A. WHY RULES OF EVIDENCE?

1. Why Evidence Law at All?

Many reasons have been advanced in answer to the second question posed above, but five stand out. At the end of the course you will be better able to evaluate them, but keeping them in mind from the outset may help on your journey through the subject.

The first sounds strange in a republic that places great faith in the jury system, but mistrust of juries is the single overriding reason for the law of evidence. The hearsay doctrine exists, for example, largely because we believe that a lay jury (an amateur factfinder) cannot properly evaluate statements made outside its presence, and the rules governing character evidence assume that juries place too much weight on such proof or employ it improperly for punitive purposes.

A second reason for the law of evidence is to serve substantive policies relating to the matter being litigated. Rules that set and allocate burdens of persuasion are examples. They amount to substantive evidence law, existing in the hope and belief that they affect outcome—recovery or exoneration from liability in civil litigation and conviction or acquittal in criminal cases—in ways nearly as significant as purely substantive principles. Everyone understands that the prospect for recovery in negligence is enhanced or inhibited by adjusting substantive law to allow or preclude recovery where plaintiff is himself partly to blame. Similar results may be achieved by setting and allocating burden of persuasion: Plaintiff has a better chance if he only needs to prove his case by a “preponderance” (lowest standard of proof known to the law), as opposed to “clear and convincing” evidence; his prospects also improve if defendant bears the burden of showing plaintiff’s negligence, and diminish if plaintiff must prove due care.

A third reason is to further substantive policies unrelated to the matter in litigation—what we may call extrinsic substantive policies. Typically rules in this category seek to affect behavior or quality of life outside the courtroom, and
privileges are the prime example. Thus the two spousal privileges (one covering marital confidences, the other regulating the use of one spouse as witness against another) aim to protect marriage, vindicating the widespread public assumption that marital privacy is protected and removing (or limiting) the specter of pitting spouse against spouse in court.

A fourth reason for the law of evidence is to ensure accurate factfinding. Thus the rules governing authentication of documents and things ("laying the foundation") and the Best Evidence doctrine (which requires the content of a writing to be proved by means of the writing itself) exist largely to ensure accuracy—to force litigants and courts to be careful.

The fifth reason for evidence law is pragmatic—to control the scope and duration of trials, because they must run their course with reasonable dispatch. Achieving resolution is itself valuable, even if it is not perfect. To this end, the Rules authorize the trial judge to confine and organize the dispute. Rule 403, for example, permits the judge to exclude evidence that would be otherwise admissible, simply because it would take more time than it is worth and might confuse the jury. And Rule 611 gives the judge power to control the sequence of proof and the manner of examining witnesses.

2. Why Rules Rather Than Common Law?

Accessibility is the main reason advanced by the framers of what has become the most influential body of American evidence law—the Federal Rules of Evidence. This code sets forth the bulk of the law of evidence in 63 short provisions, in language easily read and largely free from technicality and cross-referencing. The text of the Rules may be printed in a small book easily carried to court, quickly perused and readily understandable.

Success of the Federal Rules. It is in part because of their brevity and simplicity that the Federal Rules have become so influential. Their quality and widespread success make them a logical focal point for a course in American evidence law, and they are central to this text.

Consider just how important the Rules have become:

They apply in federal courts across the land in both criminal and civil cases, and generally they apply regardless whether federal or state law supplies the rule of decision. (In diversity cases where federal courts apply state substantive law, however, the Rules require federal courts to apply state evidence rules in limited areas—namely, presumptions, privileges, and competency of witnesses. See F.R.E. 301, 501, and 601.)

Within the first 12 years after the Rules were adopted in the federal system, a majority of states adopted codes closely tracking the Federal Rules, and the

1. To some extent, this concern overlaps with the first one, for another way of expressing mistrust of juries is to say that we fear that juries will not soundly appraise certain types of evidence and will be misled to wrong conclusions. Nobody really thinks that hearsay evidence, for example, is worthless, and we all routinely rely on hearsay in daily life. Mistrust of juries results from a belief that jurors will not (and to some extent cannot) adequately evaluate hearsay, which is another way of saying that we fear they will fail to perform accurate factfinding.
number of state adoptions has reached 42. Even in states that have not adopted the Rules, appellate opinions cite them and sometimes adopt their underlying principles.

It was not always so.

Pre-Rules evidence law. Until the Federal Rules appeared, evidence law was mostly a creature of common law tradition. To be sure, in most jurisdictions there were statutes addressing such matters as physician-patient privilege, admissibility of business and public records, and some aspects of impeaching witnesses. But comprehensive codes were longer in coming and slower to gain acceptance.

Numerous efforts to codify evidence law preceded the Federal Rules, of which the following four are most notable:

1. Dean Wigmore wrote an early code in 1909 when he was a young man. It was a long and cumbersome document that achieved no success in practice, except perhaps in proving that evidence law could be codified. See J. Wigmore, Code of Evidence (1909).

2. A generation later the American Law Institute proposed the Model Code of Evidence (1942). Professor Edmund Morgan drafted and later defended it, and he vigorously disagreed with Wigmore on important points. But the Model Code was both radical and technical. It would have largely discarded the hearsay doctrine, and its cross-referencing and precise terminology put it on a par with the modern Uniform Commercial Code in complexity. No jurisdiction adopted the Model Code.

3. In 1953 the original Uniform Rules of Evidence appeared, proposed by the National Commissioners on Uniform State Laws. It drew from the Model Code but was shorter, less technical in wording, simpler in design, and not so radical. The Uniform Rules were adopted (with local variation) in a handful of states. (In 1974 the Commissioners abandoned the original Rules and adopted the new Uniform Rules, which largely track the Federal Rules, and the states that adopted the original rules mostly went along.)

4. In 1965 a fourth codification appeared—the California Evidence Code, a comprehensive statutory scheme put together by a public commission and enacted by the legislature. It proved highly successful, and made important modifications in common law tradition.

The Federal Rules. The Federal Rules of Evidence are the most recent and most successful codification. They were proposed by a distinguished Advisory Committee that comprised practitioners, judges, and law professors appointed by the United States Supreme Court. The Committee was chaired by Albert Jenner (a prominent Chicago trial attorney), and the principal task of drafting

the Rules fell to Professor Edward Cleary (then of the University of Illinois). The Committee labored more than eight years, publishing two drafts which it distributed to bench and bar, and a would-be final version, which the Supreme Court accepted and transmitted to Congress pursuant to the Enabling Act (28 U.S.C. §2072).

By accident of history, the Rules arrived at Congress as the Watergate scandal was erupting. Amidst claims of executive privilege by President Nixon stirring impassioned resentment in Congress, the privilege provisions in the Rules attracted immediate attention. Acutely sensitive on the matter of legislative prerogative as against presidential power, members of Congress saw the Rules as an encroachment by the other branch—an infringement of legislative prerogative by the judiciary. Hence the Rules were not destined to pass quietly into law (under the Enabling Act, as it existed then, Rules proposed by the Court became law after 90 days if Congress took no action). Instead Congress held hearings, scrutinized the Rules, changed them substantially, and finally enacted the changed version in statutory form.

Most significant among congressional changes was the deletion of the privilege rules, and the adoption in their place of a single provision (Rule 501) leaving privilege to common law evolution. In 2004, some 29 years after adoption of the Rules in 1975, an Advisory Committee is working on drafting comprehensive privilege Rules, but these Rules have not yet been adopted or even submitted to the Court or to Congress for possible adoption. Also significant, when the Rules were adopted in 1975, was congressional rejection of a proposal to admit prior inconsistent statements by testifying witnesses as “substantive” (and not merely “impeaching”) evidence, by defining them as “not hearsay.” Congress would not go along with this proposal, even though years earlier the Supreme Court had implied that such a provision would pass constitutional muster.

There are those who believe strongly that evidence law should not be codified and that the Federal Rules are a mistake. Consider, for example, the viewpoint of the Supreme Judicial Court of Massachusetts, which in 1982 declined to adopt the Federal Rules in that state:

A majority of the Justices conclude that promulgation of rules of evidence would tend to restrict the development of common law principles pertaining to the admissibility of evidence. The valid objective of uniformity of practice in Federal and State courts would not necessarily be advanced because the Proposed Rules, in their present form, depart significantly from the Federal Rules of Evidence. Additionally, in the view of some of the Justices, the Federal Rules of Evidence have not led to uniform practice in the various Federal courts and are, in some instances, less well adapted to the needs of modern trial practice than current Massachusetts law.

Announcement of the Judicial Court of Massachusetts Concerning the Proposed Massachusetts Rules of Evidence (December 30, 1982). The announcement went on, however, to suggest that the proposal being rejected has "substantial value as a comparative standard" and that parties may "cite the Proposed Rules, wherever appropriate, in briefs and memoranda"!
B. WHAT HAPPENS AT TRIAL

In both civil and criminal cases, the trial is the culmination of preliminary work and skirmishes. The decision whether to bring a claim or prosecute charges was made long before, and evidence has been collected, witnesses located and interviewed, and negotiations aimed at settlement (“plea bargaining” in criminal cases) have been attempted and abandoned. And the court has already played a role. Pleadings, motions, and in civil cases discovery and perhaps pretrial conferences have gone forward to their conclusion.

Comes now the main event—the trial itself.

1. Jury Selection

In most jurisdictions a jury panel has been assembled when the lawyers enter the courtroom on the first day of trial. The jurors may be sitting in the spectator section behind the “bar” or assembled in waiting rooms or milling in the hall. One by one the clerk summons an adequate number (usually 12 in criminal cases, sometimes less; in civil cases often 12, but often as few as six) plus two alternates, and they take their seats in the jury box.

The jurors usually introduce themselves one at a time, and the trial lawyers note their names. Particularly in large urban centers, the lawyers may already have information about each juror: Often jury selection forms are available to the lawyers, and private agencies rent “jury books” containing whatever information can be unearthed about members of the panel—age, marital status, occupation, prior jury service (with details about the nature and outcome of the case), and so forth.

The next step is called “voir dire,” in which court and counsel try to find out whether any members of the panel should not serve in the case at hand. Sometimes this process brings to light the fact that a potential juror does not meet the statutory qualifications, which typically set minimum and maximum age (often 18 to 72), require that each be a citizen, and sometimes include quaint prerequisites (not being “decrepit”). But usually these standards are implemented by the clerk in issuing the summonses and do not arise during voir dire. More people on the panel are eligible, but one or another should not serve for a reason specific to the case. If a juror is related to a party (by blood or marriage, or by business connection such as being his creditor or debtor, employer or employee), or is “prejudiced” on one or another issue or against one or another party, he should be excluded “for cause.” Each party may challenge any number of people for cause, and the judge must determine any such challenge, excluding if cause is found. In addition, each party (or each “side”) has a fixed number of “peremptory” challenges (often three), which entitles him to exclude potential jurors for any reason at all—and the reason need not be stated.5

3. In criminal cases, the government must be prepared to show that its exercise of peremptory challenge does not rest on racial considerations. See Batson v. Kentucky, 476 U.S. 79 (1986). Later the Court extended the same principle to private litigants in civil cases and defendants in criminal
In addition to specific questions aimed at uncovering "cause" to exclude potential jurors, voir dire involves talking to them in general terms about the case and asking them whether they are ready and able to serve conscientiously. In state courts, the lawyers often conduct voir dire. They prize the right to make direct contact, and use it to establish rapport. In federal court and many states, voir dire is conducted by the trial judge. She may well question the panel as a whole, rather than one by one, and counsel must be content with submitting questions to her, in hopes that she will put them to the panel.

2. Opening Statement

The opening statement gives each side its first opportunity to set before the jury "the story" that the ensuing proof will tell. Here the lawyer presents an overview that will help the jury understand what is to come, for the evidence will likely seem fragmented and disjointed. The courtroom is a kind of theater, the trial a kind of drama, but it is not a well-made play—few witnesses on the stand perform as well as actors on stage.

Customarily the party bearing the burden of persuasion—usually plaintiff in civil litigation and prosecutor in criminal cases—has the right to make the first opening statement, and the opponent follows. (If the court permits, the opponent may delay his opening until the other party has presented her case and rested, although this approach is seldom taken.)

In theory the opening statement is not an "argument," it simply sums up "the facts" that each party contends that her proof will later establish. But the opening statement is an argument of sorts, for the lawyer tries to persuade, in the sense of predisposing the jury to favor the cause of her client. She points out the direction, the themes, the meaning of it all, so testimony and other proof will come as echoes or continuities of thoughts already in the minds of the jurors, and her opening remarks begin to draw the shape of things to come. The opening statement is "the first act" in the theater of trial.

It is during opening statement that the jury learns background facts about the parties—for example, plaintiff is a laboratory technician at Carle Clinic who was driving to work when the accident occurred. Such humanizing information may not be relevant to the legal issues in the case, but may garner sympathetic reaction, so inevitably it comes out as part of the presentation and is likely to receive early mention. And it is during opening statement that the jury hears that plaintiff was injured in a car accident, that he sustained serious injuries requiring treatment and convalescence, and that defendant was speeding (or drunk or inattentive). In a phrase that counsel will likely repeat often, "the evidence will show" all these points.

3. Presentation of Proof

Now comes the main act—the presentation of proof, where each party seeks to build his case and tear down his opponent's. Ordinarily the party with the
burden of persuasion goes first, followed by his adversary, and each may have additional turns if needed. Thus plaintiff usually begins in a civil suit, followed by defendant; the prosecutor goes first in criminal cases, followed by the accused.

During his first appearance each party presents his “case-in-chief.” Now he holds center stage: He need not “speak all his lines,” but he cannot hold back much of substance. He has to establish everything he must prove in order to prevail, keeping in reserve only what he will use to rebut whatever his opponent presents. When he is finished, he “rests” and yields the stage to his adversary. After both have put on their cases-in-chief, the party who opened has another chance, this time to present his “case-in-rebuttal,” and then his adversary has a similar opportunity. The process may go on until each side is satisfied, or the judge decides that proof and counterproof have become repetitive or trivial. Rebuttal cases are narrower than cases-in-chief, for the only purpose is to give each side a chance to refute what the adverse party presented during his most recent appearance, and each succeeding rebuttal should be narrower (hence usually shorter) than the one before.

During his case-in-chief, then, each party seeks to establish everything he must prove to prevail, calling every witness on whom he depends, seeking to build his case by means of testimony elicited on “direct examination” (of which more later). He also introduces tangible evidence, such as the allegedly defective steering link that caused the accident, or the contract sued on, or medical records, or models and photographs of the accident scene. Such tangible things are often swept up under the general heading “demonstrative evidence,” and sometimes more particular labels apply. Thus the objects actually involved in the events in litigation (the steering link) are called “real” or “original” evidence, and almost always such things are admitted, if physical limitations of the courtroom permit. Writings are called “documentary” evidence, and they are so common that special rules apply.

During the time when one party holds center stage, he is in control. He calls the witnesses and puts the initial questions, thus determines the subjects and sequence, and trial lawyers prize and jealously guard that control. But even during his case-in-chief each party must share the stage with the opposition: After direct examination of each witness is completed, the opponent gets a turn to ask questions, this time by “cross-examination” (of which more below). Thus in effect the opponent interrupts the calling party’s case, though in most jurisdictions the opponent can cross-examine only on subjects opened up on direct, and may not go into other relevant matters not explored on direct. (The question whether cross should be limited by the “scope of direct” is hotly debated. See the discussion in section D of this chapter, infra.)

When cross-examination is finished, the calling party may engage in “redirec-" examination, and then the adversary may again cross-examine (now “re-cross-examination”), and so on. Each succeeding round of questioning becomes narrower until the parties are satisfied or the judge decides that repetition has set in or that the sparring has become trivial.

To sum it up, the order of proof goes this way:

1. Plaintiff (or prosecutor) presents his case-in-chief, then rests;
2. Defendant presents his case-in-chief, then rests;
3. Plaintiff (or prosecutor) presents his case-in-rebuttal;
4. Defendant presents his case-in-rebuttal (sometimes called his “case-in-rejoinder”);
5. Each side presents further cases-in-rebuttal (again sometimes called cases-in-rejoinder).

And the order of examination is as follows:

1. Direct examination by the calling party;
2. Cross-examination by the adverse party;
3. Redirect examination by the calling party;
4. Re-cross by the adverse party;
5. Further redirect and re-cross as may be necessary.

4. Trial Motions

When the evidence on both sides is in (sometimes earlier), a party confident that a reasonable person could only find in his favor may make a motion for judgment (only the defense may do so in a criminal prosecution). Here the court has an opportunity to assess the sufficiency of the proof, and to take the case from the jury if a reasonable person could resolve the dispute only one way.

In ruling on such motions, the trial judge follows well-recognized rules of thumb (though they vary among jurisdictions). She assumes that the jury (if given the case) will believe witnesses for the party opposing the motion, which means that the judge does not determine credibility issues (or “resolves them in favor of the party opposing the motion”). In some jurisdictions the judge considers only evidence offered by the party opposing the motion, but it is usually said that she considers that evidence and evidence offered by the moving party that a reasonable juror could not reject. She also may take “judicial notice” of facts so well known and universally accepted as to be indisputable (it is hot in Phoenix in August). The trial judge only rejects evidence that runs contrary to the “laws of nature” or to matters that can be judicially noticed.

Typically such motions are denied; they are seldom granted for the party bearing the burden of proof in a civil case, and seldom granted in negligence cases. They are perhaps most often granted for defendants in criminal cases, and for defendants in civil contract suits. As a practical matter, they are routinely denied in jury-tried cases even where the judge is inclined to go along with the movant, if only because the outcome is better protected from reversal if the jury takes the case and comes in with a verdict for the moving party. (If the jury comes in the other way, the judge has the chance after the verdict to grant a similar motion, and if she does so and is found on appeal to have erred, the original verdict can be reinstated.) Particularly in civil cases, these motions are attended by procedural complexities that help ensure that they are rarely granted.
5. **Closing Argument**

When presentation of proof is finished, the time comes for lawyers and judge to have their final say. The lawyers argue and the judge instructs. In federal court and most state systems it is done in that order (hence instructions are the last thing the jury hears before it "retires"). In a number of state systems, however, the judge speaks first and the lawyers have the last word, an approach much preferred by the trial bar.

The party bearing the burden of persuasion (usually plaintiff or prosecutor) has the right to make two closing arguments, one before and one after his adversary. The notion is that he needs an extra chance to persuade, since he loses if the jury finds the evidence equally balanced. In short, the party with the burden opens first and closes first and last. His adversary goes second, in both opening and closing.

In closing argument each side gets its chance to put its "last word" to the jury. The lawyer has seen the ebb and flow of trial, and perhaps expressions of sympathy or doubt on the faces of jurors, and now he has his last chance to clear away doubts, reinforce sympathetic reactions, and explain why the jury should find for his client.

Often the trial lawyer has already written a draft of his close, and he devotes final preparation to finding the best words. He concentrates on phrasing, allusions, tone, cadence. He thinks about the relationship that has grown up between him and the jury, seeking words and expressions in keeping with the positive aspects of that relationship. And he works on continuities—ideas already set out in the opening statement and supported by testimony.

