in prior proceeding – YES
        2. Opportunity and similar motive for examination
            a. A
                i. Similar Motive – YES, at criminal trial
                    1. Trying to avoid going to prison, so had motive to cross-examine fervently
                ii. Opportunity – YES, at criminal trial
                    1. Argues that he now has info he didn't have before that would impeach C
                    2. Insignificant that if he had the chance to examine witness again, would do a better job
                        a. Doesn't say *similar* opportunity – that fact that you now have a better opportunity does not

mean that you didn't have an opportunity the first time around

b. B
    i. B was not a part of the criminal proceeding, so did not have an opportunity or similar motive for examination
    ii. BUT, this is a civil case, so former testimony admitted as long as *predecessor in interest* had opportunity and similar motive for examination
    iii. Depends on how "predecessor in interest" is defined, but marriage could probably work

6. DYING DECLARATION

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

b. Doesn't get used very often
c. Has to potential to be the vehicle for getting in a fairly wide range of information
    i. Doesn't just encompass – "X shot me"
    ii. But also – "X shot me and he was in a 4-yr conspiracy with Y and Z and they stole the cocaine, etc."
d. In criminal cases, only usable in homicide prosecution
    i. Almost had a SCOTUS case about whether this violates the Confrontation Clause
e. Almost surely wildly unreliable
    i. Doesn't really make sense but just so deeply engrained in the law

7. STATEMENT AGAINST INTEREST

a. (3) *Statement against interest.* A statement that:

i. (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

ii. (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

b. Conceptually most difficult
c. Idea is to let things in that the declarant said that people would not say unless they are true b/c they would cause themselves injury (either monetary or send them to prison)
    i. If saying something is going to be to my detriment, then why would I say it unless it's true?
d. CRIMINAL: Most egregious and obvious instance is when someone makes a statement that subjects that person to criminal liability
    i. Operative effect is for that person to take responsibility for the particular crime
    ii. Inferential effect is that the person on trial for the crime did not do it
    iii. PROBLEMS
        1. Person could get paid off to do this
        2. Person could be going to prison for something else anyways and it wouldn't change their sentence
    iv. SOLUTIONS
        1. Could potentially just let everything in and let the jury distinguish between legitimate and illegitimate
        2. BUT, current position of Federal Rules says that it has to be *supported by corroborating circumstances that clearly indicate its trustworthiness* if it is offered in a criminal case that tends to expose declarant to criminal liability
            a. Previous version of the rule said that the statement must be offered to exculpate the accused

b. Now no specific requirement that the statement is exculpating someone else
c. Winds up solving all sorts of interesting legal and factual problems
    i. Offered in criminal case
    ii. Where someone else is saying I did it
    iii. Still can be admissible provided there is some independent verification
d. New version does not really change foundational requirement, but asks for more evidence of trustworthiness
    i. Changed to deal with the situation in which someone is taking the fall for the crime, but taking the fall is not going to do him much harm (i.e., because he's already serving a life sentence)

e. CIVIL: Simpler in ordinary civil case
    i. Simple Case – I agree that I owe you $2,000
        1. Seems to be against my pecuniary interests to make that up, so why would I say it unless I actually owed the $?
            a. If declarant is not available, then yes – this is ok
    ii. BUT, it can get a lot more complicated – I say that I owe you $2,000, but you say that I owe you $20,000
        1. My statement is still against my pecuniary interests if in reality I think I owe nothing
        2. But from your standpoint, this is not against pecuniary interests
f. Not always clear when someone makes a statement that could be interpreted as against their interest
    i. If they didn't realize at the time that they made the statement that this was the potential consequence, it does not have the same indicia of reliability as the rule presupposed
    ii. The rule contemplates statements that people know are going to be against their interests
g. No clear answer to the conceptual problems

8. STATEMENT OF PERSONAL OR FAMILY HISTORY

a. (4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

b. Doesn't really come up

9. FORFEITURE BY WRONGDOING

a. (6) *Forfeiture by wrongdoing.* A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

b. Connected to Confrontation Clause
c. Straightforward codification of traditional equitable doctrine
d. Happens quite often in criminal cases – all sorts of witnesses who disappear or whose memories disappear from the time that they testify at preliminary proceeding to the time of trial
e. As long a judge finds that as the reason that they are unavailable is the action of the person against whom their statements were meant to be offered and the, then all of their preliminary testimony comes in

10. SO-CALLED RESIDUAL EXCEPTION (transferred to Rule 807)

a. RULE 807: A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that

i. (A) the statement is offered as evidence of a material fact;
ii. (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
iii. (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

b. Suppose a judge really wants something to be kept out – 403 is like the "magic wand" that judge could use to keep it out
c. 807 provides (at least in theory) the "magic wand" on the inclusion side as far as hearsay is concerned
    i. Covers the situation in which evidence does not happen to fall into any of the exemptions or exceptions
    ii. But judge thinks it's better than some of the other things that we decide to allow in (i.e., dying declaration)
    iii. Can let it in provided that it meets (A)-(C) above
d. There was a period of time when this looked like it was used fairly widely, but probably no longer possible under Confrontation Clause cases
e. Practically not used that often:
    i. Probably don't need it b/c of all of the other exemptions and exceptions
    ii. There's a constraint b/c it has to be THE best evidence you can produce under reasonable means in order for it to come in
    iii. Some indications in legislative history that says don't go crazy with this rule
        1. If judges were doing so then Congress would probably have amended the rule
        2. The fact that there have been no amendments shows that people have left this well enough alone
f. Significance up in the air