The matter of closing argument is highly personal to each attorney and dependent on the course of trial. But the attorney is not the subject of the close—the plight of the client is. Hence a good close does not overwhelm the jury with the skill or brilliance of the lawyer, but instead leaves the jury with an inexorable feeling that the client's cause is clearly the stronger, and that any lawyer worth his salt would have shown as much (just as this lawyer happened to do).

6. **Instructions**

The judge instructs the jury on the law, so it understands what it must decide in order to reach a verdict for either party. Instructions explain the applicable substantive principles, and allocate and define the burdens of proof on the various issues. Usually they also contain standard admonitions about the manner in which deliberations are to be conducted, the need to decide on the basis of the evidence, and so forth. The parties draft the instructions and submit their requests to the court (providing copies to the adverse parties) before the process of proof has been completed (in the wording of FRCP 51 and FRCrimP 30, before "the close of the evidence"), and in fact the judge often expects and gets instructions before trial even begins.

Often the judge also instructs the jury on evidentiary matters. Such instructions may take many different forms:

They may admonish the jury to exclude from consideration certain testi-
mony that it heard or information suggested by a question during trial. Such instructions are often given when the incident occurs, and the repetition is for good measure. These are “curative” instructions whose purpose is to save the verdict and judgment to come from later reversal on account of inevitable errors as trial progresses. On some points, a “curative” instruction cannot work and may even be counterproductive—emphasizing the very point it asks the jury to forget. Hence for the most part the question whether to give such instructions is left in the first instance to the party whose case might be damaged by the incident in question.

Often instructions advise the jury to consider certain proof only on one point and not others or against one party and not others. These are “limiting” instructions, made necessary by the unavoidable fact that a great deal of evidence that is essential at trial has unwanted side effects, and the aim is to obviate or minimize these. Again such instructions are likely to be given during trial when such incidents occur, and again the party who might be hurt by the evidence in question ordinarily decides in the first instance whether he wishes the jury to be admonished in this way.

Another kind of instruction seeks to convey to juries the effect of “presumptions” and certain formal inferences. Sometimes the instruction is simple. In civil cases, for example, a presumption sometimes requires the jury to accept a fact as established if no counterproof has been adduced. But in criminal cases, and in civil cases where counterproof has been adduced, the matter of instruction is complicated. The jury is sometimes told that it may draw an inference from particular proof, although the parties may quarrel over language and may not agree that the evidence even warrants the instruction. (See Chapter 10, infra.)

Still other instructions tell the jury that it must decide certain points before it may consider certain evidence. In criminal cases, for example, a defendant who contends that a confession admitted against him was “coerced” may be entitled to have the jury consider the coercion claim before it takes the confession as proof of any element of guilt. (The accused is constitutionally entitled to have the judge resolve his claim of coercion, but if the judge decides against him and admits the confession, the accused may be entitled to a “second bite”—that is, to make the same argument to the jury, in hopes that it will come out on his side.)

7. Deliberations

After lawyers and judge finish talking to the jury, the curtain falls. The characters have left the stage. Their lines have been spoken, their performances watched and heard. Judge and lawyers, themselves producers and directors (and actors too) make their exits as well. Now it is the turn of the jury: The audience becomes actor.

The performance of the jury takes place behind closed doors. There it selects a leader and deliberates its verdict. The lines spoken in the jury room, and the performances of individual jurors, are hidden from view. Necessarily hidden as well are the factors that prove persuasive and the personalities that
B. What Happens at Trial

become influential, among witnesses and lawyers, and among the jurors themselves.

This secrecy is intentional. One purpose is to encourage jurors to share their views with one another, a notion reflecting our democratic ideals and faith in the value of free expression and exchange of views—the faith that underlies the First Amendment. Another purpose is to insulate verdicts, both from public scrutiny (which would lead to relentless examination and criticism in the press) and from judicial review (which could have no purpose but to provide additional ground for reversal). Paradoxically, one reason for such precautions is the widespread belief that jury deliberations may not live up to an ideal of enlightened exchange of views and sifting of evidence, and that the jury as an institution might not survive close scrutiny of its deliberative process.

In modern practice jurors usually go home at the end of each day, although they are admonished not to discuss the case among themselves or with outsiders. If the case is notorious or controversial, however, the jury may be sequestered during trial and deliberations to insulate it from outside influence and pressures.

Questions often arise during deliberations, and jurors seek clarification of testimony or instructions. Typically the leader passes a note to the bailiff to be forwarded to the judge, who summons the jury and the opposing lawyers to the courtroom, where the jury’s request can be heard and considered. Often instructions are repeated, or portions of the trial transcript are read aloud by the reporter.

If deliberations bog down in disagreement, the leader may again communicate with the judge, and the question arises whether to declare a mistrial. Often the judge admonishes the jury to try again, reminding it of the time already spent and the expense of a new trial and telling each juror to reconsider her position. Commonly the admonition suggests that jurors who find themselves in the minority or alone in their view should take into account the contrary view of most of the others and carefully consider whether that view might not be right. It suggests to those in the majority that they should reconsider the objections of the others once again. Particularly in criminal cases, defendants object to this so-called “dynamite charge” as infringing the constitutional safeguard requiring proof beyond a reasonable doubt for conviction.

8. The Verdict

When the jury reaches its verdict, the actors in the drama assemble in court—judge and jury, lawyers and parties, and the court reporter. The jury leader announces the verdict or hands a written verdict to the judge or court clerk, who reads it into the record. Generally the judge asks appropriate questions to ensure that all jurors agree on the verdict as thus rendered, closing the door to any later claim that what was announced is not what was agreed to.

Usually the jury gives a “general verdict,” which in civil cases states simply who wins and (if it is the plaintiff) the amount of recovery, and in criminal cases states simply that the defendant is found “guilty” or “not guilty” of the various charges. But sometimes in civil cases the jury answers special interrogatories (with or without a “bottom line” general verdict), which ensures that the jury addresses and resolves particular issues. And in criminal prosecutions where
the death penalty is possible, the jury may retire a second time to deliberate and recommend punishment.

9. Judgment and Post-Trial Motions

After the verdict is announced, the court enters judgment. In civil cases, generally the prevailing party prepares the judgment for the court's signature, and the clerk "enters" the judgment by notation in the docket book. Now the time for appeal begins to run, and now a judgment awarding relief becomes effective in the sense of becoming the basis for "execution" against property owned by the debtor. In criminal cases in which the jury returns a verdict of "not guilty," a judgment of acquittal is signed by the judge and entered by the clerk forthwith, and the defendant is released from custody immediately. Where the jury returns a verdict of "guilty," the judgment is signed and entered after a sentencing hearing has been held and sentence has been pronounced. In civil and criminal cases alike, entry of judgment starts the time for appeal, although the prosecutor usually has no appeal from an acquittal.

Post-trial motions present the parties with their last opportunity at the trial level to obtain the result they have sought. Routinely the losing parties in civil cases move for judgment as a matter of law (formerly called a J.N.O.V. or "judgment notwithstanding the verdict"), requesting in the alternative a new trial. In federal court and in many states such motions must be made not later than ten days after entry of judgment, a time constraint that is rigorously enforced. And routinely the defense in criminal cases moves for a judgment of acquittal, which in federal court and most states is once again subject to a rigid time limit.

Other kinds of post-trial motions may be made. Some are less sweeping, such as motions to correct "clerical" or "ministerial" mistakes in the judgment, and motions for permission to interview jurors (if the parties suspect some impropriety during deliberations). Others seek to begin the contest anew, such as motions to reopen on account of "newly discovered evidence."

10. Appellate Review

Federal courts and most state judicial systems adhere to the principle of finality, under which appellate review may be had only at the end of the case, when the trial court has entered a "final judgment" that dismisses the claims or charges for jurisdictional or other "technical" reasons (thus in effect denying the relief sought) or disposes of them "on the merits" (perhaps awarding relief and perhaps not, but in any event resolving substantive issues). There are notable exceptions to this pattern: In New York, parties in civil cases may obtain "interlocutory" appellate review of a wide range of orders and rulings by trial courts. And even jurisdictions observing the finality principle permit interlocutory review of some rulings and orders.

The finality principle applies to appellate review of evidence points, with the result that usually a party aggrieved by a ruling on an evidence point must
await final judgment before seeking review. (There are a few exceptions to this pattern, taken up below in section E.)

Even when judgment has been entered, a party may obtain full appellate review only if it has "preserved" its claim of error by stating its position promptly and clearly at trial (see sections C and D, infra). If these procedural steps have been taken, appellate review of evidence rulings may lead to relief (reversal and often a new trial), but only if the reviewing court concludes both that the trial court erred and that the error probably affected substantial rights of the appellant, hence that the error was "reversible" rather than merely "harmless" (see section E, infra).

C. MAKING THE RECORD

1. What Is the Record and How Is It Made?

Trying a case involves a performance designed to affect both a live and a remote audience. The live audience is the judge and the jury (if any), who see and hear the goings on in the theater of trial. The remote audience is the appellate tribunal, which neither sees nor hears the performance, and depends entirely on a secondhand source—the "cold" written "record." Hence trial lawyers are aware of the immediate impact of their performances (and those of the witnesses), but are also conscious of the picture that their words (and those of witnesses) will make when printed for remote scrutiny.

In the first instance it is the responsibility of the court reporter to prepare the record of trial. One might think that in the twenty-first century and the era of the computer, it would no longer be necessary for a human agent actually to hear and record a trial, and that a machine should be able to pick up the sights and sounds of a trial and produce, almost instantaneously, a readable transcript and a video with sound. That day may come, and it is already true that sometimes the proceedings are recorded electronically, and the court reporter later works from the recording to produce a record. (For reasons that might not occur to you at first, using a recording machine rather than a live court reporter has some drawbacks: A reporter will speak up if he cannot hear or spell a word, and a judge will "protect" her reporter by reminding witnesses to speak clearly and to use the microphone when necessary. Most machines don't "say something" when voices become inaudible, and the judges and lawyers are prone to forget that the machine is even there, so transcripts produced from recordings tend to be inferior to those produced by a reporter actually sitting in the courtroom.) For the most part, in any event, a court reporter is still to be found in most American trials making a record of what is said.

The reporter is a skilled public servant and officer of the court, and his task is exactly what the title implies: He puts into permanent written form, as best he can, the words actually uttered at trial. He is neither editor nor dramatist, and he tries not to add to or subtract from what is actually said. Hence in a real sense it is also the responsibility of court and counsel to prepare the record—to try hard to ensure that the words spoken at trial will make sense
when written down—and making the record is, in the end, a cooperative venture requiring coordinated efforts by trial lawyer, judge, and reporter.

The "official record" of a trial actually comprises five different kinds of material:

1. The pleadings. In civil actions these include complaint and answer, and often third-party claims, counterclaims (sometimes called cross-complaints), cross-claims, and answers to these. In criminal actions the pleadings include the indictment or complaint and the plea of the accused (usually entered orally and recorded in a verbatim transcript).

2. Filed documents. The record includes all other papers filed in court, such as motions and accompanying briefs, documents seeking and providing discovery, jury instructions, and court orders. Many of these fade into oblivion as the action proceeds: Complaint and answer are often superseded by pretrial order; many discovery requests and responses lead nowhere and are quite rightly forgotten. But any one may be critical later on: A judgment, for example, becomes the basis for executing upon a claim successfully brought, and for enforcing the doctrines of res judicata and collateral estoppel, which block prosecution of a subsequent claim or charge and relitigation of points decided. And often the jury instructions and the findings and conclusions play a central role in later appellate review.

3. The record of proceedings. One of the most important parts of the record is the verbatim memorial of what transpires in the courtroom when the action is tried. It captures what is said by the parties, witnesses, and court in public session. It also captures whatever spoken words are considered important by the court or any of the parties in private conferences, conducted sometimes in whispers at the bench, occasionally while the jury (and perhaps even the public) is excluded from the courtroom, and sometimes "in camera" (the office or "chambers" of the judge), at least when the court or a party requests the reporter's presence. Thus the record of proceedings puts into permanent form the testimonial evidence presented in the trial of a case, as well as questions, objections, arguments, comments, and stipulations offered by the trial lawyers during the proceedings, and orders and rulings announced orally by the trial judge.

It is important to note that inevitably much of the ebb and flow of the proceedings is of little or no subsequent importance, whatever immediate influence it might have on the live audience. For that reason, the reporter does not routinely prepare an actual transcript in readable typewritten form. Indeed, the record that he produces is for the most part simply stored away in the original form of stenographic notes, once comprised of fanfold pages resembling an adding machine tape and now more often comprised of computer memory produced by the reporter's use of a keyboard, but in either case the content is the reporter's personalized arrangement of symbols. For the most part, these are readable only by their maker, being so much Greek to anybody else.

It is equally important to note that any part of this portion of the record may become critical in post-trial motions seeking a new trial or other relief and on appellate review of the proceedings. Hence the reporter stands ready to prepare the transcript whenever asked to do so by one of the parties—and the party who wants a transcript must pay the reporter for this additional service, which is not financed by taxpayers through the judicial system. In "big" cases,
C. Making the Record

heavily supported by one or more parties, the lawyers may request a “daily transcript,” and the task of taking down the proceedings may be divided up between two or more reporters who operate in shifts, alternately spending an hour or so in court stenographically recording what goes on, and then an hour or so setting down in typewritten form the tape just completed. Through their combined efforts they produce at day’s end an “instant transcript” for lawyers to review that night in preparation for the next day.

As should be obvious by now, this portion of the record is critical in preserving for review the various points of evidence raised by the parties during trial. The appellate opinions set out in this book depend heavily on this portion of the record as a primary source, even though they may not actually quote or even mention it.

4. The exhibits. The record includes all the physical exhibits offered during trial (much is documentary, but some may be other kinds of physical objects). These are identified by one or more of the parties and lodged with the court, whether or not actually “admitted” for consideration by the trier of fact. Here the job of the reporter involves more care than technical skill, and doing it well is critical in preserving for review the contentions of the parties concerning such items of proof. Here too cooperation between reporter and trial lawyer is essential. In many modern courts, computers alleviate some of the physical clumsiness of this process, as documents can be stored in computer memory, accessed simultaneously by the lawyers and the court for viewing on individual screens, and “published” so a jury can see them (either in the form of printouts or images on a larger monitor).

5. Docket entries. Finally, the record includes the court’s own “ledger” of the proceedings—the “docket” or “docket book” kept by the clerk of court, which contains dated line items entered in chronological order from the beginning to the end of the proceedings (that is, from summons and complaint or indictment through judgment, post-trial motions, and notice of appeal). In this form the clerk simply lists each filed document and all important orders made by the judge, although the latter are generally entered in the docket book only if put in written form and filed. The docket book is a virtual “table of contents” for the proceedings, and sometimes the moment when each item is “entered” has great legal significance: For example, the time for appeal and for making some post-trial motions begins to run when the clerk “enters” the judgment in the docket book.

The record as a whole, including the five categories of material described above, is not actually assembled until and unless one or more of the parties decides to seek appellate review. Then an early task of the appellant is to “designate” the record, part of which involves directing the reporter to prepare a transcript of important parts of the proceedings.

2. Beware the Pitfalls—What Not to Do

Trial lawyers, particularly beginners who suffer stage fright in their early performances, make a number of common mistakes that tend to muddy the record.

1. Echoing. Often a nervous trial lawyer, particularly the novice, repeats the answers before putting the next question. This practice swells the record,
distracts the listening audience and later the reviewing court, and conveys hesitancy and unease which tend to undermine the cause that the attorney seeks to advance. No doubt the practice gives the attorney some breathing room between questions, but the real reason is not so much the need for reflection as discomfort with the surroundings. Consider this example:

Q (by Phillips): Were you present in the operating room?
A (Mr. Irwin): Yes, I was.
Q: You were. And who made the incision?
A: Dr. Young made the incision, and Dr. Hansen closed and cleaned up afterwards.
Q: Dr. Young made the incision, and Dr. Hansen closed. Very good. And were any other physicians in attendance?

2. Overlapping. The reporter’s feat in taking down the spoken word verbatim is considerable, but even skill and dedication can be overwhelmed when several voices speak at once and at cross-purposes. When lawyers or judges interrupt each other or the witness, the reporter tries to continue to set down the words of whoever had the floor, but often the interrupted speaker stops or hesitates in surprise, and the reporter tries to pick up the ongoing words of the interrupter, which may be impossible if the original interrupting voice has itself been joined or interrupted by yet another. The result is an unreadable mishmash and a disgusted reporter. Consider the following:

A: Yes, Dr. Roth stepped in toward the end to examine the abdominal wall before—
Q (Rogers): Nothing to do with this lawsuit, and isn’t even—
Q (Phillips): Interrupted by such discourtesy, which he knows, as Your Honor has again and again said you would—
A (Mr. Irwin): That again—
[Whereupon a discussion was had off the record.]

3. Numbers, names, and big words. When a witness recites a number in her testimony, her spoken word may be susceptible to many different interpretations. What does a witness mean when she says “thirty-four O seven”? She could mean 3,407, 34.07, or even 30,407. Context may make one or another interpretation by far the more probable: “Thirty-four O seven” likely means “$3,407” (rather than either of the other two possibilities) if the witness had been asked how much it cost to rebuild the engine of the car, but the context will not always make clear the intended meaning of the answer, and the trial lawyer is well advised to clarify the record on such points.

Q (by Phillips): By “thirty-four O seven” do you mean three thousand four hundred seven dollars?
A (Rogers): Yes, that’s right.

In everyday experience, names present spelling difficulties. Witnesses named “Meyer,” “Myer,” “Meier,” “Mayer,” “Meir,” or “Maier” may utter the very same sound when asked their last name: What is the reporter to do? In fact, he may interrupt the proceedings and ask for a spelling then and there, but if the pace of questioning is hectic there may be no chance, and the problem may go unnoticed until the transcript appears. Sometimes the witness spells
her name on her own, recognizing the problem. A thoughtful lawyer provides a list of names to the reporter in advance, so the reporter will know the spelling already.

Difficult or uncommon words, especially technical medical terms, create difficulties for the reporter. The witness who uses them should be asked first to spell them for the reporter, then explain them to the jury:

Q (by Phillips): Doctor, what did the abdominal incision reveal?
A (Dr. Young): Acute secondary peritonitis caused by bacterial invasion from the biliary system, entering through a perforation in the viscus brought on by acute cholecystitis.

Q: Doctor, would you be kind enough to assist the reporter by spelling those technical terms? Then I'll ask you to explain your answer in lay terms, as best you can, so that the jury and I can understand you.

4. Exhibits. The problem of laying the foundation for tangible evidence is taken up in detail in Chapter 13. Suffice it to note here that in addition to laying the foundation, the trial lawyer must find an unambiguous way of referring to such evidence so his questioning is intelligible in the transcript. Instead of referring only to “that X-ray” or “the letter in your hand,” the lawyer should refer to the object in question by reference to its exhibit number.

Q (by Phillips): Doctor, I hand you what we have marked as plaintiff’s exhibit number 35 for identification, and ask you to identify it if you can.
A (Dr. Young): Certainly, yes, that is the X-ray which Dr. Knight prepared at my direction, showing Carl Deaver’s abdominal cavity.