CONFRONTATION CLAUSE

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

1. START WITH HEARSAY EVIDENCE
    a. Statement of out-of-court declarant sought to be introduced for proof of the matter asserted
2. IS IT TESTIMONIAL?
    a. Solemn declaration or affirmation
        i. SOLEMN: serious in the context in which the person knows that there are going to be legal consequences
    b. Made for the purpose of establishing or proving some fact
3. NOT TESIMONIAL
    a. Look to Federal Rules (or state rules) to find out if evidence comes in
4. YES, TESTIMONIAL
    a. Therefore the person is a witness
    b. CONFRONTATION CLAUSE APPLIES
    c. ADMISSIBLE ONLY IF:
        i. Witness is unavailable, AND
        ii. D had prior opportunity to "confront" (cross-examine) the witness
            1. Not totally clear whether pre-trial proceedings count, but presumably yes

1. Witness is not available to testify at criminal trial, there's a prior record of witness's testimony – someone tries to introduce it
    a. Q #1: Do Federal Rules of Evidence permit introduction of said prior testimony?
    b. Q #2: If rules let it in, could criminal D argue that if the person is going to giving evidence against him, he wants the right to confront that person
2. Anytime you're introducing hearsay evidence – either defined by the rules as not hearsay, or exempted – you're talking about a statement that a criminal D will not have the opportunity to cross-examine at trial
    a. If Confrontation Clause applies → If declarant is unavailable, the only way to allow testimony would be if D had previous opportunity for cross-examination
    b. If Confrontation Clause does not apply → If declarant is unavailable, just look to laws of evidence to figure out if statement is admissible
3. HISTORY
    a. Connection between the possible admissibility of statements that were never s/t cross-examination by D and 6th Amendment right to cross-examination only part of law in relatively modern times
        i. When 6th Amendment was ratified, confrontation clause applied only to federal prosecution of federal crimes – few federal criminal cases in that time period
        ii. Last half century or so, two large changes that guaranteed string of SCOTUS decisions
            1. Federalization of crime (though most still at state and local level)
            2. Incorporation Doctrine – Confrontation Clause became incorporated against the
    b. ***Ohio v. Roberts (SCOTUS 1980, 4-3 split)***
        i. FACTS
            1. Credit card fraud prosecution; D claimed that it wasn't fraud but that his family let him use the cc

2. D's star witness was a relative, and at preliminary hearing she doesn't testify the way that D expects
3. By the time trial comes, relative is unavailable as a witness – no one can find her
4. Prosecution wants to bring her testimony from preliminary hearing, where she said that no one gave D permission
5. D objects, claiming that he has the right to confront this witness so testimony can't come in if she's not there
6. (NOTE: Ohio Supreme Court was divided on whether D had adequate opportunity to confront the witness at the preliminary hearing, or in other situations in which D is not fully drawing out testimony → SCOTUS ducks this Q and just looks to whether confrontation clause applies)

ii. Law for a long was concerned with keeping out unreliable evidence → evidence meets requirements of Confrontation Clause if it bears adequate indicia of reliability

iii. REQUIREMENTS FOR PASSING CONFRONTATION CLAUSE
1. Hearsay declarant is unavailable
2. Evidence falls within firmly rooted hearsay exception (almost all hearsay exceptions were firmly rooted)
3. If evidence does not fall into long-standing exception, it is nonetheless reliable
   a. Can show reliability or trustworthiness through case by case determination

iv. Confrontation Clause construed as check against unreliable evidence
1. Bases application on purpose, not really text
2. Does textual interpretation make sense here?
   a. 99.9% of the time when the Confrontation Clause is applied, a state is the government body that is going to be prosecuting; all very well and fine to parse the text of 1791 6th amendment to verify concerns that drove it to see how it should apply to federal criminal prosecutions; BUT when you change it to include the prosecutions of every state, which the drafters of the 6th amendment would have been shocked at . . . is it the same?

v. VIRTUES
1. Leads to a relatively minimal degree of intrusiveness of the 6th Amendment into state criminal prosecutions
   a. The only universe of cases that 6th Amendment would exclude is where something is admitted pursuant to relatively new hearsay exception, and under particular circumstances, there are no external guarantees of trustworthiness
2. Things that we already know about hearsay basically are applicable to Confrontation Clause

vi. DOWNFALL
1. Basically impossible to come up with any remotely plausible textual or historical interpretation of the Confrontation Clause that makes it judged by reliability, which is judged by the age of the hearsay exceptions

c. ***Lilly Case***
i. Application of *Ohio v. Roberts* in which evidence does not pass Confrontation Clause barrier
ii. Statement against penal interests was not held to be firmly rooted
iii. Therefore admissible under Confrontation Clause only if there were circumstantial guarantees of trustworthiness (not found in this case)

d. ***Crawford v. Washington***
i. LOWER COURTS:
1. Michael Crawford and his wife Sylvia believe that Kenneth Lee tried to rape Sylvia; Crawford goes after rapist, they fight, Lee ends up with a knife in him, Crawford ends up with cut on his hand
2. Question is who attacked whom with what?
3. Because C went out hunting for L, prosecution thinks that C probably stabbed L
4. C says it was SD – L was coming after him, reaching for something, so C stabbed him