Q: Thank you, sir. Your Honor, if there is no objection, we now offer in evidence plaintiff’s exhibit number—let’s see, it’ll be number 32 in evidence, I believe.

Court: Any objection?

Ms. Dreeves: No, your honor.

Court: Very well, it is admitted.

Q (by Phillips): Thank you, Your Honor. Now Dr. Young, calling your attention again to plaintiff’s exhibit number 32 in evidence, can you tell us in lay terms what it shows?

5. Pantomime, nonverbal cue, gesture, internal reference. From time to time the witnesses follow the conventions of everyday conversation, conveying information by use of nonverbal cues or words whose significance depends entirely on reference to the immediate physical surroundings. Here the meaning is likely clear to the observer at trial, but lost completely to readers of the written transcript.

For example, the witness may give his answer in pantomime: Holding arm to his side with shoulder raised, elbow out and hand turned inward, he might say, “He was carrying the book this way.” Here the trial lawyer conducting the questioning would be wise to state, “Let the record show that the witness is indicating that the subject carried the book at his side in one hand at about waist level.” (If the lawyer on the other side disagrees, she should say so, and either the witness must convey his meaning in words or the parties must agree as to what the witness in fact indicated.)

Or the witness may answer by nonverbal cue: A nod or shake of the head,
a shrug of the shoulders. Usually such a response evokes a gentle reminder from trial judge or questioning lawyer: "Please give an audible response. The reporter can write down only what you say."

Sometimes the witness answers by gesture, indicating a direction or object or identifying a person by pointing. Again usually the lawyer fills the gap: "Let the record show that the witness pointed northward" (or "up" or "at his right knee"), or "Let the record show that the witness pointed to the defendant, Leon Hall." Once again, if opposing counsel disagrees, she should so state, and silence is likely to be taken as assent.

Sometimes the witness answers by making reference to objects in the courtroom, and again a clarifying remark by counsel helps, with an express or tacit stipulation by opposing counsel, or an additional answer by the witness:

A: The hammer I saw was about as big as her honor's gavel.
Q: Let the record show that the gavel has a handle about eight inches long and a head about an inch in diameter and about two inches long. That's about right, isn't it?
Ms. Dreeses: Yes, I think that's the burden of his testimony.
Q (Phillips): Thank you counsel—
A (Gordon): Yes, that's about what it was.
Q: Thank you.

6. Going "off the record." Trial lawyers are very much in the habit of going "off the record" at difficult moments during depositions and occasionally during trial. The point is to avoid cluttering the transcript with bickering or long discussion that may end in agreement on a small point and a stipulation that can ultimately be briefly and simply stated.

But going off the record produces problems of its own.

For one thing, the need to do so may not appear until a discussion has already begun, with the result that one of the lawyers sings out "Off the record, don't take this down," and the discussion then continues. The reporter is now in a quandary: He is professionally responsible to record all that transpires; he has no wish to be entangled in disagreement between the parties or lawyers, in case one of them wants what is said to be recorded; if he stops taking notes, he may not know when to begin again. The better part of wisdom is to keep on recording until all parties agree to go "off the record," then to note in his transcript, "Whereupon a discussion was held off record." To do otherwise...

For another thing, the lawyers themselves may forget that the reporter has stopped recording the proceedings. If an important answer or concession goes unrecorded, the lawyer who later needs the record faces acute embarrassment. Having gone off the record, lawyers must take care to signal the reporter that he is to begin again to record. Catching his eye or pointing to the stenograph may do it, but the careful lawyer might prefer to leave no doubt: "Alright, let's go back on the record now. We need to get this down."

7. The sidebar conference. Frequently during trial the need arises for lawyers and court to speak on procedural or evidentiary points that might confuse the jury or convey matters that might ultimately be ruled inadmissible. See Rule 108(c). In such cases the court summons the lawyers to the bench, or one or another of them asks permission "to approach the bench." Often the judge
moves her chair to the side of the bench furthest from the jury, the better to talk with the lawyers without being heard. These “sidebar” conferences are necessarily “off the record” if the court reporter cannot hear them, though he may be invited to join (and record) the huddle.

Physical limitations of the courtroom usually make it awkward to conduct a sidebar conference that is “on the record” yet outside the hearing of jurors in the nearby box. It can be done in modified stage whispers if the reporter hears well and moves close to the participants, but lengthy conversations are best conducted in chambers or after the jury has been momentarily excused from the courtroom.

3. Taking Care—What to Do

As the foregoing discussion suggests by negative inference, two important contributions that the trial lawyer makes in preparing a useful record of the proceedings are (1) to ensure that utterances important to his cause, whether his own or those of witnesses or the judge in the case, are spoken clearly enough to be understood and put down by the reporter, and (2) to ensure that those utterances will have meaning when they appear in typewritten form in the transcript. Accomplishing just these aims requires the trial lawyer to be aware of the court reporter and his task, and to pitch his performance toward both the live and the remote audience.

The procedural requirements for preserving points for review by appropriate offer of proof and objection are described below, as are the formalities of introducing tangible evidence (whether in documentary or other form). Both require care in building the record of proceedings.

D. HOW EVIDENCE IS ADMITTED OR EXCLUDED

1. Getting Evidence In: Foundation and Offer

   a. Testimonial Proof—Direct Examination

   Almost always, the bulk of the trial (in terms of time spent) involves the presentation of live testimony by witnesses. Initially each party presents such testimony by “direct examination,” during which she tries to do basically three things with each witness:

   First, she brings out background information—name and address and other basic facts, such as occupation and perhaps age or marital status. Several things are going on here: Opening questions help put the witness at ease, and along with the ritual of the oath impress on him that now is an occasion to behave responsibly; the jury wants to know who is talking, and needs a few moments to get used to the person and voice before focusing on the issues at hand; in a trial of public record a person giving evidence should be identified rather than faceless and anonymous.

   Second, each party “lays the foundation” for the testimony to follow by
asking questions that show that the witness has "personal knowledge" of the matters to which he will speak, such as by placing him at the scene of the accident or the signing of a will (see Chapter 6, infra). In the case of an expert witness, the party brings out the special skill or training that provides the basis for his testimony on unfamiliar or technical matters (see Chapter 9, infra).

Third, the lawyer asks "substantive questions" getting at the witness' knowledge of pertinent facts—the direction from which the car was coming, how fast it was going, which car had the light, and so forth.

**Form of questioning.** For the most part, direct examination must proceed by nonleading questions. See F.R.E. 611(c). The point is that the questioning should not unnecessarily push the witness toward a particular response—it should not be too suggestive of the answers sought. In most instances, lawyer and witness have already gone over the substance of the expected testimony, and usually they reach a mutual understanding of the narrative that is to unfold before the trier of fact, so there should be no particular need to lead the witness.

There is no simple test for the "leading question," which is to be avoided during direct examination. Sometimes it is said that any question seeking a yes or no answer is leading, but that is plainly not so: Asking a witness whether he was at a certain place at a certain time calls for such a response, for example, but would not likely be considered leading. Consider this description of what makes a question leading:

> Sometimes it is simply a matter of phrasing: Even in cold print, a question which begins "Isn't it a fact that" or "Did you not" suggests a response and is leading. So is one that is phrased in the alternative to highlight the desired response in careful detail while diminishing the other choice in vagueness: "Did you understand that you were to meet him at your home at ten o'clock, or what?" But a question that frames the only likely alternatives in an evenhanded way is not leading: "Did you call him, or did he call you?" Sometimes phrasing tells little, and context is more important: In a trial for battery where defendant claims he struck no blow, the defense might ask an eyewitness "Did you see the defendant beat the victim?" and it would hardly be considered leading, but the same question would be leading if put by the prosecutor. And sometimes inflection, facial expression, voice dynamics, or gestures tell the story. It is easy enough to imagine asking the question "Did he seem really angry to you?" in a leading manner that conveys clearly that either a "yes" or a "no" answer is the one sought, but also easy to imagine the same words spoken in a neutral, nonleading way.

---


The idea is that the witness should do the testifying during direct examination, and not the attorney. Questions pushing too hard in one direction or another are bad because they may (1) invoke in the witness a false memory of events, (2) induce him to lessen efforts to relate what he actually remembers and to acquiesce instead in the examiner's suggested version, and (3) distract him from important detail by directing his attention only to selected aspects of the story. (Important departures from this pattern are taken up in Chapter 7, infra.)
D. How Evidence Is Admitted or Excluded

b. Testimonial Proof—Cross-Examination

With each witness, "direct examination" is followed by cross-examination by the adverse party. During plaintiff's case-in-chief, defendant has opportunities to cross-examine after plaintiff's direct is finished, and plaintiff has similar opportunities during defendant's case-in-chief. Cross-examination seeks to set limits or bring out inconsistencies in the direct testimony.

So important is this process that cross-examination has been extolled as a bulwark of our liberty, and the most powerful weapon in the arsenal of the trial lawyer: Wigmore called it "the greatest engine ever invented for the discovery of truth." 5 Wigmore on Evidence §1390 (J. Chadbourn rev. 1974).

Leading questions. Cross-examination differs markedly from the direct. Here counsel is in the limelight, and the substance of what is conveyed to the jury emerges more from questions than answers—the latter serving to confirm an idea already planted by counsel in the question. Much has been written about this process, perhaps because lawyers sometimes see this function as their highest calling and greatest challenge. The following advice to practitioners gets to the heart of the matter:

The name of the game in cross-examination is control. However, such control should perhaps more properly be categorized as subtle control. While it is certainly in your interest to control the witness, it may not be in your interest to convey the fact of control too overtly to either the witness or the jury. Sympathies are a fickle thing and can shift rather easily without much provocation or justification. Thus, you cannot make it appear, despite what you may be attempting to accomplish with respect to a particular witness, that you are taking unfair advantage of the witness, brow-beating the witness or otherwise treating the witness with less respect than you would treat any other human being. This is made all the more difficult when you know the witness is a liar or is capable of providing you with information which is extremely helpful to your case, but won't do so without a certain amount of intimidation. . . . [B]y the same token, you cannot permit the witness to take advantage of you. While there is nothing wrong with permitting it to appear as if the witness is taking advantage of you for the purpose of setting the witness up for the big fall, you cannot permit the momentum to become such that the cross-examination and its direction [are] actually being dictated by the responses of the witness as opposed to the questions you ask.


Apart from the personality of counsel, the main instrument of control during cross-examination is the leading question. From the standpoint of the litigant, the leading question narrows the inquiry and limits the opportunity of the witness to stray from the chosen path.

From the standpoint of the system, leading the witness on cross is acceptable because the qualities in this form of questioning that seemed bad during direct now seem beneficial. Thus during cross-examination leading questions may (1) invoke the conscience of the witness and awaken his memory sufficiently to dislodge him from his previous version of events in favor of what he himself considers a more complete or accurate version, (2) expose limits or inaccuracies in his memory, and (3) focus his attention on important details.
a later stage as his own and will abandon the inquiry. Getting concessions from
the opponent’s witness hot on the heels of the direct while his story is fresh is
worth trying for. It is a much less attractive option to call an unfriendly witness
later when his first testimony is stale.


Defense of the scope-of-direct rule. Despite these strong objections, most jurisdict-
ions continue to prefer the scope-of-direct rule. One reason has proved persua-
sive to many observers, and two others are often advanced in support of the
result thus reached:

1. The order of proof. The strongest single reason for the scope-of-direct
rule is that it enables the parties to control the order in which they present
their evidence. Trial lawyers carefully plan their presentation, and while they
cannot put on a well-made play, in which every line is spoken in just the right
place, still they take pains to present their case in coherent fashion, and they
do not want their adversary to disrupt this process.

Does the scope-of-direct limit actually serve this interest? The answer seems
to be yes and no, which is to say that it is an imperfect means to achieve this
end.

The yes part runs this way: When the calling party introduces evidence of
a single act or event in the case, limiting cross to the subject of that act or
event does protect the order in which the calling party has decided to present
his case. The no part is as follows: If Witness 1 testifies to the color of the light
at the intersection and Witness 2 describes the speed of the vehicles, then
disallowing cross-examination of the latter on the color of the light does not
preserve the order of proof. That cat is already out of the bag, and the calling
party would likely have questioned Witness 2 on the subject if he could have
expected favorable answers.

2. The special case of the accused as witness. The Fifth Amendment entitles
the accused not to testify for himself and bars the prosecutor from calling him
as a witness. That constitutional protection reinforces, in this special context,
the tradition of limiting cross-examination to the scope of the direct.

It is settled that when the accused does testify, he cannot raise the Fifth
Amendment as a shield against reasonable cross-examination:

(The accused) has the choice, after weighing the advantage of the privilege against
self-incrimination against the advantage of putting forward his version of the facts
and his reliability as a witness, not to testify at all. He cannot reasonably claim
that the Fifth Amendment gives him not only this choice but, if he elects to testify,
an immunity from cross-examination on the matters he has himself put in dispute.
It would make of the Fifth Amendment not only a humane safeguard against
judicially coerced self-disclosure but a positive invitation to mutilate the truth a
party offers to tell.


The question then becomes, How broad is the waiver of the Fifth Amend-
ment right? To put it another way, Does the waiver coincide with cross-examina-
tion that would be permitted by the scope-of-direct rule, or is it broader or
narrower?
There is every indication that the waiver is limited to matters related to the direct testimony. See Brown v. United States, 356 U.S. 148, 154-155 (1958) (defendant “determines the areas of disclosure and therefore of inquiry” and thereby “the breadth of his waiver”); Fitzpatrick v. United States, 178 U.S. 304, 315-316 (1900) (after testifying to an alibi, defendant could be cross-examined on his whereabouts, but going “farther” would present “a clear case of the defendant being compelled to furnish original evidence against himself”); United States v. Hernandez, 646 F.2d 970, 978-979 (5th Cir.), cert. denied, 454 U.S. 1082 (1981); Tucker v. United States, 5 F.2d 818, 822 (8th Cir. 1925). See also Carlson, Cross-Examination of the Accused, 52 Cornell L.Q. 705 (1967), and Scope of Cross-Examination and the Proposed Federal Rules, 32 Fed. B.J. 244 (1973).

In one opinion, however, the Supreme Court seems to have squinted in the opposite direction. See Johnson v. United States, 318 U.S. 189, 195 (1943) (in testifying the accused waives his privilege against self-incrimination “as to all other relevant facts”). And in the much-publicized prosecution of kidnapped heiress Patricia Hearst for bank robbery, the reviewing court demonstrated that even a limited waiver may be construed broadly. See United States v. Hearst, 565 F.2d 1231, 1341 (9th Cir. 1977) (in support of her claim that she was coerced into participating in bank robbery, defendant described what happened during her lengthy period of captivity but omitted reference to happenings during one “lost year” in that period; on cross-examination, the prosecutor could inquire about that “interim year” even though he might uncover other criminal acts, for this line of inquiry was “more than ‘reasonably related’ to the subject matter” of her direct testimony), cert. denied, 435 U.S. 1000 (1978).

3. The voucher principle. It was once said that the calling party “vouched” for his witnesses and was thus “bound” by their testimony. In practice, this principle meant that a party could not impeach witnesses he called, and it reinforced the notion that the calling party should not cross-examine such witnesses by leading questions. It seemed to follow that the cross-examiner should not be permitted to explore matters that had not been “opened up” on direct, for doing so would let him (1) “make his own case” by leading questions, (2) avoid “vouching” for a witness who would become in substance “his” witness although not actually called by him, and (3) build his case by testimony of a witness for whom his opponent had vouched and whom his opponent could not impeach.

These somewhat formalistic objections have disappeared. FRE 607 does away with the voucher rule in no uncertain terms, providing that “any party” may impeach, “including the party calling the witness,” and it is no longer open to doubt that a party who cannot cross-examine a witness adequately at the outset may recall her later, without fearing that he thereby “vouches” for her or becomes “bound” by her testimony, and with the right to “impeach” and put “leading questions” to her.

4. Here was a dog whose bark was worse than its bite. A party could always adduce evidence conflicting with what one of its witnesses said, and there were so many ways around the rule that it came to be honored more in the breach than the observance. But it was pernicious. It rested on the half-truth that a party really has a choice of what witnesses to call, and sometimes it produced gross injustice, as happened in the case of Chambers v. Mississippi, 410 U.S. 284 (1973) (see Chapter 4H, infra).
If it be argued that the freedom made possible by throwing out the voucher rule makes it unnecessary to permit cross-examination beyond the scope of the direct, the answer may be the one advanced by McCormick: Questioning delayed is likely to be questioning denied, for the adverse party often will not dare recall the witness later.

**Striking a compromise.** The framers of the Federal Rules were unable to choose between the scope-of-direct limit or wide-open cross. They seesawed back and forth. In his testimony before Congress, Albert Jenner described the debate in Committee:

*Mr. Jenner:* The committee went up the mountain and down the mountain on the question of the scope of cross-examination. The rule in the Federal court today is and has been that the scope of cross-examination is limited to the scope of the direct examination.

There are very strong views around the country that the scope of cross-examination is not limited where a party is a witness. You may ask a party any questions. He tenders the whole issue when he is on the stand.

Well, the committee took many votes on this subject. It was either one way or the other by 1 vote. It was 8 to 7 one way or the other and [in] the final vote, virtually within the last few weeks of the meetings of the committee, the committee opted for the present proposed rule 611 that the scope of cross-examination be limited to the direct. [This version was originally suggested by the Committee and ultimately enacted by Congress.—Eds.]

Now, there is an area in which the Congress and you may very well [differ]—it is a close question. Litigators are of the view that the scope of cross should be limited to the direct. The scholars in their great wisdom feel that it should be wide open as it is now [in subsequent Committee drafts of Rule 611, including the one finally recommended by the Committee to the Court, and thereafter endorsed by the Court and sent to Congress for approval].

*Mr. Cleary:* I think we could probably align [sic] the judges on our side, Mr. Chairman.

*Mr. Jenner:* Align those judges who had not been litigators before they assumed the bench.

*Mr. Hungate:* They will have to qualify as scholars, then won’t they?

*Mr. Smith:* On your final option was it still a one vote decision?

*Mr. Jenner:* Yes, it was, one vote.

*Judge Maris:* It was one vote in the Advisory Committee. It was by one vote in the Standing Committee. We approved the draft that the majority of that committee had presented.


In all this vacillation the Committee was debating only a matter of emphasis in a very flexible provision—one that would say either that cross-examination “should be limited to the subject matter of the direct” but that the judge may “permit inquiry into additional matters” or that cross-examination may delve into “any matter relevant to any issue in the case” but that the judge might “limit cross-examination with respect to matters not testified to on direct.” The former was to prevail, so usually the scope-of-direct rule applies, but the trial judge may permit broader cross. The rule in this form largely obviates the objection that it is hard to administer, since the trial judge is not likely to be
reversed for choosing either alternative and there is little "percentage" trying to make an issue out of the choice she makes in any given case.

The divisions in the Committee are reflected in conflicts in state practice. Although most states adhere to the scope-of-direct rule, a substantial minority has gone the other way. By recent count, more than a dozen states have abandoned or diluted the scope-of-direct rule. See Arizona Rule of Evidence 611(b) (permitting cross-examination on "any relevant matter"); Maine Rule of Evidence 611(b) (trial judge may limit cross-examination "in the interests of justice"); Boller v. Cofrances, 42 166 N.W.2d 129 (Wis, 1969) (landmark opinion adopting wide-open rule).

PROBLEM 1.A. How Did It Happen?

At the intersection of Folsom and Valmont two cars collide—a yellow Fiat driven by Abby Barton, in which Carl Dreeves rode as passenger, and a blue Buick driven by Eric Felsen. In a Rules jurisdiction, Barton sues Felsen for personal injuries and property damage. During her case-in-chief, Barton calls Carl Dreeves, who testifies on direct examination that "the Buick ran a red light."

On cross-examination, Felsen's counsel asks the following questions:

Q: Now Mr. Dreeves, you and Ms. Barton are seeing each other socially, isn't that right?
Q: Isn't it true, Mr. Dreeves, that at the time of the accident Ms. Barton here had turned clear around in her seat and was looking out the back window of the car?
Q: Tell me, Mr. Dreeves, you and Ms. Barton here had just finished lunch at Sebastian's where she drank three glasses of wine just before the accident, isn't that true?

To each question Barton's counsel objects, "Improper as beyond the scope of direct, your honor." How should the judge rule in each instance, and why? What arguments do you expect from Barton and Felsen?

c. Real Evidence

"Real evidence" refers to tangible things directly involved in the transactions or events in litigation—the defective steering assembly involved in the accident, the weapon used in the homicide or armed robbery, the wound or injury suffered by the claimant, the written embodiment of the terms of agreement.

Apart from writings, the law of evidence ordinarily does not require production of such items, and their existence and nature may be established by testimonial account. But the Best Evidence doctrine (Chapter 14) generally does require the introduction of writings (or an excuse for not producing them),

5. States with decisions or positive law seemingly adopting the wide-open rule include Alabama, Arizona, Georgia, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, and Wisconsin.
and all such items are generally considered relevant. They are likely to be admitted unless practical considerations preclude receipt.

The proponent's task in getting them admitted is to lay the necessary "foundation." Even if the thing in question looks very much like what it is supposed to be, the law of evidence is a Doubting Thomas, taking the skeptical position that the thing may not be taken "at face value" and the trier of fact may not assume it is "what it seems to be." Instead, the proponent must prove this point, and the process is called "authenticating" the evidence. Few specific Rules govern this process, and the ones we have are found in Article IX (see Chapter 13). Usually authentication is taken care of by stipulation, or by testimony from a witness having firsthand knowledge:

Q (Ms. Phipps): Now, Lieutenant Goldbloom, I hand you a gun which has been marked for identification as People's Exhibit Number Seven, and ask whether you can tell us what it is. Don't worry, sir, I've checked to be sure that it is not loaded.
A (Mr. Goldbloom): Thank you, but I always like to check these things myself. (Witness pauses to examine the gun.) Yes, I can identify this weapon. It is a Smith & Wesson .38 caliber revolver.
Q: And have you seen this particular weapon before?
A: Yes.
Q: How can you tell?
A: Here on the handle, it has my identification mark on it, which means that I found it in the course of my duties and wrote it up in a report.
Q: And could you tell us how you happened to find it?
A: Certainly. It was during the investigation of the death of Irving Stiffler, and I found the gun on the floor of the bedroom about five feet from his body.
Q: Your honor, I now offer this gun into evidence—what number will it be, Mr. Glade?
Court Clerk: It would be People's Number Three in evidence.
Ms. Phipps: I offer this gun into evidence as People's Exhibit Number Three.
The Court: Any objection from the defense?
Mr. Darnell: Yes, your honor, I do object, on several grounds. In the first place, nothing Lieutenant Goldbloom has said here connects that gun in any way to the defendant, or even to the alleged homicide. Moreover, the Lieutenant's testimony fails to account for the whereabouts of that gun from the time he picked it up until now. For all we know, the Property Room has fouled up again, and that's an entirely different weapon.

The Court: Ms. Phipps, any counter?
Ms. Phipps: Yes, your honor, it should suffice that the gun was found in the same room with the victim, but in any event we will offer ballistics testimony proving that the bullet that killed the victim was fired from this gun, and testimony from Forensics that defendant's fingerprints were found on the gun. As to the objection that we have not established the chain of custody, such proof should be unnecessary when we have the Lieutenant's testimony based on his mark that this is the very weapon which he found at the scene.

The Court: I'm inclined to agree. Objection overruled. Exhibit—what number is it, now?
Court Clerk: Number Three in Evidence.
The Court: Yes, the gun is admitted as Exhibit Number Three in Evidence.

In the above exchange, notice that the authenticating witness Goldbloom recognized the gun and knew from memory that it was the weapon he found at the scene. In effect, the trial court has ruled that this information suffices
to "authenticate" the weapon, even without "chain-of-custody" evidence establishing that the gun he found was carefully kept in a safe place under watch (or at least lock and key). Implicit here is a judgment that the proponent need not show precautions against a switch, at least when the authenticating witness says, in effect, that no switch occurred. Note too that the trial judge did not decide whether "authentication" requires proof connecting the gun to the homicide (the ballistics evidence) or to the defendant (forensics evidence), taking the prosecutor at her word that she would supply such proof later. If she does not deliver, the defense may force the issue by moving to strike the evidence.

Note too that the gun was "marked for identification" before even being mentioned. All physical objects that a party expects to offer are routinely marked in this preliminary way. This precaution helps keep track of them and enables the parties to refer to them, in a way that will later make sense in the transcript, even before they are admitted. If the trial judge excludes an object, still it is lodged with the clerk, and the record of the offer may become important later on. When the judge admits the object, it is renumbered as an exhibit in evidence, and the number finally assigned may differ from the one originally assigned for identification.

d. Demonstrative Evidence

As the name implies, demonstrative evidence is tangible proof that in some way makes graphic the point to be proved. It differs from real evidence in that it is created for illustrative purposes and for use at trial, and it played no actual role in the events or transactions which gave rise to the lawsuit. Diagrams, photographs, maps, and models are all within the present category. So are computer-aided reconstructions, which can depict in color and from multiple perspectives an automobile accident or a crime, such as a robbery or murder or assault. See generally Fred Galves, Where the Not-So-Wild Things Are: Computers in the Courtroom, The Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance, 13 Harv. J.L. & Tech 161 (2000).

Such materials are usually considered relevant and are routinely admitted. Once again there are no specific rules or principles that apply, and the task of the proponent is to show that the proffered item amounts to a fair and accurate depiction of the matter in question. The growing sophistication of computer-aided reconstructions, which have the power to convey a sense of movement, mass, and perspective that cannot easily be captured in verbal descriptions, but also have the power to distort or overwhelm, have "raised the ante" for such foundational issues. These reconstructions must usually be supported by testimony showing that the dimensions and perspectives are correctly depicted, and may require experts rather than ordinary eyewitnesses. For more routine and less dramatic forms of demonstrative evidence, usually the proponent simply calls a witness who has seen the matter and who then testifies that the exhibit fairly represents it:
D. How Evidence Is Admitted or Excluded

Q (Ms. Phipps): Lieutenant Goldbloom, may I call your attention to the drawing on the stand over here, which has been marked for identification as People’s Exhibit Number Eight. This drawing is intended to show the layout of the bedroom where the victim was found. Is that a fair and reasonably accurate diagram of the room as you remember it?

A (Lt. Goldbloom): Yes, the bed came out more or less from the center of the wall farthest from the door, there was a bureau along the wall to the left as you came in—that’s supposed to be the bureau, isn’t it?

Q: Perhaps you could label the various items with this marker. (Counsel hands marker to Witness.)

A: OK, here’s the bed. (Witness marks drawing.)

Q: You’ve written the word “bed.” OK. Thank you. Would you also mark where the window is? (Pause. Witness marks drawing.) You’ve written the word “window” with an arrow. Is that where the window is located?

A: Yes.

Ms. Phipps: Your Honor, we now offer into evidence what has been marked for identification as People’s Exhibit Eight.

The Court: Mr. Darnell?

Mr. Darnell: No objection, Your Honor.

The Court: Very well, then. The diagram of the room will be received as People’s Exhibit—what number are we at now?

Court Clerk: This will be People’s Number Four in Evidence, Your Honor.

The Court: It is admitted as People’s Exhibit Number Four.

Notice in this exchange that the drawing was taken only as illustrating the testimony of the witness, Lieutenant Goldbloom. You will see that a drawing produced to make graphic the testimony of a witness has no evidential force independent of that testimony. Sometimes jurors are instructed to this effect, and sometimes the parties even argue that material of this sort should not be taken to the jury room or even displayed to them because of the risk that the jury will treat it as evidence, uncritically accepting the things that it represents as having been established, when in fact they have no more support than the testimony of the witness, which the material merely illustrates. Of course the same is true of computer-aided reconstructions.

e. Writings

Writings are one kind of physical evidence that generally must be introduced at trial rather than proved by means of testimonial description. Often writings amount to real evidence because so many transactions generating lawsuits involve documents. But often writings provide a means to prove what someone has said about a matter in dispute: Laboratory reports and medical records, for example, are routinely admitted into evidence as proof of the matters that they relate. Again electronic technology sometimes aids courts and litigants, for written documents can be stored and organized on computers, made available to the lawyers and judges for simultaneous access on computer screens, and “published” for juries to see on larger screens, or printed out for ease in access on a selective basis.
With writings, once again the job of the proponent is to establish authenticity, and we have some specific rules on authenticating writings (Article IX, taken up in Chapter 13). Suffice it to say here that in civil suits the parties usually authenticate writings involved in the underlying transaction by means of discovery or stipulations during pretrial. Taking time at trial to authenticate such writings is a sign that there is a genuine dispute over authenticity or that trial counsel are not well prepared.

With respect to writings offered to prove what somebody has said about the matters in litigation, laying the foundation is usually a twofold task. First, the proponent establishes that the writing is what he says it is—in other words he authenticates it. Second, he shows that it falls within a hearsay exception:

Q (Irwin): Dr. Rogers, I hand you now a book and would ask you now to look at it and tell me whether you are acquainted with this work?
Q: Would you be good enough to turn to page 287 and read aloud to us the paragraph which has been marked? Mr. Steed, here is a copy of the page in question.
Mr. Steed: One minute, Your Honor, please. I have not seen this before.
The Court: Yes, of course. Dr. Rogers, please wait with your response.
Mr. Steed: I'm going to have to object, Your Honor. Obviously this book is hearsay, and since the doctor here has not said that he relied on it in formulating whatever opinion he is going to offer, the passage in question is not admissible.
Mr. Irwin: Your Honor, Dr. Rogers has testified that Appleby on Thoracic Surgery is a standard work in his field, and that should suffice to satisfy Rule 803(18), which is the exception for learned treatises.
Mr. Steed: But there's been no reliance on this book, and without reliance it cannot be offered in evidence.
Mr. Irwin: Perhaps that was the common law rule, counsel, but the Federal Rules have changed that. Exception 18 doesn't say the witness has to rely on it, so long as the book is shown to be authoritative.
The Court: Mr. Steed, I think he's right. I'm going to let it in.

In this exchange, proving that the object is what the proponent claims it to be is easy. A physician acquainted with a published work can authenticate a particular bound volume as a counterpart of that published work, and ordinarily there would be no contest on this point whatsoever. In this particular exchange, laying the foundation involves mostly a demonstration that what the book contains is competent evidence.

2. Keeping Evidence Out

a. The Objection

Perhaps the one practice known to everybody is that lawyers object when they want to keep evidence out. You have probably concluded that there must be a reason and that failing to object must carry a cost. Right on both points. Broadly speaking, the aim of the rules surrounding this custom is to provide
the parties a fair opportunity to make their case, but not an endless one. If a party aggrieved by particular evidence were permitted to await the outcome and then complain that it should not have been admitted, the trial process would be even more drawn out and costly. The eventual loser could hold his peace during trial, and perhaps even encourage error, then avoid the result by obtaining a reversal. Requiring objections helps limit this risk. Of course this approach carries a cost, for it means that some errors (those not objected to) go uncorrected, and the fact that we take this risk is one indication that the system tolerates imperfection.

There are two other (more particular) reasons to require objections to be raised at trial. One is that the objection helps the trial court. The law of evidence is vast and sometimes complicated, and trial judges (like other mortals) do not always have the right answer close at hand. The other is to help the offering party cure on the spot any problem in his proof. If an objection is sustained, the offering party may be able to accomplish her original aim by rephrasing the question, laying a further foundation, or asking the question of another witness.

These aims imply two further points about objections:

The objection must be timely, meaning that it must be raised at the earliest reasonable opportunity. Thus an objection to testimony by a witness should usually be stated after the proponent has put a question but before the witness answers. (If the witness “jumps the gun,” perhaps with the connivance of the other lawyer, the objection can be stated after the fact, when it becomes a “motion to strike.”) The obvious drawback of this “after objection” is that the jury has heard the answer, so an instruction to disregard may be ineffective, even counterproductive (emphasizing the point to be forgotten). Hence the objecting party often couples a motion to strike with a request for a mistrial, arguing that the damage cannot be undone, and therefore that the trial must begin anew before another jury. You can probably guess why this part of the motion is not likely to succeed.

And the objection should include a statement of the underlying reason (“ground”). When the context leaves room for doubt, the objection should specify what the objector seeks to exclude. In other words, the objection should be “specific” and not “general.” The alliterative phrase “irrelevant, incompetent, and immaterial” is viewed as a general objection, even though a more detailed argument that evidence is “irrelevant” would be considered specific.

The specific grounds that support an objection may be, for want of better terms, either “substantive” in nature or “formal.”

Substantive objections. These rest on particular exclusionary principles in the Rules of Evidence, which are examined in detail in this course. The fervent hope of the party raising such an objection is to keep the evidence out altogether. He may not entirely succeed, of course, even if his objection is sustained, as the proponent may find another way to offer substantially the same proof. Examples of substantive grounds include the hearsay and Best Evidence doctrines, the attorney-client and marital confidence privileges, and the rules governing character evidence and “subsequent remedial measures” (these last are usually framed in terms of limitations upon the general notion of relevancy). Consider the following exchange:

...
Q (Mr. Parsons): Were you at the intersection of Fourth and Green in the commercial area in Champaign near campus on Wednesday afternoon, June 16th of this year?
A (Ms. Gordon): Why yes, I think I was. I can't remember the date for sure, but you're talking about the day of the accident, aren't you?
Q: Yes, that occasion. You were present then?
A: Yes.
Q: And did you see an accident between two cars at that time?
A: Well yes, I happened to be looking at the station wagon when it collided with the other car.
Q: And did you have occasion to speak to Mr. Cronan shortly after that?
A (Ms. Gordon): Yes, I did.
Q: And what was his reaction?
A: Well, he told me—
Mr. Dawson: I'm going to have to object, your honor. The jury has no way of knowing whether Mr. Cronan was speaking accurately or even whether he was truthful. What he said is inadmissible hearsay.
Mr. Parsons: Your Honor, Mr. Cronan's statement fits within the exception for excited utterances. That's Rule 803(2), I believe—Yes, that's it.
Mr. Dawson: He hasn't shown that that exception applies, your honor.
The Court: Well, Mr. Dawson, I'm inclined to agree. Mr. Parsons, you'd best lay the foundation first or call Mr. Cronan himself to the stand.

Pay attention to several things here. One is that the objection is both specific and timely. Another is that it imparts the necessary information to the judge, and yet it conveys sympathy for the jury rather than mistrust of its judgment. Because the jury hears most objections, trial lawyers need to find a way to object without seeming to obstruct, to make the necessary legal point without seeming to hide information from the jury. Finally, the objection serves one of the underlying purposes, which is to alert the proponent to a problem in his proof, so he may cure it if he can, and here perhaps he can: He may be able to call Cronan ("declarant" who made the statement), hoping he will say the same thing on the stand, or to "lay the foundation" by satisfying the excited utterance exception so that Gordon can testify to Cronan's statement.

Formal objections. These focus on the manner of questioning, and they are standard equipment for trial lawyers. Many of them are mere tactical weapons, used to obstruct, delay, or break the cadence of the opposition. But in the right circumstances they raise proper points and will be sustained. Apart from the objection to leading questions, these objections are not enshrined in particular Rules, but they speak to the broad authority of the trial judge to regulate the presentation of proof in the interest of getting at the truth while avoiding confusion and delay and preventing abuse of witnesses. See FRE 611, and see generally Roger C. Park, David P. Leonard, and Steven H. Goldberg, Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials, Chapter 3 (1998).

Here is a list of what may be the most frequently encountered of these objections:

1. "Asked and answered." Here the objecting lawyer accuses the questioner of drumming away too hard on the witness, putting the same question time and again in hopes of coercing the desired response. Clearly the questioner must be allowed to press the witness (particularly on cross) and need not take
the first answer given, or else the witness would soon catch on that she can get out of the hot seat by simple denials or the time-honored evasion of “I don’t know/remember.” But when the questioner has gotten his response and has had a reasonable chance to expose falsehood or awaken the memory and conscience of the witness, then the questioning must move on to other matters, and this objection can force the point.

2. “Assumes facts not in evidence.” If the questioner imparts important information in his query, it should be supported by proof already admitted. If such support is missing, the question is objectionable as assuming too much. Thus, asking “How long did it take to drive the 20 miles from the ranch to town?” would be objectionable if nothing in the record indicated that the ranch was 20 miles from town.

3. “Argumentative.” Sometimes the questioner tries to contradict the witness or wants more to confront her with disbelief than to get a response. Questions in this vein, usually dripping with sarcasm and contempt, amount to “grandstanding,” which may be permissible in closing argument but not while evidence is being presented. “What you mean when you say Martin wasn’t speeding is that his car hadn’t taken off like an airplane, isn’t that it?” is a question that cannot be taken seriously and is objectionable as argument thinly disguised.

4. “Compound.” Sometimes a question apparently seeks more than one answer or suggests alternative responses, while being framed in a way that invites a yes or no response. The problem is that the witness may answer yes or no and her meaning will then be obscure. For example, “Did you telephone or see the decedent after that?” If the witness says yes, a strict construction of the question and response suggests that she telephoned or saw the decedent, but not both. But in the more relaxed everyday parlance the yes might mean that the witness both telephoned and saw the decedent, or perhaps simply that she saw the decedent (that being the last and perhaps more inclusive possibility). A careful witness might see the ambiguity and answer clearly (“I saw the decedent after that but did not speak to him on the phone”), but a timely objection will likely persuade the judge to tell the questioner to rephrase, so as to lessen the risk of ambiguity in the upcoming response.

5. “Leading the witness.” Here the suggestion is that counsel is telling the witness what to say, and the net impression is that the lawyer is doing the testifying, with the witness simply acceding to the will of counsel. We have already looked at the underlying problems in this technique.

6. “Misleading.” Here the question misstates the evidence. If the only proof on point suggests that the ranch is 40 miles from town, a question asking “Why did it take you an hour to drive the ten miles to town?” would be objectionable as misleading. The same is true of a question that misquotes the testimony of a previous witness.