5. S has some tape-recorded testimony as well and also testifies about what happened
    a. For the most part tell the same story – slight differences about who was holding what at what time
    b. Prosecution thinks that S's testimony supports its claim
6. At trial S doesn't testify, invoking spousal privilege, and prosecution introduces tape recordings of her prior testimony saying that C was the aggressor
7. ANALYSIS
    a. FIRST, have to analyze this under regular evidence law (if Washington evidence law keeps this out, then there's no confrontation clause issue)
    b. SECOND, are S's statement's hearsay?
        i. Absolutely
    c. THIRD, is there something in the exception/exemptions that would let it in?
        i. Because S was accompanying her husband in the hunt, she could subject to prosecution as well, and therefore her statements are against penal interests, and therefore subject to exception to unavailability, and she's unavailable b/c of invoking privilege
    d. FOURTH, does the 6th amendment interfere?
        i. Was it let in under firmly rooted hearsay exception?
            1. NO: Already been resolved in *Lily* – not considered one of the deeply rooted exceptions
        ii. If no, are there circumstances under particular case to indicate that the evidence is trustworthy or reliable enough that we'll let it in anyways?
            1. Trial court goes back and forth – yes it's reliable
            2. Court of Appeals looks at same factors and say it's not reliable
            3. Wash Supreme Court reverses again and says it's reliable

ii. SCOTUS:
1. NEW STANDARD – Fairly careful, textual and historical construction of the confrontation clause that leads to a very very different way of approaching the question
2. WHAT DOES IT MEANT TO CONFRONT?
    a. <u>Baseline, Minimal Requirement</u>
        i. To be somewhere in sensory distance of the witness
        ii. Could say that they have to be able to look you in the eye, or hear you, etc. – some kind of proximity
        iii. Even just being there may have some effect – lying witness might feel guilty doing so when he actually sees D
        iv. *PROBLEM*
            1. Particularly in trials involving small children, psychologists saying it's going to be traumatic for child to appear in same room as abuser, so have to get D out of the courtroom when kid is testifying
                a. 1988: Scalia said cannot do this
                    i. Can't confront someone if you've shoveled out of the room as soon as you come in
                b. NOW, it's allowed → procedures in many states in which kid can testify in different room in close circuit TV, so D can see the testimony when it happens, but kid doesn't know he can
                    i. SCOTUS says this satisfies confrontation requirement
    b. <u>Stronger Notion</u>

i. Maybe it means more than just being in the same room – also means being able to poke holes in the story
ii. Substantial discussion in *Crawford* that leads to the notion that YES, **confrontation requires right to cross-examination**
iii. Not really an issue because it has not been controversial
iv. *PROBLEM*
1. Must it be in the courtroom in the criminal trial? Or can it be some previous proceedings?
a. Addressed by Ohio Supreme Court in *Ohio v. Roberts* but not answered by SCOTUS
b. Normal response is that yes it counts – if party has opportunity to do some sort of cross-examination, not our problem if strategically didn't want to develop testimony to its fullest
c. Court doesn't want to have to go back and make determinations about what a reasonable lawyer would view as a reasonable trial strategy in a 104(a) context

3. WHAT DOES IT MEAN TO BE A WITNESS?
a. Constitution's text alone does not resolve this case
b. Narrowest understanding – Someone on the witness stand
i. Would just mean that D has right to be present in the courtroom – wouldn't really be getting at hearsay at all
ii. Extremely unlikely understanding
c. Broadest understanding – Anyone that brings material that shows up against D in trial
i. Anyone that provides or helps to provide evidence relevant to the case against D
ii. Would guarantee the right to confront anyone and everyone who had something to do with prosecution of the case
iii. Seems too broad
d. Current Understanding (*Crawford*)
i. Witness is someone who bears testimony
ii. Testimony: Statements, made by people, with two characteristics
1. Solemn declaration or affirmation
2. Made for the purpose of establishing of proving some fact
iii. Anyone who makes those statements, to the extent that they are meant to be used at a criminal trial, is a witness
1. Making the statement in and of itself doesn't mean anything until the prosecution uses is to lead to evidence at trial
iv. When this happens, D has the right to confront him
1. Could be confronted at trial, or be confronted before trial
v. Pretty good match with the concerns that drove the confrontation clause
1. Concern being that the person that is going to put you in jail isn't there to answer questions about their testimony
2. Paradigm cases – bunch of witnesses sign statements that say yes person is a traitor to the king, then the trial is just introduction of the statements without having the actual people there, the lawyers of D are not invited when the witnesses are writing the statements down, someone in the courtroom just reads the statements out loud

vi. Not appearing at trial, but giving statements that will be used at trial, and that's still testimony

iii. DIFFERENT FROM OHIO v. ROBERTS

1. Different theoretically because asking whole new set of questions
    a. BEFORE, asking questions about how reliable to the evidence was
    b. NOW, asking whether the statement sought to be introduced here counts as testimony
2. Bigger difference in terms of impact
    a. One of the virtues of the old regime is that it was relatively benign – wasn't a routine event that confrontation clause would interfere into state criminal justice regime
    b. Once you switch to *Crawford* regime, there are all sorts of things that would fall under long-established hearsay exceptions but that clearly count as solemn declarations or affirmations for the purpose of establishing or proving some fact
        i. Therefore it does a lot more to interfere into state criminal justice regime