7. “Speculation or conjecture.” This objection raises the point that witnesses are expected to say what they “know,” not what they “guess” or “suppose” or “expect” is true. Like objections to hearsay, this one has substantive content. It may be impossible for the questioner to offer what he wants because lay witnesses are expected to say what they know and to be factual and specific. (Experts have more leeway and often testify to what they would expect in hypothetical circumstances, where these are supported by evidence.) Asking a
lay witness, for example, "what she would have done" if she knew something then that she knows now, or what someone else "was thinking when he did that," is typically objectionable on this ground. (Categorical certainty is not required, for in court as in life it is hard to come by. Someone who saw a robbery and "thinks" X did it may testify to this effect, even if she is "not absolutely certain." We expect a reasonable belief; a "guess" is not good enough.) Sometimes the problem is less substance than form, as when the questioner cannot figure out how to get what he wants in a nonleading way. A court that does not let a lawyer ask "what you would have done" with other information would probably let him ask, "What was the most important reason you did what you did?"

8. "Ambiguous, uncertain, and unintelligible." Like the alliterative general objection ("incompetent, irrelevant, and immaterial"), this three-part protest is time-honored. It isn’t pretty, but it does point out the flaw in questions that simply cannot be understood or whose meaning depends entirely on inflection that the record cannot capture. Sometimes the problem is that the lawyer has garbled his words and needs to start over. Sometimes the query is a close cousin to the argumentative question, where there is no serious expectation of a response. Here is an example: "In arranging the lineup, you picked seven men who weighed the same and didn’t weigh the same, who were the same height but not the same height, and who looked alike but didn’t look alike, didn’t you?"

9. "Nonresponsive to the question." Lawyers who ask proper questions on specific points are entitled to answers addressing those points. Suppose counsel for plaintiff asks defendant in an accident case, "Weren’t you driving faster than the posted limit?" If he replies, "Maybe so, but your client darted out in front of me and I couldn’t have stopped no matter how fast I was going," the questioner can ask the court to "strike the answer as nonresponsive and instruct the witness to answer the question." (The judge will do so and, on request or maybe even without it, tell the jury to "disregard the answer.") Anyone who watches televised interviews knows questioners and respondents have agendas and work at cross-purposes—sometimes it’s hard to know who’s manipulating whom. In the courtroom, the judge decides such things and ordinarily gives the lawyer leeway to decide what points to make and when, and the witness has to cooperate. Clients are usually stuck with evidence their lawyers offer, so when a witness answers a question that wasn’t asked, striking the answer as nonresponsive may be important. (A fair answer to an open-ended question is not nonresponsive. If the lawyer says, "Tell us what happened," and the witness replies, "Your client darted out in front of me," that answer is responsive and the lawyer is stuck with it.)

The general objection. If overruled, a general objection does not preserve for review whatever point the objector had in mind, and in this sense it gives less than maximum protection.

Yet a general objection is far from useless, and trial lawyers make such objections all the time. Sometimes the reason is that they (like the rest of us) do not always find the right words immediately—they sense that something is wrong but cannot say exactly what. Sometimes the reason is almost the converse—which is to say that everybody knows exactly what is wrong, and the point is too obvious for words. Here the trial lawyer may well resort to the
D. How Evidence Is Admitted or Excluded

alliterative "incompetent, irrelevant, and immaterial," or (better yet, to avoid evoking the stereotypical lawyer's image, never much liked by lay people) might simply say "I object, Your Honor; he can't do that" or "That's unfair" or words of similar effect.

If the problem is that the objecting attorney has for the moment lost his wits and cannot think of the specific ground, these words at least halt the proceedings momentarily while he gropes in his mind to formulate his point. If lawyers and judge already know what is wrong, the judge may well sustain the objection in peremptory fashion, and a general objection sustained will survive attack by the other party on appeal if there are any grounds upon which it may be supported.

So a general objection may be a sign of poor lawyering, but not necessarily and not always. And in the right circumstances it can aptly serve the objector's purpose.

b. The Motion in Limine

Often a party anticipates that particular evidence will be offered to which he will object. Sometimes he anticipates that an item of proof that he plans to offer will meet serious objection from the adversary. In either case, he may want to obtain a ruling in advance, and the mechanism of a "motion in limine" (literally, "at the threshold") provides the means. This procedural device is sometimes authorized by statute or rule, and it exists by common law tradition in almost all other jurisdictions (including the federal system).6

The attraction of this device is readily explained. It provides a chance for both parties to brief an important evidence issue and present more elaborate argument than is possible during trial. It allows the movant to isolate and emphasize a point, and in the process obtain a carefully considered ruling. It may affect trial strategy: In the common situation in which the accused seeks an order forbidding the prosecutor from questioning him on past criminal convictions, the ruling may determine whether he should testify on his own behalf. And trial judges may be more than willing to consider and rule in advance upon such matters, in hopes of making a sounder decision and avoiding delays that are awkward while trial is in process.

But motions in limine are not always satisfactory.

From the standpoint of the trial judge, the motion may seem to seek an "advisory opinion" that she is loathe to provide. It grates on her judicial temperament to be asked to decide a point not yet actually presented, and its very isolation from the trial may persuade her that she does not yet know how the issue should be resolved. In the frequent case in which the accused wants to foreclose cross-examination about his own criminal convictions, ruling correctly may involve the trial judge in considering the nature of testimony as yet unheard.

6. The motion to suppress evidence, which is generally authorized by specific provision in the rules of criminal procedure (see, e.g., FRCrimP 12(b)) and routinely made by the defense as a means of asserting rights based upon the Fourth and Fifth Amendments, is the best known instance of this procedure in operation.
And the trial judge may want to know more about the entire complexion of the case than she can know before trial has begun.

Motions in limine sometimes create procedural ambiguities for the parties. If the trial judge denies a motion to exclude certain evidence, must the movant object again during trial in order to protect his right to obtain later appellate review? Decisions conflict on this point, but FRE 103(a) was amended in 2000 so that it now provides that an objection need not be renewed at trial if the judge makes a “definitive ruling” on a pretrial motion. If the trial goes differently from what was anticipated at the time of the ruling, however, it seems that the judge may change the ruling. See United States v. Gaertner, 705 F.2d 210, 214-216 (7th Cir. 1983) (in drug trial, court first ruled that prosecutor could not ask defendant about prior narcotics convictions, but after he implied in his testimony that he was a person of good character, court permitted cross-examination on the prior convictions), cert. denied, 464 U.S. 1071 (1984). Thus, even a clear ruling in limine still leaves the lawyers with the problem of deciding when (and whether) events have gone sufficiently far astray to justify reconsideration.

3. The Offer of Proof

The counterpart to the objection is the offer of proof. Making an offer of proof is not nearly so ingrained in the popular image of lawyers as objecting, but it is equally important, and failing to make offers when necessary is a common and serious shortcoming. Here is the basic point: A lawyer faced with a ruling excluding evidence must make a formal offer of proof, if he wants to preserve the point for later appellate review, which means demonstrating to the trial court exactly what he is prepared to introduce if permitted.

Broadly speaking, offers of proof are required for the same reason as objections. The idea is to accord the offering party (the “proponent”) a fair procedural opportunity to get in his proof, but not endless chances. He must be ready to present his evidence when the objection is made and must make its “substance” known to the court (see FRE 103(a)(2)). If it were otherwise, if the proponent could await the outcome and only then make it known that he has additional evidence and disclose the details of what he would have proved if allowed, the end result would be a costly and potentially interminable trial process. An offer of proof is also necessary in order to “preserve the record” for purposes of review. Without an offer, an appellate court normally has no way to determine whether excluded evidence might have affected the outcome.

Like the objection, the offer of proof serves a disclosive function and thus achieves two additional ends. One is to enable the objector to refine his objection if need be, and perhaps to frame it more fully. The other is to assist the trial judge to arrive at the correct ruling, since a detailed exposition of the evidence in question might lead her to change her mind and admit.

If the evidence offered is a document or other physical exhibit, it will likely have been marked for identification before trial. At the time of the offer, the proponent will hand it to the clerk (“lodge” is the usual expression), to become part of the record regardless whether it is ultimately admitted in evidence. (You already saw this ritual in the examples of the gun and drawing, offered with
Lieutenant Goldbloom's testimony.) With documentary evidence, technology can make this process simpler, since a document stored on computers can be accessed by the lawyers and the court at the same time, and "calling it up on the screen" can enable the court to consider and rule on the proffer without handling pieces of paper around. If the evidence is testimonial, usually counsel for the proponent makes his offer by means of an oral description on the record of the substance of the expected testimony. If the judge entertains any doubt that the witness would testify in the manner described, she may ask counsel to put him on the stand: In the words of FRE 103(b), the court may "direct the making of an offer in question and answer form." Needless to say, in all these cases the offer of proof is made (in the words of FRE 103(c)) "to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means." It follows that ordinarily the jury is excused when a proffer is heard.

It should be obvious from the description of objecting that the party wishing to exclude evidence bears the initial burden of raising the objection. When the objection has been made, however, ordinarily the proponent bears the burden of showing that his evidence is admissible. In other words, in making his offer of proof he must be prepared to explain why the pertinent rule or principle supports receipt of the evidence. The necessary showing may involve simply winning an argument over the meaning and applicability of the rules, but often it involves presentation of testimony or other proof to establish facts and conditions that bring a rule of admissibility into play. The apparently successful objection voiced by Dawson in the exchange quoted above might lead to an offer of proof by Parsons:

*Mr. Parsons:* Your Honor, may I be heard further on this matter? I believe that I can establish that Mr. Cronan's statement fits within the excited utterance exception set out in Rule 803(2), and I would like to make an offer of proof for the record.

*Mr. Dawson:* Cronan's statement does not fit, and the court has quite rightly sustained my objection. If we're going to get into a legal argument on this point, may I suggest that the jury be excused while we fight it out? The jury has to leave if he's going to make an offer of proof, anyway.

*The Court:* Gentlemen, please approach the bench.

[Discussion is held off the record.]

*The Court:* Ladies and gentlemen, we have not been able to reach an understanding yet, and since the dispute concerns a rather technical question of law, I'd like to ask you to step out in the hall for about 20 minutes while we get to the bottom of this thing. The bailiff will show you out. You may want to take this opportunity to go down to the snack room in the basement for a cup of coffee or other refreshment. There are some vending machines down there, and you can take a midmorning break.

[Jury leaves the courtroom.]

*The Court:* Alright, gentlemen, let's get this over with. Mr. Parsons, you say I should let Ms. Gordon tell us what Mr. Cronan said shortly after the accident. You claim that his statement fits within the excited utterance exception and you want to make a record of Cronan's statement, is that right?

*Mr. Parsons:* Exactly, Your Honor. The exception was practically designed for this very situation, and we want to preserve a record of what he said.

*The Court:* Alright, Mr. Dawson, you say the statement is hearsay, and I should not let Ms. Gordon testify to what Cronan said, is that right?
Mr. Dawson:  Right, Your Honor. Cronan’s statement is pure hearsay, and Mr. Parsons
should call him as a witness if he wants the jury to hear what he has to say.

The Court:  The ball’s in your court, Mr. Parsons.

Q (Parsons):  Thank you, Your Honor. Ms. Gordon, where were you when the accident
occurred?

A (Gordon):  As I said before, I was on the sidewalk about 40 feet away from where the
two cars collided.

Q:  And where was Mr. Cronan at the time?

A:  He was about ten feet away from me.

Q:  And did you two know each other?

A:  No, sir. But we both went into the gas station on the corner to call for help, and
then we stayed around in case we were needed. And when the police came, they
took statements from both of us, and it was then that I picked up his name.

Q:  I see. And shortly after the collision, but before you found out his name, did Mr.
Cronan say something to you about the accident?

A:  Yes.

Q:  How long after the accident, would you say?

A:  Well, hardly any time had passed. It’s a little hard to say, since I was concerned
about the condition of the people in those cars, and worried that we were going
to have other collisions. But to answer your question, I would say that Mr. Cronan
said what he said not more than half a minute after the impact.

Q:  Thank you. And Ms. Gordon, could you tell us how he sounded? Did he speak to
you in—

Mr. Dawson:  Just a minute, Your Honor. He’s about to put words in the mouth of the
witness. Let her tell us how he sounded in her own words.

The Court:  Yes, I agree. Ms. Gordon, you heard the question. Tell us how Mr. Cronan
sounded.

A (Gordon):  Well, he just said it. I suppose we were both a bit upset—probably more
surprised than anything. You know how it is when you’re walking along the street
and all of a sudden out of nowhere you hear tires screech and that terrible sound
of metal crashing together and you don’t know for sure whether you’re out of
harm’s way. I’d say Mr. Cronan said the first thing that came to him, and he kind
of blurted it out.

Q:  You said that Mr. Cronan sounded upset. Could you elaborate on that?

A:  Well, I don’t know what more to say. He was startled and sounded sort of aggravated.

Q:  And now tell us, please, what you heard him say.

Mr. Dawson:  Your Honor, you haven’t ruled yet that what Mr. Cronan said is admissible.
Let me just state for the record that I continue to object that his statement is
hearsay.

The Court:  Yes, counsel, I haven’t forgotten your objection. You may answer, Ms. Gor-
don. What did he say?

A (Gordon):  Well, he said “I knew that guy in the stationwagon wasn’t going to stop.
He never did slow down.” Then he added something like, “Too much of a hurry
to obey the rules the rest of us live by.”

Mr. Parsons:  Thank you, Ms. Gordon. Your Honor, I submit that Cronan’s statement
is within the excited utterance exception of Rule 803(2). Ms. Gordon has said that
he seemed “startled,” to use her word, and subdivision (2) expressly mentions
statements “relating to a startling event or condition” when such statements are
made while declarant was “under the stress of excitement” brought on by that
event. Well, a car accident is a startling event, and Mr. Cronan was obviously excited.

His statement relates to the event. It should be received.

The Court:  I take your point. Mr. Dawson, your turn.
D. How Evidence Is Admitted or Excluded

Q (Dawson): Ms. Gordon, the intersection of which you spoke was Fourth and Green, was it not?
A (Gordon): Yes.
Q: And what were the traffic conditions at the time, if you remember?
A: Well, it was about three o'clock on a Wednesday afternoon, and there were quite a few cars coming down Green from both directions, and up and down Fourth too.
Q: So would you say things were pretty quiet, or on the noisy side?
A: Well, rather noisy. It is a busy street corner, and with the buses and the students and all, it's fairly noisy.
Q: So you heard the sounds of the accident against a background of pretty substantial traffic noise?
A: Yes, I would say so.
Q: Thank you, Ms. Gordon. Your Honor, this is not a case—

The Court: Excuse me just a minute. Are you both through with the witness?

Mr. Parsons: Yes, Your Honor. For the moment.
Mr. Dawson: Yes, sir.

The Court: Ms. Gordon, you may step down. Would you be good enough to wait in the hall for a few minutes? We'll tell you shortly whether we will be needing you any further.

[Witness leaves.]

The Court: OK gentlemen, where are we?

Mr. Parsons: Your Honor, may I be heard? Ms. Gordon has told us that neither she nor Mr. Cronan were afraid for their personal safety. They were far enough away from the accident to be out of danger. She has also testified, and I don't know how she could have said otherwise, that there was considerable noise in the intersection at the time. The noise of the collision was not like a sudden thunderclap. It wasn't any more than a loud sound in the general rumble of traffic, nothing you could even call unusual. The excited utterance exception contemplates a person exclaiming something "under the stress of excitement," and these people were not under stress and were certainly not excited. No more than you or I would be under similar circumstances.

Mr. Parsons: Your Honor,—

The Court: Unless you have something new to add that you haven't already said, I'd just as soon not hear anything further.

Mr. Parsons: Let me just say that the Rule does not require the declarant to be frightened for his life. It speaks of a "a startling event" and "excitement," and we have that here. Moreover, this evidence is critical to my case.

The Court: Well, it's a close question. You've made a record of what you want to get in, Mr. Parsons, so if this case goes up on appeal you can point out exactly what you wanted to prove. I still think this is just hearsay, and I'm inclined to agree with Mr. Dawson that there wasn't enough excitement here to guarantee reliability. If you want to get in Mr. Cronan's opinion, you'll have to call him. The objection is sustained. Gentlemen, unless you have any objection, I am going to excuse Ms. Gordon. Bailiff, please ask Ms. Gordon to step back in the courtroom, and I'll tell her she is excused. Then you may bring the jury back in.

If Parsons' client loses the case and takes an appeal, he now has the fullest possible on-the-record offer of proof, done in "question-and-answer form" so as to preserve the very testimony ultimately excluded and including testimony supporting the ground upon which he contends that the statement should have been admitted. If error was committed, the reviewing court should be able to
see it and assess its significance. Consider for a moment how much harder those tasks would be if no offer had been made—if the record had stopped short when the objection was originally sustained.

Fortunately such an elaborate offer of proof is not always necessary. In the example above, Parsons put Gordon on the stand to get her to testify to what Cronan said about the conduct of the driver of the station wagon. Testimony as to what another person said raises hearsay issues, which cannot properly be resolved simply on the basis of Parsons’ initial question to Ms. Gordon (“And what was his [Cronan’s] reaction?”), so further inquiry is in order when the defense makes its objection. But if Parsons sought to elicit from Ms. Gordon her own account of what happened when the cars collided, the nature of her expected response would likely be apparent on the face of the question. Recall that Parsons placed her at the scene (“Were you at the intersection of Fourth and Green. . .?” “Why yes, . . .”) and established that she saw what happened (“And did you see an accident. . .?” “Well yes, I happened to be looking at the station wagon. . .”). Assume the questioning then proceeded in this way:

Q (Parsons): If you can, Ms. Gordon, please tell us about how fast the station-wagon was going as it entered the intersection.

Mr. Dawson: Your Honor, please, Ms. Gordon can’t give her opinion on points like that.

Mr. Parsons: Your Honor, I don’t know where Mr. Dawson got that idea. Under the Rules, let’s see, I think it’s 701, any witness can testify to matters based on personal observation, so long as it’s helpful to the jury. Certainly a person who sees a car driving along can give an estimate as to speed, and that’s all I propose for Ms. Gordon to do here.

Court: No Mr. Parsons, I don’t think so. She couldn’t see the speedometer from outside the car and I don’t think I’ll allow it. Now if you want to cover any other points with her, go right ahead.

In this situation a careful attorney in Parsons’ position might well request permission to approach the bench and would whisper to the court, the reporter, and to opposing counsel, “Let the record show that if permitted, Ms. Gordon would testify that she saw the station wagon driving along Fourth Street at approximately 50 mph just prior to the collision.” Unless court or counsel did not believe that Ms. Gordon would testify in that vein, this representation would likely be accepted as true, satisfying the requirement of an offer of proof.

It is even probable that if Parsons made no further statement of the expected tenor of Gordon’s testimony, the record would suffice to show the appellate court that Ms. Gordon was expected to testify that the vehicle was speeding and that the ruling disallowing such testimony would be reviewable for error. (Most courts permit an eyewitness such as Ms. Gordon to testify to the speed of an automobile, and the court probably erred in refusing to permit her to answer. See Chapter 9A, infra.)

4. Judicial “Mini-Hearings”

Objections and offers of proof can involve court and parties in what amounts to “mini-hearings” raising all sorts of questions. Does the hearsay doctrine permit Appleby on Thoracic Surgery to be used to prove proper surgical tech-
nique? Is a gun sufficiently connected to the crime to be admitted into evidence in a murder prosecution, on the basis of testimony by Lieutenant Goldbloom that he found it "on the floor of the bedroom about five feet from [the victim's] body"? Was Cronan excited when he spoke, since apparently the hearsay doctrine would permit this use of his out-of-court statement about the speed of a stationwagon if he was?

Obviously the judge has a role to play. But does he decide these questions himself? Or just screen them, passing them to the jury if a reasonable person could decide them either way, on the basis of the evidence or common sense and experience?

Rule 104 describes the functions of judge and jury in deciding evidence questions. Rule 104(a) says that the judge determines "preliminary questions"—witness competency, privilege, and "admissibility of evidence." Rule 104(b) says it is different when "relevancy" turns on "fulfillment of a condition of fact." Here the judge merely screens the evidence, and when different answers are possible the jury decides. That is, it decides whether the condition is satisfied ("fulfilled"), and evidence that is conditionally relevant is admitted "upon, or subject to" the introduction of sufficient other evidence to support "a finding" (by the jury) that the condition is satisfied.

Sometimes Rule 104(a) and 104(b) operate without a hitch.

Pretty clearly Rule 104(a) applies to the first and third questions noted above, for example, because both involve application of the hearsay doctrine. In Rules terms, the proposed use of the treatise and the bystander's remark about speed raise questions of "admissibility." Rule 104(a) also applies to questions of witness competency. The only common question of competency involves qualifying a witness as an expert, and the trial judge alone decides this point. And Rule 104(a) also allocates to the judge alone issues involving the application of privileges, such as attorney-client and spousal.

And there are clear applications of Rule 104(b). It governs the question raised by the gun that Lieutenant Goldbloom found next to the body. In Rules terms, the question whether the gun is sufficiently connected to the crime raises an issue of "authentication," which is treated as a matter of conditional relevancy (see the ACN to Rule 901, and Chapter 13, infra). That is, the jury decides whether such an item is what its proponent claims. The task of the judge is to ensure that there is enough evidence to enable a reasonable juror to conclude that the item is (or is not) what it is claimed to be. Only in extreme cases does the judge take over this decision. (At one extreme, he excludes for failure to authenticate where there is not enough foundational evidence to enable a reasonable person to find the item authentic, or where the counterproof is so cogent and compelling that a reasonable person could only find the item not authentic. At the opposite extreme, he could instruct that the item is what its proponent claims, though such an instruction is seldom given in fact, and conceivably it would be improper against the accused in a criminal case.) And Rule 104(b) applies to the question of personal knowledge of witnesses (see ACN FRE 602, and see generally Chapter 6J, infra).

As you will see in succeeding chapters, however, sometimes application of Rule 104 is more difficult. While connecting a gun to an alleged murder is a clear instance of conditional relevancy, other instances are not at all certain. And while applying the hearsay doctrine is mostly a matter for the judge under
Rule 104(a), a few hearsay issues are sometimes given to juries, such as the question whether a party “adopted” a statement made by another and the question whether a person who makes what is offered as a “dying declaration” actually knew he was dying (see Chapter 4B2 and 4D3, infra). Note too the language in Rule 104(a) that the judge is not bound by “the rules of evidence” (apart from privileges) in deciding questions of admissibility. That implies that he may consider matters that the jury cannot consider in deciding the case on the merits, and this point too creates problems in applying the admissions doctrine and the exception for excited utterances (see Chapter 4B3, 4B4, 4B5, and 4C1, infra).

E. CONSEQUENCES OF EVIDENTIAL ERROR

Few trials make it from beginning to end without error on points of evidence, and claims of evidence error are commonplace in appeals. It is doubtful that perfection in administering evidence law may be had at all, let alone at a price worth paying. There are three main causes of imperfection, and for each the system has developed an adaptive technique that helps separate errors requiring correction from those that do not.

First, some evidence rules are slippery or complex. Hence unerring application under the pressures of trial is too much to expect. Judges who make the initial decision, lawyers who guide and influence that decision by framing the issues and setting out the factual picture, commentators and authors of appellate opinions—all are mortals who make mistakes. This reason alone suggests that there can be no such thing as “automatic” reversal on account of evidence errors. The reviewing court awards relief only when errors seem to have made a real difference in result.

Second, some evidence rules are framed as vague standards, and close appellate scrutiny would make no more sense than trying to fix a computer with a wrench. Many of the more particular rules require someone—usually the judge—to resolve factual issues, and the remoteness of the reviewing court suggests that deference to the trial judge is very much in order. Moreover, freewheeling review of efforts by the trial judge to apply vague standards or find facts affecting application of specific rules would be demoralizing, and would discourage trial judges from taking care in the first instance.

Third, ours is an adversary system, which places the lion’s share of responsibility for the conduct of trial in the litigants themselves (acting through their lawyers). There is good reason to hold them to the choices they (their lawyers) make at trial, and to refuse relief for errors they cause or might reasonably have been expected to prevent.

In sum, our system tolerates a less-than-perfect world. The three adaptive techniques are worth a closer look.

1. Appraising Such Error on the Merits

Assume that the reviewing court means to resolve an evidence point on the merits. One of its tasks is to identify error and instruct the trial court (and the
E. Consequences of Evidential Error

rest of us) how to do the right thing next time. But since reversal is not to be automatic, identifying error is only the beginning. The rest of the job is to distinguish errors that matter from those that do not.

The distinction turns on two somewhat connected points. One is that the evidence error must have affected what Rule 103 calls “a substantial right,” meaning essentially outcome (the verdict in jury cases, hence a judgment based thereon; the judgment alone in judge-tried cases). The other is that there must be some assurance that the error had such effect, for otherwise we are stuck at the extremes, with automatic reversal or no possibility of correction at all. In short, we need a standard of proof. The usual standard directs appellate courts to reverse a judgment only for error which “probably affected” the result, although this formula tells little and does not capture the flavor of the cases.7

Kinds of error. In explaining what they do, reviewing courts classify evidence errors in four categories:

One is “reversible” error, which refers to the kind of mistake that probably did affect the judgment. Generally the term also means that appellant took the necessary steps at trial to preserve his claim of error (usually by raising an appropriate objection or making a formal offer of proof).

Another is “harmless” error, meaning the kind of mistake that probably did not affect the judgment. This label expresses the reviewing court’s conclusion that appellant has not shown that a ruling affected the verdict.

The third is “plain” error, meaning the kind that in the estimation of the reviewing court warrants relief on appeal even though appellant failed at trial to take the steps usually necessary to preserve its rights (objecting or making an offer of proof). It bears emphasis that the plain error doctrine provides only a slim hope for the trial lawyer whose wits and instincts failed at an important moment, and appellate opinions routinely reject claims of plain error and emphasize that the lawyer failed to object or offer proof, thus waiving the right to argue error. Generally reviewing courts insist that error is “plain” only if it is in some sense “obvious” (the judge should have known better even if the lawyer did not) and more “serious” in the sense of providing greater certainty (more even than “reversible” error imparts) that outcome was affected at trial. Sometimes courts go so far as to say that error can be viewed as plain only if the judgment below amounts to a “miscarriage of justice.” See Rule 103(d).

The fourth is “constitutional” error in criminal cases, which usually means a mistake by the trial court in admitting evidence for the prosecution that should have been excluded under the Constitution. Most often invoked are

7. Most courts apply the standard quoted above, but the matter is not free of doubt. A famous scholar of the bench preferred a formulation requiring reversal unless the reviewing court “believes it highly probable that the error did not affect the judgment.” R. Traynor, The Riddle of Harmless Error 35 (1970). And it has been argued that in criminal cases the standard applied on review should track the standard of proof observed at trial, meaning that the prosecutor should be prepared to establish beyond reasonable doubt that the error did not affect the result. See Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988, 991-1907 (1973). In its most thorough consideration of this subject, the Supreme Court admonished against “technicality,” emphasized the importance of considering the proceedings “in their entirety,” but then stated its conclusion in elusive language. Kotteakos v. United States, 328 U.S. 750, 765 (1946) (reversal proper unless reviewing court can say with “fair assurance” that error did not affect the judgment).
the search and seizure provision of the Fourth Amendment (source of the doctrine requiring exclusion of illegally seized evidence, see Mapp v. Ohio, 367 U.S. 643 (1961)), the privilege against self-incrimination set out in the Fifth Amendment (source of the doctrine requiring police to warn suspects in custody of their rights, see Miranda v. Arizona, 384 U.S. 436 (1966)), and the Confrontation Clause of the Sixth Amendment (source of the doctrine entitling the accused to cross-examine witnesses against him, see Davis v. Alaska, 415 U.S. 308 (1974)). Here is a place where it was once thought that the general rule required "automatic" reversal, without a showing that the error affected the results below. But the Supreme Court repudiated that position in Chapman v. California, 387 U.S. 18 (1967), adopting for most such cases (though perhaps not all) a more lenient standard under which the judgment may be affirmed if the prosecution shows beyond a reasonable doubt that the error was harmless. Less often, constitutional error occurs when courts exclude evidence offered by the defense, see Chambers v. Mississippi, 410 U.S. 284 (1973) (Chapter 4H).

Distinguishing "harmless" from "reversible" error. You will discover that appellate courts are likely to find that a party has lost or limited her "standing" to complain of error on review by the way she (her lawyer) conducted herself at trial. Tremendous energy goes into explaining why one or another contention cannot be fully considered on appeal. Putting this difficulty aside for a moment, the hardest task for appellate courts (and for lawyers trying to decide whether to appeal) is to distinguish between harmless and reversible error.

Viewed in isolation, many errors might have affected the outcome: Evidence admitted in error might have been the reason why the trier decided against the appellant on a critical issue; evidence excluded in error might (if only it had been admitted) have tipped the balance on an issue that the jury decided against the appellant. An impeaching attack (or cross-examination) undertaken by the appellant but erroneously cut short by the trial court might have undercut a critical witness for the adverse party if allowed to run its full course. And an improper attack (or cross-examination) undertaken by the adverse party might have destroyed a witness for appellant whom the trier would otherwise have believed. Convincing an appellate court that such errors "probably" had such effect is the second task of the appellant (the first being to persuade the reviewing court that indeed there was error below).

In this quest appellant usually must also convince the reviewing court that other circumstances disclosed by the record (and emphasized by the party who won below) do not turn what seems to be reversible error into harmless error.

Three doctrines have evolved, each describing and responding to a circumstance that turns the poignant into the bland (reversible into harmless error):

First is the "cumulative evidence" doctrine, which supports affirmance despite errors by the trial court both in admitting and in excluding. Nothing is so common as to read in appellate opinions that while the trial judge erred in admitting evidence offered against the appellant, still so much other proof was properly received on the same point that the jury would likely have found against her even if the judge had correctly excluded the evidence in question. And you will read almost as often the appellate view that while the trial judge erred in excluding evidence offered by the appellant, still so much other proof was admitted on the same point that the jury would not likely have changed its mind even if the judge had correctly admitted the evidence in question.
E. Consequences of Evidential Error

A point that needs to be made here—and appellate opinions sometimes overlook it—is that the "cumulative evidence" doctrine does not justify affirmane merely because other evidence in the case was sufficient to sustain the result reached below: The question in every case is whether evidence erroneously admitted probably affected outcome or whether evidence erroneously excluded probably would have affected outcome. If the answer is yes, the error calls for corrective action even though there is enough other evidence in the case to support the conclusion that the trier actually reached below.

Second is the "curative instruction" doctrine. When a trial judge commits an evidence error, he may be able to avoid reversal by means of an instruction to the jury. When the risk is great that evidence admitted on one point or against one party may be improperly considered by the jury as proof on a different point or against another party, a "limiting" instruction may be sought (see FRE 105), and such instruction is usually viewed as effective, thus disposing of any contention on appeal that the evidence was used improperly. When it becomes clear after the fact that evidence already admitted should not have come in at all, an instruction to "disregard" may be equally effective in preserving the judgment on appeal. These instructions are said to "cure" the error, rendering it harmless. Occasionally an instruction even cures an error in excluding evidence, as happens when a judge implies in his instructions that the issue has been (or should be) resolved in favor of the party who offered the evidence. Sometimes the verdict itself cures the error, as happens when the jury finds in favor of the appellant on the only issues affected by any error.

Third is the "overwhelming evidence" doctrine. If a reviewing court concludes that evidence properly admitted supports the judgment below overwhelmingly, generally it affirms, even in the face of errors admitting or excluding evidence that might otherwise have been considered serious. The opinions seem almost to suggest that the evidence was such as to invite a directed verdict.

2. Appellate Deference: The Discretion of the Trial Judge

The doctrine of judicial "discretion" has led to the practice of limiting appellate review of evidential rulings. One source of this discretion is found in evidential doctrines that are framed in loose terms. It is settled, for example, that trial judges may exclude even competent and relevant evidence if it seems likely to prejudice the jury against one of the parties or confuse it by introducing collateral issues leading far afield. See FRE 403. And it is settled that the trial judge may control the manner and sequence of presenting evidence and questioning witnesses. See FRE 611.

Doctrines such as these may be viewed in different ways. Clearly they confer great power in the trial judge to affect the presentation of evidence; they amount to a vote of confidence in her ability to fashion sensible ad hoc solutions to the inevitable problems of trial; the generality of such doctrines concedes that specific rules do not exist and suggests that such could not be framed. Lawyers are inclined to describe the decisions which these doctrines invite in terms of "balancing," by which is usually meant selecting between one course and another by considering and comparing dissimilar factors (in effect "choosing between apples and oranges").
In such cases the trial judge is likely to be upheld no matter which choice she makes. Appellate opinions refer to the “broad discretion” of the trial judge, and often they suggest that her decision is reviewable only for “abuse,” which is perhaps only another way of saying that the appellate court strongly disagrees. (If the claimed error falls into a discretionary category, sometimes reversal can be had if it can be shown that the trial judge failed to exercise discretion in the mistaken belief that she was bound by a particular rule.)

There is another source of judicial discretion. It is the more particular evidential doctrines whose application turns in the first instance upon factfinding by the trial judge. Even in criminal trials and civil jury cases, where we think of the jury as the factfinder, the trial judge performs factfinding duties in administering the law of evidence. Recall the discussion between Parson and Dawson over Cronan’s remark about the fellow in the stationwagon being in “too much of a hurry.” There the trial judge was asked to apply Rule 803(2)—the “excited utterance” exception, which applies only where (1) there was an occasion which startled the declarant, (2) he spoke while excited, (3) his statement expressed his reaction to the occasion. It is the trial judge who must determine whether these requirements are satisfied, and her conclusions are reviewed under either a “clear error” or “abuse-of-discretion” standard. These terms seem in this context to coalesce, and they mean that the reviewing court defers to the conclusions of the trial judge, and reverses only if it strongly disagrees.

3. Procedural Pitfalls and Adversarial Gambits

Often reviewing courts do not reach the question whether error was harmless, or even whether it was committed. And often they do not reach the question whether the ruling below should be affirmed because the matter at hand is committed to the sound discretion of the trial judge and her decision was within reasonable parameters. Instead, courts often limit review or foreclose relief altogether because of the trial behavior of the appellant (acting through counsel). In hindsight, that behavior may fall somewhere on a continuum from gross blunder to understandable mistake, calculated risk, or carefully planned (but unsuccessful) strategy.

In general, three kinds of behavior generate such effects:

1. Failing to object or offer proof. We have already considered the need to object and to make offers of proof. When a case goes up on appeal, a serious consequence usually flows from failing to object or offer proof: Failing to object waives the right to claim error in admitting evidence, and failing to offer proof waives the right to claim error in excluding evidence. In both cases relief is denied in the absence of “plain error,” and review is limited because appellant failed to “preserve the point” by objecting or making an offer. Plain error is seldom found in rulings admitting evidence, and almost unheard of in rulings excluding evidence (absent a record of the unoffered proof, a reviewing court can hardly tell that it would have affected the result).

More refined consequences flow from the manner in which objection or offer of proof is made. Thus, an objection on particular grounds suffices only to preserve errors made on those very grounds: If appellant unsuccessfully
E. Consequences of Evidential Error

objected that certain testimony violates the hearsay doctrine, he can prevail on appeal only if the testimony did offend the hearsay doctrine (as well as outcome). He might argue on appeal that the testimony also offended the rule against proving conduct by character evidence, but failing to raise this ground in his original objection waived his right to assert it on appeal. (He might still win on this ground, but only if the reviewing court concludes that failing to see and apply the character rule was plain error.)

Likewise, an unsuccessful offer of proof resting on a particular ground for admitting evidence suffices only to preserve that ground for review: If appellant invokes a particular hearsay exception in his offer, he can prevail only if the trial court erred in refusing to apply that exception (and the excluded evidence would likely have affected outcome). The fact that the evidence fits another exception avails appellant little, for failing to advance this ground in his proffer waived his right to rely on it, and once again he can argue this new exception only if the failure to see and apply it was plain error.

And there is more:

Inobjecting and making offers of proof, appellant may limit or lose his right to review if some significant part of the proof in question does not fit the objection or the offer. If part of a document is not excludable under the hearsay doctrine, an objection on that ground may be viewed as inadequate even though other parts of the document should be excluded for that reason. Conversely, if part of a document does not fit a particular hearsay exception, an offer of the whole document may be viewed as inadequate even though part does fit the exception. In short, rulings by the trial judge adverse to the party who later appeals may be sustained if that party was not sufficiently precise in specifying the evidence subject to the objection or offer.

Finally, and here we see real determination of the system to sustain the trial court if possible, appellate courts often say that where the trial judge sustains an objection or accepts an offer of proof on the wrong ground (a ground later shown inapplicable or erroneous), her ruling will likely be sustained on appeal if some other ground, though unmentioned below, supports her action. Thus if the trial judge accepts an offer of proof dependent upon a particular hearsay exception, she is likely to be sustained even though that exception is shown to be inapplicable, if the offering party can demonstrate that some other exception supports receipt of the evidence. In short, the system favors affirmance of judgments, imposing what amounts to a double standard operating in favor of the trial judge and against trial counsel.

2. Inviting error. Trial behavior of a very different sort may affect review, for counsel sometimes put questions that produce otherwise excludable answers. Assuming that the witness has fairly replied to the question asked, the questioner is said to have “invited” any error that would otherwise have arisen in admitting the answer. And a party also “invites” error by relying on (and in this sense endorsing) evidence offered by his opponent that he might otherwise have succeeded in excluding by raising appropriate objection.

3. Opening the door. Finally, trial behavior may “open the door” to evidence that would otherwise be excludable. In the typical instance, a party testifying on direct examination by his own counsel makes an ill-advised and overbroad assertion that he has a blemish-free past. Thus a criminal defendant sometimes testifies that he has “never been in trouble with the law before,” and if this
statement is false it "opens the door" to devastating evidence of prior arrests or convictions, which he might otherwise have kept out. And a party in a civil negligence suit sometimes testifies that he "has never had an accident before," which (if false) "opens the door" to damaging proof that indeed he has had other accidents. (See the material on impeaching witnesses in Chapter 8, infra.)