4. PROBLEMS – "SOLEMN" DECLARATION
    a. Sometimes obvious that someone is giving solemn affirmation and trying to prove facts
        i. Prior testimony from prior trial
        ii. Someone sitting in deposition
        iii. Affidavit
    b. BUT, sometimes not so clear
        i. Possible understandings of "solemn"
            1. Sworn under oath
            2. Serious in a context in which person can pretty well understand that there are going to be legal consequences for what he says
                a. Not only legal consequences for the person witness is reporting against
                b. But legal consequences to the witness himself if he were lying
                c. This slightly broader notion is pretty much the consensus
                d. Encompasses statements made to police in non-formal setting
                    i. Go into police station and say that you want to report a crime, and police officer gets a tape recorder and says talk
                e. There are still all sorts of statements that people make to law enforcement officials that don't fall into this category (therefore Confrontation Clause doesn't apply)
                f. Even statements that people make to each other in witnessing crimes that don't count as solemn declarations
                    i. If someone else comes in and testifies "that guys said 'look at that robber with .22'" then the guy that said it would not be witness and therefore the confrontation clause would not bar testimony b/c D can't confront out of court declarant

5. PROBLEMS – 911 CALL
    a. EMERGENCY EXCEPTION
        i. If someone is calling the police to draw attention to a <u>*current emergency*</u>, then the person is not making the statement to bear testimony → therefore not a witness → therefore Confrontation Clause does not apply → therefore just look to laws of evidence to figure out if statement is admissible
            1. ***Davis v. Washington (2006)***: M's former boyfriend, Davis, comes over and beats her up; she calls 911 and says get this guy out of here before he does anymore damage – says he's using fists, no weapons, and identifies him; M is unavailable to testify at Davis's trial
                a. Prosecution wants to introduce 911 call into evidence
                b. Washington Supreme Court affirms Court of Appeals and trial court in deciding that THIS IS NOT TESTIMONIAL, and is therefore not s/t Confrontation Clause

i. Statements made like "help!" may reference facts, BUT they are not designed to prove or establish them
ii. If the sufficient part of the motive of the statement made is not to report facts, but to lead to current action, then it's not testimonial
1. If afterwards ask M whether she knew that legal consequences attached to the fact that she made a 911 call, the answer would probably be yes
2. BUT that's not why she made the call – wanted the police to come and get him off of her

b. REPORTING INCIDENT
i. 911 call to report a crime that had already occurred IS testimonial → Confrontation Clause applies
1. ***Hammon v. Indiana (2006)***: Amy calls police about domestic disturbance – husband throwing things, breaking glass, throwing her into the glass, BUT not while she made the 911 call; police come to the house and put husband in the kitchen while they ask wife questions
a. Just like her going to the police station, but in this case the police station essentially comes to her
b. Therefore, TESTIMONIAL
c. Primary motive is to report the incident – not calling police to have them take action

c. PROBLEMS
i. How can you tell what someone's primary motive for making a particular statement is?
1. *Davis* and *Hammond* give polar instances where it's relatively easy to see where someone is or is not a witness
2. Does not give guidance in figuring out primary purpose in other cases
ii. 911 call can START as an emergency call, but then as police are on their way, caller can start to describe past events
1. Therefore, caller starts out as non-witness but becomes a witness by the end of the call
2. Theoretically, the right answer in these circumstances would be to separate the statements, but that's a very difficult task
3. ***Michigan v. Bryant (Feb. 2011)***: Covington shot; 5 police officers hovering around him, for 30 min taking down every word as he described being shot in the back by Bryant; Covington then taken to hospital where he promptly dies
a. Police want to introduce their account of what Covington said
b. SCOTUS rules that Confrontation Clause DOES NOT APPLY
i. More like *Davis* than *Hammon*
1. Bryant armed with a gun, so at least part of what police are doing when they're talking to Covington is figuring our where Bryant is so that they can get the gun out of his hand and keep him from harming anyone else
a. The ruling seemed to based on the fact that Bryant had a gun – the chance that Bryant might come back or shoot someone else creates an ongoing emergency
2. Where in *Hammon*, husband was sitting patiently in the kitchen – not going to come back and attack
a. Also no weapon in *Hammon*
ii. Therefore, evidence comes in through dying declarations hearsay exception, or excited utterances
c. BUT, in reality it's probably a combination of the two
i. Possible that when police first get to Covington, the early statements are *Davis*-like statements about how to keep Bryant away and stop his bleeding

ii. But the next 28 minutes are probably more like the *Hammon* situation in which the police station is essentially coming to Covington
1. Bryant probably not likely to come back and try to harm Bryant
2. Covington telling the police b/c he wants to identify Bryant

d. Concern that the scope of the non-testimonial statements exception carved out by *Bryant* is too expansive and will gut *Crawford*

6. PROBLEMS – STATEMENTS MADE TO NON-LAW ENFORCEMENT OFFICIALS
   a. Talk to someone who you have no reason to think is going to talk to police
      i. Watch a crime happen and describing it to the person standing next to you
      ii. Might be perfectly possible to have absolute rule that says any statement made to anyone not affiliated with law enforcement process cannot possibly be testimony
         1. Some support for such a hard line – have some holdings that categorically exclude this from testimony
   b. Talk to someone who is nominally not law enforcement, but who you know is going to talk to the police
      i. Statement testimonial if the person making it knows that he is talking to conduit
         1. i.e., doctors – must report gunshot wounds
            a. In that context doctor is proxy for the police
      ii. Statement not testimonial if the person making the statement has no reason to think that he is talking to someone who is going to go straight to police
         1. i.e., informants, statement of a 3-yr-old victim
   c. NEW PROBLEM
      i. Have to figure out WHY the person was making the statement
      ii. AND make inferences about what that person knew about the person he was talking to
7. PROBLEMS – STATEMENTS MADE BY PEOPLE CONDUCTING TESTS
   a. Report made by person involved in law enforcement testing process → Person makes statements about the test to the police → Police make statements to prosecutor
   b. If the person who actually conducted the test shows up on the witness stand and says – yes this is what I tested and this is what I came up with – then lawyer can cross-examine and everything is fine
   c. BUT, Prosecution would rather use the reports than have the person on the witness stand (or person could be unavailable, or there could be 20 people involved in conducting the tests)
      i. Testimonial – presumably doing the job to put people in prison, so aware of legal consequences → Therefore Witness → Therefore need prior opportunity to cross
   d. Which means that there appears to be obligation on part of prosecution to put people on witness stand, or if they're unavailable to provide prior opportunity for them to be confronted
      i. BUT, very expensive to make the people doing the test available for pre-trial confrontation
      ii. ***Melendez-Diaz (SCOTUS 2009; 5-4)***
         1. Only 4 Justices saying the above – reports are affidavits, and therefore absent a showing that analysts were unavailable AND petitioner had some prior opportunity to confront, must bring analysts in or evidence is out
            a. Scalia, Stevens, Ginsburg, Souter
            b. Thomas is 5th vote, but on other grounds
         2. <u>Dissent</u>: Fundamental flaw in focusing on testimony to define a witness – reading testimony into Constitution is incorrect
            a. Framers were concerned with typical witness – one who perceived an event that gave rise to personal belief in D's guilt; nothing that says that Framers meant to extend this to unconventional witnesses
            b. Could define witness by looking how it was understood at the time it was used – ask what kinds of people would normal people have considered to be witnesses in 1791
               i. Giving trial, deposition, going to police – yes
               ii. Someone running tests in the laboratory that knows that the tests will eventually used against criminal D – probably not

iii. BUT, *this is not how the Crawford court defined "witness"*

e. Wind up with someone who fits dictionary definition of witness, but leads to strange results
   i. Analysts does not observe the crime or any human reaction to it
   ii. Often does not know D's identity and doesn't have any aspects of D's guilt
   iii. Conventional witness responds to Q's under interrogation, but lab tests are conducted according to scientific protocols
f. NO SOLUTION – HAVE TO WAIT FOR NEXT CASE

8. FORFEITURE BY WRONGDOING
   a. *Crawford* kept open the possibility that out-of-court statements may come in even if they're in violation of the Confrontation Clause
   b. Waiving Rights Under Confrontation Clause
      i. Instruct lawyer in open court to waive claim of violation of Confrontation Clause
         1. More likely, just choose not to object to introduction of a statement that the Confrontation Clause prohibits
      ii. FORFEITURE: Do something to make the witness unavailable – i.e., kill the witness so he won't testify against you
         1. Majority View: D waives the Confrontation Clause right only if D does something that makes witness unavailable *with the purpose of preventing witness from testifying*
            a. If it's just a coincidence – i.e., killed witness b/c he stole the cocaine, and now he can't testify – haven't waived Confrontation Clause claim
         2. Minority View: D waives the right in both situations

EXPERT OPINIONS

1. Rule 701: *Opinion Testimony by Lay Witnesses*. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are

a. (a) rationally based on the perception of the witness, and
   i. 104(a) question

b. (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and

c. (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

d. Better if witnesses would just lay out the facts but people don't talk that way
e. Also difficult to break down statements into opinions and conclusions
   i. Say someone is drunk
   ii. Or say that their eyes were bloodshot
   iii. Or ask how many veins in their eyes
f. RULE is going to be one of common sense → trial judge discretion
   i. Trial judge will decide based on nature of the witness, and assessment of communicative abilities, to decide how far to let them go in their testimony for things that would fall more to the opinion side of the spectrum
g. 701 is not concerned with credibility – just asking if the person was in the position to testify
   i. Example: domestic abuse case, wife kills husband after long time of enduring abuse, GA insurance law classifies death as accidental if husband reasonably thought that wife would not respond to his abuse with force
      1. Daughter testified that father never thought that mother would shoot him
      2. Insurance co. appealed b/c daughter didn't have direct knowledge about what her father was thinking and therefore her opinion could not be rationally based on perceptions
         a. Affirmed on appeal – how else are you going to prove what husband was thinking at the time?
         b. Probably not the most credible witness b/c she's interested in insurance proceeds, BUT that's up to jury to decide
      3. Look to ability to perceive

a. If it was the case that the daughter had been estranged from her father and they hadn't spoken for 18 years then the insurance company would have a case
b. But if she's living with him, she's in as good of a position as anyone to testify as to what he was thinking
c. Lawyer for insurance company could ask questions
i. Why would she have that belief? Conversations?