**PROBLEM 1-B. He Didn't Object!**

Carl Dreeves joins with Abby Barton as the second plaintiff in the suit against Eric Felsen (Problem 1-A). The defense offers testimony by police officer Hill, based on measurements of skidmarks at the scene, that Barton's Fiat was traveling at a speed of about 50 mph just before entering the intersection. (The posted limit was 35 mph.) Counsel for Barton objects that "officer Hill is not qualified as an expert in accident reconstruction," and that "estimates of speed based on skidmarks involve sheer speculation and are not helpful to the jury."

The court overrules the objection; the jury returns a verdict for Felsen; the court enters judgment that Barton and Dreeves take nothing, and that their claims be dismissed with prejudice. Dreeves appeals, and Felsen argues that his appeal should be dismissed because of his failure to object below. Should he prevail on this argument? Why or why not?

**F. OBTAINING REVIEW OF EVIDENCE POINTS**

1. **Appeal from Judgment**

Evidence rulings are, for the most part, prime examples of the nonappealable interlocutory order. When such rulings are made during trial, immediate review would be impractical: The resultant interruption of trial would be an imposition upon trial courts, not to mention juries and witnesses; piecemeal review could become another weapon of delay for a party fearful of an adverse judgment; the very nature of the review would change radically if appellate courts had to evaluate evidential error without the record of a completed trial.

Hence rulings admitting or excluding evidence, rulings on examination of witnesses (whether dealing with the form or the substance of the questions), and rulings on such evidential devices as presumptions and burden of persuasion are almost always reviewed only after judgment. Generally (though not always) rulings on claims of privilege are likewise reviewed only after judgment.

2. **Interlocutory Appeal**

There are two important exceptions to the pattern sketched above—two instances where interlocutory appeal is commonly permitted. One arises when a person claims a privilege and refuses to answer despite an order of the trial court directing him to do so, and the other involves pretrial orders suppressing evidence in criminal cases.
Privilege rulings. Here the cases are in disarray.

Under one approach, the threshold question is whether the person from whom information was sought has been held in contempt. If not, no review may be had. If so, some authority would permit the reviewing court to consider the merits of the privilege ruling only if the person was held in criminal contempt, and otherwise would limit review to the matter of the authority of the trial judge to impose the contempt sanction.

Under another approach, the threshold question is whether the nondisclosing person is a party to the action. If he is a party, he may be permitted to obtain review of the privilege ruling only by suffering an adverse judgment on the merits of the case, then raising the privilege issue (and all other points of error) on appeal from the judgment. If he is not a party, he may obtain review of the privilege issue without suffering a judgment of contempt, simply because the final judgment in the proceedings will never afford him a chance to obtain such review.

Not surprisingly, many modern cases present the issue of review in the context of orders of production directed to criminal defense lawyers. As you will see, a lawyer may (indeed must) invoke the attorney-client privilege on her client’s behalf, and of course the lawyer is not herself a party to her client’s case. In this circumstance, some modern federal authority applies the doctrine of Perlman v. United States, 247 U.S. 7 (1918) (party permitted to appeal, on ground of Fourth Amendment violation, from disclosure order directed to court clerk), and permits the attorney to appeal immediately from a disclosure order overruling her claim of privilege, advanced on her client’s behalf. See, e.g., In re Grand Jury Proceedings (Fine), 641 F.2d 199, 201-203 (5th Cir. 1981).

Suppression motions. In criminal cases in federal court, applicable statute paves the way for government appeals “from a decision or order . . . suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information” if the U.S. Attorney certifies that the appeal has not been taken “for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding” (18 U.S.C. §3731). Many states have similar statutes. For the most part, such pretrial suppression motions raise issues under the Constitution rather than the Rules of Evidence, but any pretrial defense motion to exclude evidence may generate an appeal by the prosecutor under such statutes.
INTRODUCTION

"Relevance" is an everyday word describing factors that bear on the decisions we make and problems we set out to solve, and the term carries similar meaning in the law of evidence. As rational beings, we know as a matter of habit or common sense what we ought to consider in making decisions and solving problems. A picnic in the park? We think about whether we have time, whether the sun is out, what the temperature might be, whether the roads are congested or the park crowded, and so forth.

Long ago Thayer said that the very existence of a judicial system, created to resolve disputes affecting private rights of citizens and administration of regulatory and criminal laws, implies the principle that "relevant" evidence should generally be considered, and not irrelevant evidence. J. Thayer, Preliminary Treatise 264-265 (1898). This principle finds expression in FRE 402, which says that relevant evidence is generally admissible and irrelevant evidence is not.

A relational concept. By nature, relevance is relational—it carries meaning only in context. If we learn that E is employed as a driver by the Corporation and that this fact is "relevant," we would ask, "relevant to what?" In a suit against the Corporation for injuries allegedly caused by a truck owned by it and driven by E, his employment is some indication that he was acting pursuant to his duties, hence that the Corporation may be responsible under the tort doctrine of respondeat superior if E was negligent. But in a suit by E for injuries he sustained crossing a street, his employment would not likely be "relevant" to any issue at hand. E might argue that his employment in a responsible position shows that he is careful, hence that he was being careful when he was struck. But we would likely conclude that relevancy is marginal at best and reject his argument as unconvincing.

The context in which relevance questions arise is defined partly by applicable substantive law (like the doctrine of respondeat superior) and partly by the issues that the parties raise. In criminal cases the issues are raised by the information or indictment and the defendant's plea. In civil cases the pleadings
raise the issues generally, though they are refined through discovery and motions and narrowed by pretrial conference and order.

No modern thinker considers it profitable to codify relevance in detail. Disputes leading to litigation are too varied, as are problems of proof. Not that the possibility of detailed rules governing relevance has been ignored: John Henry Wigmore, who did much for the law of evidence, tried early in life to draft such rules, and anyone who believes the task worthwhile should begin with a look at the compendium of banalities that found their way into his Code of Evidence (1909). Thayer hit on a more durable truth when he said "the law furnishes no test of relevancy," but relies instead on "logic and general experience." J. Thayer, Preliminary Treatise 265 (1898).

Following Thayer, FRE 401 furnishes no test and is content to set out a general standard: Evidence is relevant if it has "any tendency" to make the existence of any consequential fact "more or less probable."

Direct and circumstantial. If the question is whether E is employed by the Corporation, nobody doubts the relevance of his own testimony to that effect, or testimony by W that she saw E loading boxes on a truck with the Corporation logo painted on the side. Both are relevant on the question of E's employment, but here a distinction is commonly drawn: The former is usually called "direct" and the latter "circumstantial" evidence.

"Direct" describes evidence that, if accepted as genuine or believed true, necessarily establishes the point for which it is offered (if E is believed, the trier must conclude that he was employed by the Corporation). "Circumstantial" means evidence that, even if fully credited, may nevertheless fail to support (let alone establish) the point in question, simply because an alternative explanation seems as probable or more so (perhaps E was seen loading the truck, but other facts suggest he was helping a friend employed by the Corporation).

The Federal Rules draw no distinction between direct and circumstantial evidence, and the latter is not necessarily inferior: Alternative explanations may be so much less likely than the one advanced by the proponent as to seem preposterous, and direct proof may be unavailable, either because there are no witnesses or because the issue is such that direct proof cannot be had (usually "mens rea," the mental element of a crime, is proved circumstantially). Courts recognize these realities. See Michalic v. Cleveland Tankers, 364 U.S. 325, 330 (1960) (circumstantial evidence may be "more certain, satisfying and persuasive than direct evidence"). Even criminal convictions may rest on such proof, see United States v. Young, 568 F.2d 588, 589 (8th Cir. 1978) (conviction may "rest solely on circumstantial evidence, which is intrinsically as probative as direct evidence").

Still, circumstantial evidence poses special problems. In popular imagination, the very term connotes weakness, and closing arguments often exploit that preconception. And circumstantial evidence poses the only real challenge in administering the requirement of logical relevancy and assessing the sufficiency of proof to take a case to the jury. Moreover, circumstantial evidence raises questions of coordinating the responsibilities of judge and jury.

Rationality. There are some differences between the common understanding of "relevance" and its meaning in the law of evidence. For one thing, experience seems time and again to affirm that even thoughtful decisions in life rest only in part on reason and logic, that decisionmaking is as much
psychological as analytical, and that intuition and emotion play large roles. But evidence law, especially its notion of relevance, emphasizes reason and logic. Intuition and emotion in the trier of fact are matters to be controlled and minimized, and numerous exclusionary rules serve that end, along with a tradition of discretionary power in the trial judge to exclude evidence so as to obviate or minimize extrarational forces.

Another difference is that everyday decisions generally look forward rather than backward, while courts have the task of determining matters of historical fact—what happened, why, and how. So our legal concept of relevance seeks to describe clues that enable the trier of fact to understand the past, rather than to decide on a future course of action. But the difference is not great, simply because the historical facts are contested by the parties and unknown to the trier.

The law of evidence serves a pragmatic profession, so it ignores the philosophical problem, which is illuminated in literature and experienced in science, whether anyone can ever really know what happened. It affirms implicitly that we can know enough, and that relevant evidence offered in court can help the trier of fact arrive at a close enough understanding to warrant entry of a judgment which materially alters the positions and fortunes of the parties. Carl Sandburg put it this way:

Do you solemnly swear before the everliving God that the testimony you are about to give in this cause shall be the truth, the whole truth, and nothing but the truth?

No, I don’t. I can tell you what I saw and what I heard and I’ll swear to that by the everliving God but the more I study about it the more sure I am that nobody but the everliving God knows the whole truth and if you summoned Christ as a witness in this case what He would tell you would burn your insides with the pity and the mystery of it.


A. LOGICAL RELEVANCE

1. Relevance and Materiality

Relevance readily divides into two subparts, and common law tradition distinguished them by separate terms. Evidence was “relevant” if it tended to establish the point for which it was offered, and “material” if the point bore on issues in the case.

Assume that X says publicly that J is embezzling money from her employer and tells J privately that he will repeat the story to J’s boss unless J pays X for his silence. If X were the defendant in a libel suit or a prosecution for extortion,
evidence that he altered the books of her employer and lived beyond her means would be "relevant" in tending to show that she embezzled. But the evidence would only be "material" in the libel suit, and then only if X raised truth as an affirmative defense. Truth would not matter in an extortion trial, where the heart of the crime is obtaining by threat something of value to which one is not entitled, and the evidence would not be "material."

No one doubts that evidence should be admitted only if it is, in the terminology of the common law, "relevant" and "material." But since both conditions must always be satisfied, insisting on two terms was a fetish, and the modern approach embraces both ideas within the single term "relevance." Under FRE 401, evidence is relevant if it tends to make more or less probable the existence of any consequential fact.

OLD CHIEF v. UNITED STATES (I)
Supreme Court of the United States
519 U.S. 172 (1997)

JUSTICE SOUTER delivered the opinion of the Court.

[Defendant Johnny Lynn Old Chief was charged with being a convicted felon in possession of a firearm. As is usual when this charge is brought, defendant allegedly committed other crimes that are more visible and likely to attract the attention of law enforcement: Old Chief was also charged with assault with a deadly weapon and using a firearm in a crime of violence. His prior felony conviction was for assault causing serious bodily injury, so the defense offered to stipulate to the conviction in hope of keeping its title and the details from the jury. In this opinion, the Supreme Court ultimately decides that the trial court should have excluded proof of the name and details of the prior conviction as too prejudicial. (See Old Chief (II) in section B of this chapter, infra.) Before dealing with the prejudice issue, the Court addresses the basic question whether the name of the crimes of which Old Chief had been convicted was relevant.]

In 1993, petitioner, Old Chief, was arrested after a fracas involving at least one gunshot. The ensuing federal charges included not only assault with a dangerous weapon and using a firearm in relation to a crime of violence but violation of 18 U.S.C. §922(g)(1). This statute makes it unlawful for anyone "who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm. . . ." "[A] crime punishable by imprisonment for a term exceeding one year" is defined to exclude "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" and "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. §921(a)(20).

The earlier crime charged in the indictment against Old Chief was assault causing serious bodily injury. Before trial, he moved for an order requiring the government "to refrain from mentioning—by reading the indictment, during jury selection, in opening statement, or closing argument—and to refrain from
A. Logical Relevance

offering into evidence or soliciting any testimony from any witness regarding the prior criminal convictions of the Defendant, except to state that the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year.” He said that revealing the name and nature of his prior assault conviction would unfairly tax the jury’s capacity to hold the Government to its burden of proof beyond a reasonable doubt on current charges of assault, possession, and violence with a firearm, and he offered to “solve the problem here by stipulating, agreeing and requesting the Court to instruct the jury that he has been convicted of a crime punishable by imprisonment exceeding one (1) year.” He argued that the offer to stipulate to the fact of the prior conviction rendered evidence of the name and nature of the offense inadmissible under FRE 403, the danger being that unfair prejudice from that evidence would substantially outweigh its probative value. He also proposed this jury instruction:

The phrase “crime punishable by imprisonment for a term exceeding one year” generally means a crime which is a felony. The phrase does not include any state offense classified by the laws of that state as a misdemeanor and punishable by a term of imprisonment of two years or less and certain crimes concerning the regulation of business practices . . .

As a threshold matter, there is Old Chief’s erroneous argument that the name of his prior offense as contained in the record of conviction is irrelevant to the prior-conviction element, and for that reason inadmissible under FRE 402. FRE 401 defines relevant evidence as 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.” To be sure, the fact that Old Chief’s prior conviction was for assault resulting in serious bodily injury rather than, say, for theft was not itself an ultimate fact, as if the statute had specifically required proof of injurious assault. But its demonstration was a step on one evidentiary route to the ultimate fact, since it served to place Old Chief within a particular sub-class of offenders for whom firearms possession is outlawed by §922(g)(1). A documentary record of the conviction for that named offense was thus relevant evidence in making Old Chief’s §922(g)(1) status more probable than it would have been without the evidence.

Nor was its evidentiary relevance under FRE 401 affected by the availability of alternative proofs of the element to which it went, such as an admission by Old Chief that he had been convicted of a crime “punishable by imprisonment for a term exceeding one year” within the meaning of the statute. [Court quotes ACN to FRE 401, which states: “The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see FRE 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute.”]

[If relevant evidence must sometimes be excluded because of its connection to other evidence, the reason is not] that the other evidence has rendered it
“irrelevant,” but on its character as unfairly prejudicial, cumulative or the like, its relevance notwithstanding.4 . . .

[T]he Government invokes the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it. The authority usually cited for this rule is Parr v. United States, 255 F.2d 86 (CA5), cert. denied, 358 U.S. 824 (1958), in which the Fifth Circuit explained that the “reason for the rule is to permit a party ‘to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.’”

This is unquestionably true as a general matter. The “fair and legitimate weight” of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman’s motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. When a juror’s duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law’s moral underpinnings and a juror’s obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant’s legal fault.

But there is something even more to the prosecution’s interest in resisting efforts to replace the evidence of its choice with admissions and stipulations, for beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law’s claims, there lies the need for evidence.

4. Viewing evidence of the name of the prior offense as relevant, there is no reason to dwell on the Government’s argument that relevance is to be determined with respect to the entire item offered in evidence (here, the entire record of conviction) and not with reference to distinguishable sub-units of that object (here, the name of the offense and the sentence received). We see no impediment in general to a district court’s determination, after objection, that some sections of a document are relevant within the meaning of FRE 401, and others irrelevant and inadmissible under FRE 402.
in all its particularity to satisfy the jurors’ expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about. “If [jurors’] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party.” Saltzburg, A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence, 66 Calif. L. Rev. 1011, 1019 (1978) (footnotes omitted). Expectations may also arise in jurors’ minds simply from the experience of a trial itself. The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, “never mind what’s behind the door,” and jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.

In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant’s option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

[Court concludes, however, that the prosecutor’s need for “evidentiary depth” has virtually no application “when the point at issue is a defendant’s legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior.”]

[A dissenting opinion of Justice O’Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, is omitted.]

9. Cf. Green, “The Whole Truth?”: How Rules of Evidence Make Lawyers Deceitful, 25 Loyola (LA) L. Rev. 699, 703 (1992). (“[E]videntiary rules, . . . predicated in large measure on the law’s distrust of juries [can] have the unintended, and perhaps ironic, result of encouraging the jury’s distrust of lawyers. The rules do so by fostering the perception that lawyers are deliberately withholding evidence” (footnote omitted)). The fact that juries have expectations as to what evidence ought to be presented by a party, and may well hold the absence of that evidence against the party, is also recognized in the case law of the Fifth Amendment, which explicitly supposes that, despite the venerable history of the privilege against self-incrimination, jurors may not recall that someone accused of crime need not explain the evidence or avow innocence beyond making his plea. The assumption that jurors may have contrary expectations and be moved to draw adverse inferences against the party who disappoints them undergirds the rule that a defendant can demand an instruction forbidding the jury from drawing such an inference.
NOTES ON RELEVANCE, "FIT," AND OFFERS TO STIPULATE

1. *Old Chief* is right, isn’t it, to hold that proof of a prior felony assault conviction is relevant when the point to be proved is a prior felony conviction? The statute speaks of a conviction for “a crime punishable by imprisonment exceeding one (1) year,” which basically means felony. Under the statute, it doesn’t matter *what kind of felony* (even though certain felonies don’t count, including those for “antitrust violations, unfair trade practices, restraints of trade,” and “similar offenses relating to the regulation of business practices”). Still, every conviction that does count will be for some particular crime, such as assault, so the basic concept of relevance cannot require a one-to-one “fit” between the proof and the element in the case to which the proof relates.

2. It is true, isn’t it, that in ordinary cases the prosecution proves points of detail that aren’t, strictly speaking, necessary to the case? In a murder trial, for example, the prosecution shows the circumstances surrounding the killing (the victim was killed in front of his spouse, for instance, or died of multiple stab wounds, or pleaded for his life, or was shot in the abdomen, and so forth). And in the negligence suit described in Problem 1-A (*How Did It Happen?*), proof that Abby Barton was driving a yellow Fiat and that Eric Felsen was driving a blue Buick would be relevant even if it were not needed as a means to connect those people to the accident, wouldn’t it? Partly the reason such proof is relevant is that we want witnesses to communicate in ways that are comfortable to them and to juries, and ordinary language does not easily mesh with (or reduce to) the various categories that are important in lawsuits. Partly the reason is that even “background” evidence has some relevance under FRE 401, as the ACN recognizes (even evidence that is “essentially background in nature” is routinely admitted “as an aid to understanding”). See also United States v. Daily, 842 F.2d 1380, 1388 (2d Cir. 1988) (can show “the circumstances surrounding the events”). In this vein, courts routinely let witnesses testify to their name and address, and often occupation or business, although questioning about such things as hobbies and military service may be disallowed as getting too far afield. See, e.g., United States v. Solomon, 686 F.2d 863, 873-874 (11th Cir. 1982) (barring inquiry into family history and military service). And see generally Mueller and Kirkpatrick, Evidence §§4.2 and 6.58 (3d ed. 2003).