h. Drawing the line between lay opinion and expert opinion can depend on location of witness
i. i.e., someone testifying that he heard a gunshot that sounded like it came from .22 rifle
ii. Depending on where you are in the country, could be the case that you do not need an expert to testify to this
1. Could be that EVERYONE has guns and can easily distinguish between the sounds that different caliber guns make

i. EXAMPLE: 4 different witnesses; alleged drunk driving accident; D crashed into P's car; P says D was speeding and was drunk and ran a red light (civil case); P wants to call a series of witnesses
i. Witness #1: D when he left the car was wobbly and looked like he was drunk and he could smell booze on his breath
1. Easy: smell of alcohol was detectable clearly going to be ok
a. Is there an element of opinion there?
i. Yes, smell of alcohol
ii. If it was just the facts, would have to use terms to describe smells . . . but there are certainly commonly understood smells that people use as exemplars
iii. Therefore, although this contains somewhat of an element of opinion, every statement about smell contains that much of an element of opinion, so no one is going to have a problem with that
b. Certainly be admissible – whether jury believes it is up to them
2. Wobbly: again, could frame it more carefully – how many degrees was he tilting with each step?
a. But when you frame it that way you're exceeding ordinary language
b. Uncontroversial, clearly within the bounds of what normal people say in normal conversation
c. Sort of thing that you can reasonably conclude from perception, and helpful for understanding the issue or testimony
i. How else would you want them to testify?
1. If the answer is something that goes outside of ordinary language then this is fine
3. Hard one here is the "D looked like he was drunk"
a. Q is that if witness is going to say that he was wobbly and smelled like booze, what is added to the mix by saying that he looked like he was drunk
b. If this was the ONLY statement out of witness's mouth, and witness having trouble identifying . . .
i. But this witness isn't having trouble identifying the features that made him look like he was drunk – he knows that it's the fact that he was wobbly and smelled
c. No slam dunk answer
d. Trial judge probably wouldn't be reversed for either admitting or excluding
e. Lawson – intuition is to exclude because it's not going to help but might hurt . . . let it in only if there's nothing else to the testimony
ii. Witness #2: Is a mile away from the accident getting a hair cut and the car that was D's went by at about 70 mph
1. People are allowed to testify about their impressions, opinions, inferences about speed
2. Normally these are not held to be in violation
3. Provided it was a rational opinion from what the witness perceived

4. What we don't know from this problem is what was the witness's opportunity to see the car?
    a. If you're getting shampooed and your head is back so you can only see the car from the corner of your eye, then it's much less likely to be let in

iii. Witness #3: heard the squeal of tired that could only be made by a car greatly exceeding the speed limit trying to stop quickly, looked up and thought D's car was running a red light
1. Red haring here is that she wasn't sure about this stuff – kind of thought it, not positive, → THAT'S FINE
    a. Law if perfectly happy with people being honest about the limitations of what they know
    b. Goes to weight, not admissibility
    c. Unless trial judge decides it's too wishy washy
2. Fact vs. opinion dichotomy?
    a. Thinking car went through intersection when light was red – normal observation
    b. Describing the sound as a squeal of tires is similar to the smell thing – describe relatively unfamiliar sounds as comparisons to more familiar sounds

iv. Witness #4: at the scene, D got out of the car, tripped, "I need a drink" or "I need another drink"
1. What about hearsay problem? Can witness #4 testify as to what D said?
    a. ABSOLUTELY YES
        i. Not being introduced to prove truth of matter contained therein
            1. Even if it were, it would be an admission because D is a party to the case
    b. Is there a lay opinion doctrine problem?
        i. NO – all seem to be straightforward factual propositions

j. Basically want witnesses tell what they know – let them tell what they think or believe when it's too complicated to separate it

2. <u>Rule 702</u>: <u>*Testimony by Experts*</u>. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if
- **a. (1) the testimony is based upon sufficient facts or data,**
- **b. (2) the testimony is the product of reliable principles and methods, and**
- **c. (3) the witness has applied the principles and methods reliably to the facts of the case.**

3. Oftentimes, the problem is not witnesses what happened, but interpreting what happened → need for expert to testify to causal inferences
4. COMMON LAW
    a. General notion that experts were only allowed to testify based on admissible evidence (hearsay possibilities)
        i. Unless you're going to allow expert to be a vehicle for undoing hearsay rules, there has to be something that keeps that process under control
            1. Only a partial solution for closing the gap between hearsay rule and expert testimony b/c anything that experts know and say come from reading scholarly works and talking to other people in their field → essentially all hearsay itself
        ii. Led to very cumbersome process for eliciting testimony
            1. Suppose I was able to prove these 9 things, what would you conclude from that?
                a. Then you have expert's opinion that isn't based on inadmissible evidence – hypothetical
                b. If it turns out you can't prove the 9 things, then the other party can just point out that they didn't prove the 9 things
    b. ***FRYE TEST***: Expert opinion allowed only if methods are generally accepted in the relevant scientific community
        i. Doesn't allow testimony based on novel theories

ii. Idea is that if you have something novel, test it out, if it's good then other people will believe it, and once others believe it, courts will accept it
iii. Still the test in about a dozen jurisdictions

5. ***DAUBERT TEST***: Expert testimony must be relevant and reliable, and subject of testimony must be scientific knowledge (*Kuomo Tire* later clarified that focus is on KNOWLEDGE part, not scientific part)
    a. Validity of methodology judged by – among other things –
        i. Empirical testing: the theory or technique must be falsifiable, refutable, and testable.
        ii. Subjected to peer review and publication.
        iii. Known or potential error rate.
        iv. The existence and maintenance of standards and controls concerning its operation.
        v. Degree to which the theory and technique is generally accepted by a relevant scientific community.
    b. Focus on the trial judge as the gatekeeper
    c. Although Rule 403 plays only a minor role in the case, Lawson thinks that this is just a 403 determination
        i. If something is not generally accepted, then it's not relevant, or it doesn't pass 403 barrier
            1. Just changes the language of explanation – instead of simply saying something is not generally accepted, say that it doesn't assist the trier of fact, or that its prejudicial risk outweighs its probative value
        ii. Trial judge decides whether expert is testifying about knowledge or just dribble – also 403
        iii. Almost impossible to think of anything that couldn't easily be fit into pre-1993 regime
    d. More of a change of "mood"
        i. Read as indication that trial judge needs to crack down on junk science
        ii. But reading text of opinion, not clear if that comes through
        iii. Not something that really changes the doctrinal mix in any substantial way, but one that is essentially telling trial judges to be tougher
6. ***Joiner***: abuse-of-discretion standard of review was the proper standard for appellate courts to use in reviewing a trial court's decision of whether expert testimony should be admitted
        i. Very small chance of getting reversed on appeal
        ii. How would appellate court even decide whether trial judge made the wrong call . . .?
7. The fact that the expert has testified in other cases does not weigh in favor or against qualifications or reliability
8. **THREE-PART INQUIRY**
    a. ***DOES THE PERSON QUALIFY AS AN EXPERT?***
        i. Don't have to have a degree – can qualify as expert by experience, training, knowledge
        ii. Basically anything that shows that person has greater knowledge than the average layman
            1. Sometimes VERY loose standard – particularly where there is no available formal degree in the subject
                a. K-Mart case – psychologist testifying about slip-and-fall victim's job prospects/lost income based on experience in vocational rehabilitation (advising disabled employees whether they're capable of returning to previous jobs (nothing about range of jobs they're capable of performing)); testimony allowed and affirmed on appeal
    b. ***ARE THE EXPERT'S METHODOLOGY'S RELIABLE?***
        i. Methodology has to be plausible – meet minimum requirement of knowledge
        ii. *Daubert* factors
        iii. Sometimes an easy case
            1. <u>Example</u>: Pain doctor acknowledges that there fibromyalgia has no known cause, but willing to testify that fall contributed to condition (no other factors present)
                a. Exactly the sort of thing that the rule keeps out – need process of investigation that would allow doctor to reach his conclusions
        iv. Methodology is the type that experts in the field rely on, but the expert finds it to be wildly unreliable nonetheless
            1. Authority in both ways:
                a. Role of trial judge to take this into account
                b. Judges don't know what they're doing, so it's not their job to decide whether the methodology is legit

2. Example: Criminal charge of murder and arson, prosecution's theory is that D killed his wife and set fire to the house to make the death look like an accident; D says he was nowhere near the house during the relevant time and the fire was the result of bad wiring; prosecutor's expert, fire marshal, offers to testify that in his opinion the fire was a result of arson; also prepared to testify about bases for his opinion – which include inter alia interviews with next-door neighbors who say they saw D running from the house at 7, when he says that he was nowhere near the house
    a. Even if this is this the sort of thing that people who are experts in finding out what started a fire look at – talk to people, look to police reports, etc.
    b. If Lawson was the trial judge, he would say I don't care if this is the methodology – it's crap! Keep it out

c. ***IS THERE A SUFFICIENT CONNECTION BETWEEN THE METHOD EMPLOYED AND THE CONCLUSION REACHED?***
    i. Not only does there have to be a plausible methodology, but something has to link the methodology to the expert's conclusion
    ii. Not enough to state applicable legal principles and give conclusions – have to explain HOW those principles yield the conclusion reached
    iii. DISCRETION TO TRIAL JUDGE
        1. Trial judge can exclude the testimony pre-trial because it's not connected enough to method
        2. Trial judge can allow the testimony despite its flaws and leave it to defense counsel to show the lack of connection between methodology and conclusion through cross-examination
            a. If expert can't match it up then that weighs heavily with the jury
        3. Trial judge can allow testimony and then strike it from the record if there's not a sufficient link

9. INTERPLAY BETWEEN 703 AND 705

a. Rule 705: *Disclosure of Facts or Data Underlying Expert Opinion*. The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

i. Example: Was fire caused by arson? Yes; doesn't have to explain all of the data that leads to that conclusion that it was in fact caused by arson
ii. Can be required to disclose on cross-examination
iii. PROBLEM: Many times proponent *wants* to introduce facts and data before opinion to enhance credibility/reliability of opinion
    1. BUT much of that information would be hearsay that would not come within an obvious hearsay exception
        a. i.e., information of past behavior of people from which expert bases opinions of conformity therewith
            i. These are the sorts of considerations that experts will frequently use in making determinations
            ii. i.e., person that police found at scene committed arson 8 times, and as an expert in pyromania, opine that the person is in fact a pyromaniac
                1. Without expert, would be able to bring in the fact that person has burnt down 8 other buildings

b. Rule 703: *Bases of Opinion Testimony by Experts*. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Facts or data that are <u>otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect</u>.

i. EXPERT BASES OPINION/INFERENCE ON INADMISSIBLE EVIDENCE
    1. Opinion/inference admissible nonetheless
        a. If facts/data are the type that experts in this field generally rely on to form these types of opinions
    2. Underlying fact/data admitted ONLY IF
        a. Probative value substantially outweighs prejudicial effect
            i. No such restriction on cross-examiner
                1. May want to bring in underlying facts to call into question the accuracy of the expert's conclusion
                2. When these facts are otherwise inadmissible evidence, just do normal 403 balancing
                3. <u>Example</u>: Car accident with snow plow, expert testifying to lost income and hedonic (enjoyment) damages for two people killed (W and M)
                    a. On cross, manufacturer asks: In the course of calculating lost income, did you take into account that W, the day before he got into the Subaru he had just been released from prison?"
                        i. Trial judge let this in w/limiting instruction
                        ii. If expert is testifying about lost income, if someone is a convicted criminal, would surely have an impact on earning potential over time
                        iii. Or more importantly, if expert said no, I didn't take that into account, that does in fact rationally go to credibility of calculation
                        iv. Comes in under 705, s/t 403 balancing
                    b. Manufacturer also handed the expert a report and saying did you consider this report when calculating damages? It was M's treatment from some rehab center where he underwent treatment for driving while intoxicated
                        i. Trial court permitted the manufacturer to cross-examine
                        ii. Also permitted to question the expert as to whether economic calculations would change if he knew in the summer prior to accident M used heroine, Special K, meth, LSD, and alcohol?
                4. If this expert never gets on the witness stand, NO WAY that this information would come in, but once you put the expert on the stand for damages, this stuff is suddenly let in . . . ?
                5. Plaintiffs should have anticipated all of this, but as a matter of the law of evidence, structure of the rules allows, in the discretion of the trial judge, this kind of evidence to come in
            ii. If D, instead of asking P's expert, put on own expert that came up with lower amount for damages, and D asked how he came up with #?

1. And expert said that he considered that W was criminal, and M was a drug user
2. THEN would have 703 problem – reversed 403 issue
    a. Presumption is that it does not come in UNLESS you can convince judge that probative value substantially outweighs prejudicial impact
3. Important for D to get this stuff out through other side's expert, not his own

ii. Example: R was environmental engineer testing smoke stack when he fell 80 ft to his death; no eye witness saw the fall, but father inferred that son inadvertently stepped through ladder opening that was admittedly missing safety rails; sue owner of smoke stack on this theory
1. D's claim is that it's possible that he was just going up the ladder and fell off the ladder – had nothing to do with design of ladder or platform
2. Safety inspector qualified as expert for P – testified that it was more probable than not that R had fallen through ladder opening
    a. Opinion based in part on statements of father and coworkers that R was always careful and it was his practice to wear gloves while climbing
        i. The fact that someone is a careful person is not something that you normally allow in
        ii. But experts are allowed to do that if that's the sort of things upon which experts reasonably rely
            1. Question of methodology – doesn't seem implausible . . . what else are they going to rely on?
            2. Jury can then decide that they don't want to buy it, but we're only talking about whether it passes gate keeping of the court

c. 703/705 regime loosens the old CL standard that experts cannot testify based on inadmissible evidence

10. CONFRONTATION CLAUSE
    a. Would potentially apply to expert testimony in criminal cases
    b. BUT much of the hearsay that experts rely on do not implicate *Crawford* at all because it's not testimonial
    c. At least case has held that statements of psychologists are testimonial and therefore bring up *Crawford* issue
        i. Not difficult to imagine circumstances in which expert opinions in criminal cases may meet *Crawford* testimonial rule
        ii. Especially with *Melendez-Diaz* rule that says that all of these police reports, etc. are hearsay
11. Law is clear that it does not want experts simply to report what other experts have said
    a. Can do so only in explaining how they came to their own opinions
    b. Actually an extremely difficult line to draw
    c. Example: criminal trial, D pleads NG by reason of insanity; during direct exam prosecution asks Dr. T, psychiatrist, how confident he was that D was sane; Dr. T responds: I'm very confident. I called Dr. Smith, leading expert in this field, explained the case, and he concurred in my conclusions
        i. Not admissible because Dr. S is not the witness here, Dr. T is
        ii. Expert is allowed to base opinions on what other people say
            1. But HERE, the witness is not doing that – he's conveying what someone else has said after he had already coming to his own opinion
                a. Conduit for conveying the opinions of Dr. S
        iii. What if Dr. T was a student of Dr. S, so that Dr. T's judgments are based largely on teachings that he learned while he was a student of Dr. S?
            1. Presumably that's part of the what based his conclusions on and that would be ok
            2. How would that be different from saying I'm not in school anymore, but I called this really smart guy and asked him about to see if I'm right?
                a. Lawson not really sure how it's different