3. *Old Chief* is also wise, isn’t it, in holding that an offer to stipulate does not make relevant evidence irrelevant? The Court rests its conclusion partly on the ACN to FRE 401. Compare Cal Evidence Code §210 (defining relevance to mean “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action”) (emphasis added), in *Old Chief*, the Court also relies on notions of policy, stressing party autonomy in presenting evidence, jury expectations, and “descriptive richness.” What does all this have to do with relevance? When you revisit this decision a few pages hence, in *Old Chief* (II), you will see that an offer to stipulate bears on whether evidence should be excluded under FRE 403 because of the risk of “unfair prejudice.”

4. The majority in *Old Chief* also says particularized evidence is important “to sustain the willingness of jurors to draw the inferences” required for a verdict, and to convince them that a guilty verdict “would be morally reason-
able.” Does this point mean that the defenses should be allowed to offer particularized proof that isn’t strictly relevant to the matter of guilt or innocence, but that might bear on what is “morally reasonable”? See generally James Joseph Duane, “Screw Your Courage to the Sucking Place”: The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts, 49 Hastings L.J. 463, 469 (1998) (asking whether Old Chief majority would “embrace the logical implications of this position” by letting the defendant “call his wife and children to testify” to the ways “their lives would be devastated” by extended incarceration, or by letting defendant show a “graphic but accurate film of living conditions in the only local prison”).

5. In Shannon v. United States, 512 U.S. 573 (1994), the Supreme Court held that a defendant, who had been charged with a violent crime and offered an insanity defense, was not entitled to an instruction that he would be committed involuntarily if the jury accepted the defense, to keep the jury from mistakenly believing that a finding of insanity would allow the defendant to go free. The majority in Shannon wrote that the jury’s function is to find the facts and decide guilt or innocence, hence that information on “the consequences of a verdict” is irrelevant to this task. This decision has been broadly applied to deny defense requests that the jury be instructed on mandatory minimum sentences that would follow from a verdict of guilty. Do Shannon and Old Chief, taken together, construct a pro-prosecution bias by inviting prosecutors to prove the consequences of criminal acts without allowing defendants to offer analogous proof relating to the consequences of conviction? See James Joseph Duane, supra note 4, at 474 (arguing that Shannon and Old Chief create an inconsistency that “borders on madness,” since the former says juries cannot consider evidence relevant to the moral reasonableness of a guilty verdict but the latter says juries can consider such evidence).

2. Establishing Relevance: The Evidential Hypothesis

Often the relevance of circumstantial evidence is obvious. Everyone may see how it bears on the case, what point it tends to prove and why the point counts. If the question is whether defendant is the one who robbed the bank, evidence that he said he intended to do so requires no explaining.

But relevance may not be so apparent, and explanation may be needed—for the judge as well as the jury. And if the adverse party raises a relevance objection, the judge may ask the proponent to justify the proffer, even if relevance seems apparent. It is one thing to see that evidence bears on a pertinent point, and something else again to understand how and to what extent. It may not support the proponent’s case so strongly as first appears. Ambiguities crop up, as well as explanations that would lead a thoughtful person to another conclusion—one that may leave the positions of the parties unchanged or even assist the adverse party.

Evidential hypothesis. The proponent should be prepared to advance an “evidential hypothesis” explaining why his proof is relevant. The adverse party should be ready to destroy it, if possible, or show its limitations, or even offer a counterhypothesis that explains away the evidence—or enlists it in aid of his
own cause. An evidential hypothesis contains one or more of what logicians call a "general premise"—a proposition of general knowledge about the ways of the world or human nature. It also contains at least one specific premise linking the proof to the general premise. Finally, it sets out the conclusion toward which the evidence points.

The evidential hypothesis sets out the steps of reasoning and inference that logicians describe as argument by "deduction" or "induction." Both forms involve appraising known or accepted data in order to reach a new understanding of matters not directly observed. Logicians define deductive argument as one in which the stated premises necessarily lead to a particular conclusion. In the classic example, the major (or general) premise holds that "all humans are mortal," and the minor (or particular) premise asserts that "Socrates is human." Hence necessarily the conclusion, "Socrates is mortal." The "inductive" argument is less categorical. Logicians define it as one in which the conclusion does not necessarily follow from the underlying premises, though they at least support the conclusion. Proving that defendant robbed a bank by evidence that he stated an intent to do so involves an inductive argument: The major premises are that "People who intend to do something likely do it" and "People who state an intent likely have it." The minor premise is "Defendant stated his intent to rob the bank"; the conclusion is that "He likely did rob the bank."

_Deduction_. Deductive and essentially categorical logic sometimes appears in litigation: Again consider a bank robbery trial, but this time the government offers a surveillance film. This film may be well-nigh conclusive proof that a crime was committed and that the person depicted is the perpetrator, but other evidence may only circumstantially link defendant to the crime, and there may be a question whether he is the person in the film. The government might call a photographic expert who examined the film and elicit his testimony that defendant is the person shown. The prosecutor might not set out his argument as a deductive syllogism, but if the evidential hypothesis were stated it would fit the model: The man in the film is the perpetrator; defendant is the man in the film; hence he is the perpetrator.

_Induction_. Not only in litigation, but in science and everyday thinking, inductive argument is far more common. In a sense it is the more potent and inventive of the two forms, for it reaches further than deduction in seeking to increase understanding. One scholar put it this way:

Valid deductive arguments are demonstrative; that is, if the premises are true, the conclusion must necessarily be true also. Because of this, the conclusion cannot embody conjectures about the empirical world that go beyond what the premises say; in this sense the conclusion of a valid deductive argument must be "contained in" its premises. However, an inductive argument . . . has a conclusion embodying empirical conjectures about the world that do go beyond what its premises say; in an inductive argument the conclusion is not wholly "contained in" the premises.

2. The parties will not likely agree on interpreting the evidence. Their differences are aired in closing argument and ultimately resolved by the trial of fact. Such differences are said to affect "weight" of the evidence and "credibility" of witnesses, rather than "admissibility." But sometimes the proponent's hypothesis is so weak, or the adversary's so strong, that admissibility is the issue.
A. Logical Relevance

S. Barker, The Elements of Logic 223 (3d ed. 1980).

Consider again evidence that defendant said he intended to rob the bank. One major premise was, “People who intend to do something likely do it.” Wigmore pointed out that this premise itself—and remember that it serves as a foundation of an inductive argument—rests on induction: How do we know people act as they intend? The answer is, by observing particular instances in which they do so—in other words, by drawing an inductive inference (a generalization) to the major premise, which serves then as the basis for an inductive inference to the particular point in issue (that this person acted on his intent). So Wigmore noticed that in every inductive argument it is possible to “force” into prominence the implied law or generalization on which it rests more or less obscurely.” But he then reached a questionable conclusion: It is “undesirable” and “useless” to do so, since forcing the premise into prominence simply requires the court “to take it up for examination,” which can be undertaken only by resort to the very inductive inference for which the proponent argued in the first place. See 1 J. Wigmore, Evidence §12 (1943).

If you think something is fishy, you are not alone. Wigmore was confronting the riddle that plagues logicians, which is that inductive argument seems circular.

In a seminal article, Professor James took Wigmore on:

Wigmore does not deny that in every instance proof must be based upon a generalization connecting the evidentiary proposition with the proposition to be proved. Conceding this, he argues that the generalization may as well be tacitly understood as expressed, . . . “because the Court’s attention is merely transferred from the syllogism as a whole to the validity of the inference contained in the major premise.” Yet it is precisely in this transfer of attention that the value . . . lies. [Wigmore’s] own examples illustrate the point. In the case of the repaired machinery we are told: “People who make such repairs [after an accident] show a consciousness of negligence; A made such repairs; therefore, A was conscious of negligence.” Before this . . . proof can be evaluated, ambiguity must be eliminated from the major premise. By “people” shall we understand “some people” or “all people”? If the argument is intended to read, “Some people who make such repairs show consciousness of negligence; A made such repairs; therefore A was conscious of negligence,” it contains an obvious logical fallacy. If intended to read, “All people who make such repairs show consciousness of negligence; A made such repairs; therefore, A was conscious of negligence,” it is logically valid. However, few could be found to accept the premise that all persons who repair machinery after an accident show consciousness of guilt; that is, that no single case could be found of one who, confident of his care in the past, nevertheless made repairs to guard against repetition of an unforeseeable casualty or to preserve future fools against the consequence of their future folly. Here the result of [forcing the premise into prominence] is discovery that it is invalid—at least in the terms suggested.

James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689, 696-697 (1941).

Consider evidence that defendant said he intended to rob a bank. The government advances the evidential hypothesis: People who intend to do something likely do it, and people who announce an intent likely have it. Combine the evidence with the premises, and the conclusion follows—not that defendant
must have robbed the bank, but that he likely did so. How likely is hard to say. James again:

Once one attempts to deal, in a quasi-syllogistic form, not with certainties but with probabilities, additional opportunities for fallacy are presented. Suppose that it is argued: “Most As are X, B is an A, therefore B is probably X; or Nine-tenths of all As are X, B is an A, therefore the chances are nine to one that B is an X.” Neither of these arguments is logically valid except upon the assumption that As may be treated as a uniform class with respect to the probability of their being X. This can be because there really is no way of subdividing the class, finding more Xs in one subclass than in another, or because no subdivision can be made in terms of available data. Suppose that nine-tenths of all people in the world have dark eyes. If absolutely all one knew about B was that he was a person, it would be an apparent nine-to-one chance that B had dark eyes. But if one knew B to be a Swede, the percentage of dark eyes in the total population of the world would no longer be important. One would want to know about the proportion of dark-eyed Swedes, which might differ from the ratio among humans generally.

James, id. at 697.

How about the government’s two premises? Do all persons having a particular intent carry it out? (Of course not, common experience cries out. Hence the conclusion is less than certain, and the argument is inductive rather than deductive.) Do most—say, seven out of ten? (Nobody knows, and we cannot be sure that the conclusion is more probable than not.) Do some—say, two out of ten? (Surely yes—often we act in accordance with earlier-formed intent—and the evidence provides some support for the conclusion.) Does it matter what is intended? (Just as the percentage of Swedes with dark eyes may differ—one supposes it is smaller—from the percentage of people in general with dark eyes, so the percentage of people intending to take a walk who actually do so may differ—one supposes it is higher—from the percentage of people intending to commit serious crimes who actually do so.) Does the age or circumstance of the person matter? (Surely it does: One who despairs of lawful profits and sustains himself in criminal endeavors may be more likely to carry out an intent to commit a now-familiar sort of act than, say, a hitherto law-abiding college student, who may want or need money too, but for whom the world holds promise of moderate profit from lawful pursuits.)

And what of the second premise—that persons who announce an intent likely have such intent? (Again, surely less than all who make such announcement actually harbor such intent, but at least some do. Again the nature of the announced intent may matter, and again the situation of the person in question probably matters.)

**PROBLEM 2A. Was He Going Too Fast?**

On an open stretch of two-lane highway in Nevada, Jay Gadsby, traveling eastbound in a red Z-Car with racing stripe, collided with Roy Reinhart, headed westbound in a pickup truck with gunrack. Both Jay and Roy were killed instantly. The road was straight, the noonday sun bright overhead, and afternoon thermal
winds had not yet picked up—in short, driving conditions were optimal. Physical facts yield no clues as to the cause of the accident.

In her wrongful death action against Gadsby's estate, Roy's widow offers testimony by another eastbound driver—one Hill, who was the first to come upon the accident—that 30 miles west of the point of collision the red Z-Car had overtaken him going "at least 80 miles per hour." The defense objects, arguing that Hill's testimony is "irrelevant" when offered as proof that Jay was speeding at the time of the accident, at least in the absence of further proof that Gadsby likely continued to travel at the rate observed for the 30 miles between the sighting and the point of impact.

Is the evidence relevant on the question of Gadsby's speed at the time of impact? Should the judge admit the evidence only if the proponent offers additional proof to satisfy the condition suggested by defendant?

3. **Relevance As Threshold: The Standard of Probative Worth**

Rule 401 provides no particularized test of relevancy, but sets a general standard requiring a "tendency" to prove or disprove a consequential fact. So it is tempting to ask: How strong must the tendency be?

Over the years four answers have been suggested:

One is that evidence has the required tendency only if it makes the point more probably true than not. But the standard must be applied again and again during trial because evidence is offered piece by piece. Hence defining the tendency this way seems too strict: It would exclude many items of proof that, taken together, might have high probative value. In civil cases usually the party with the burden of persuasion must satisfy the trier that the facts on her side are more probably true than not, so in these cases adopting this measure as the standard would mean that evidence is relevant only if it is also sufficient.

A second answer holds that evidence is relevant only if the suggested inference is more probable than any other. Some courts have taken this view. See Standafer v. First National Bank, 52 N.W.2d 718 (Minn. 1952) (in wrongful death action arising out of accident in which decedent fell down elevator shaft, error to admit evidence that he was knocked from his shoe, offered as proof that he tripped on L-beam while working on top of the elevator car; it was equally probable that he was knocked off during fall) (harmless). But setting the standard at this level would produce a sliding scale, in which evidence would be scrutinized more strictly at the beginning of trial, when little or nothing is known of the facts, than at the end, when probative worth would be more apparent in light of evidence already presented. See Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Vand. L. Rev. 385, 390 (1952).

A third answer rejects the first two, but insists that the necessary tendency requires more than minimal probative worth, hence that there is a standard of "legal relevancy" that is more strict than logic and reason alone would indicate. Wigmore took this view, writing that legal relevance demands an incremental "plus value." Occasionally courts agree. See Frank R. Jelleff, Inc. v. Braden, 233 F.2d 671, 679 (D.C. Cir. 1956). Wigmore thought the accumulation of legal precedent would create rules that resolve relevance problems, and
that resort to logic and experience on an ad hoc basis is inappropriate. See 1 J. Wigmore, Evidence §28 (1943).

The fourth answer holds that evidence is relevant if it makes the point to be proved more probable than it was without the evidence. Here is the most lenient standard of all—the one most favoring admissibility. It is the one adopted in FRE 401. The idea is captured in some downhome aphorisms: "A brick is not a wall," McCormick on Evidence §185 (E. Cleary 3d ed. 1984); "Not every witness can make a home run" (ACN to FRE 401, paraphrasing McBaine). Consider the explanation set out by Professor James, writing about evidence of intent as proof of subsequent action:

Persons who are unwilling to agree that men's fixed designs (at least in the case of murder) are "probably" carried out—or, even conceding the fact of murder, that proof of A's fixed design to kill B establishes A, more likely than not, as B's killer—still agree that somehow this bit of evidence does have some tendency to indicate A's guilt. What form of general statement can reconcile these views? Perhaps something like this: "Men having such a fixed design are more likely to kill than are men not having such a fixed design." Those who contend that even fixed designs to kill are more often abandoned or thwarted than carried out can and doubtless will still concede that enough such designs are carried to execution so that the percentage of murderers is higher among persons entertaining such a fixed design than among the general public. Obviously this proposed generalization does not lead us from A's fixed design to kill B to the conclusion that A probably did kill B. There is nothing disturbing in this. This conclusion simply does not follow from the evidence of design. The error was in the original "direct induction." In fact, no useful conclusion about A's guilt can be drawn from design or intent alone. On the basis of an acceptable generalization we are able only to place A in a class of persons in which the incidence of murder is greater than among the general public. We cannot now say that A is probably guilty, but we can say that the apparent probability of his guilt is now greater than before the evidence of design was received. This is logical relevancy—the only logical relevancy we can expect in dealing with practical affairs where strict demonstration is never possible. The advantage of [forcing the general premise into prominence] is that we know to what degree of proof we have attained, and do not overstate our results.

James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689, 698-699 (1941).

In effect this fourth answer holds that the question we began with is unanswerable. Thayer was right: There is no real test; attempting to refine the idea of "tendency" is like trying to bring in a test by the back door.

4. Relevance In Operation: Hypothesis and Standard Applied

Assessing relevance involves understanding the evidential hypothesis that leads by inductive argument to the sought-after conclusion and deciding whether the argument really does increase the likelihood of the conclusion. Consider these matters in the context of a common kind of evidence—proof of flight by the accused, offered by the prosecutor as evidence of guilt.
A. Logical Relevance

PROBLEM 2.B. Flight and Guilt

As Joe and his assistant Andy are closing the mobile fish-and-chip stand they operate from a truck in a parking lot near a lighted baseball field, a man armed with a sawed-off shotgun robs them of the evening’s proceeds.

The next day Joe and Andy examine mug books at the stationhouse and independently identify Carl as the thief. Later that day police arrest Carl at his home.

At trial, the state calls Brenda. She is Carl’s girlfriend, and she answered the door at the time of the arrest. The state offers her testimony that when Carl saw the police approaching he first ran to the back door, then hid in a closet after discovering an officer standing guard in the alley. Carl objects, arguing that proof of his behavior at the time of arrest is irrelevant. In a sidebar conference, his lawyer points out that Carl’s arrest was based on an outstanding default warrant, issued two years earlier on unrelated charges.

State the evidential hypothesis supporting the proffer. State a counterhypothesis favoring exclusion. How should the judge rule, and why?

NOTES ON EVIDENCE OF ATTEMPTS TO AVOID CAPTURE

1. Evidence of efforts to avoid capture is generally admissible in criminal trials. We even have a Biblical aphorism: “The wicked flee when no man pursueth; but the righteous are bold as a lion.” Proverbs 28:1. The Supreme Court has long thought such evidence is relevant, Allen v. United States, 164 U.S. 492, 499 (1896) (flight by the accused is competent evidence having a tendency to establish guilt), and it usually comes in. See United States v. Martinez, 681 F.2d 1248, 1257 (10th Cir. 1982) (few cases are found in which such evidence is excluded); State v. Payne, 280 S.E.2d 72, 80 n.2 (W. Va. 1981) (citing authority from all but three states approving such evidence).

2. Evidence of flight does not create a “presumption of guilt” or suffice for conviction. Hickory v. United States, 160 U.S. 408, 416 (1896). And the Court has declared that the Biblical aphorism does not state “an accepted axiom of criminal law,” noting that there may be reasons for flight apart from guilt:

Innocent men sometimes hesitate to confront a jury,—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.

Alberty v. United States, 162 U.S. 499, 511 (1896). See also United States v. Stewart, 579 F.2d 356, 359 n.3 (5th Cir.) (approving instruction warning jury that flight might result from “fear of being apprehended, unwillingness to confront the police, or reluctance to confront the witness”), cert. denied, 439 U.S. 936 (1978). While flight bears generally on guilt, it clearly cannot be taken as proof of some specific elements in the alleged crime. See United States v.
Owens, 460 F.2d 467, 470 (5th Cir. 1972) (alleged interstate transportation of stolen money orders; evidence of defendant’s flight in Louisiana could not be taken to establish that the money orders in question had been forged in New Jersey).

3. Such evidence can be troublesome because the very idea of flight is interpretive, amounting to a gloss or reading of human conduct. Sometimes there is no room for doubt, as happens when defendant leads arresting officers driving a clearly marked vehicle on a high-speed chase or runs when uniformed officers approach. But often the evidence is subject to doubt. It may show, for example, only that after the crime defendant could not be located in his usual haunts, see United States v. Sims, 617 F.2d 1371, 1378-1379 (9th Cir. 1980) (failure to return to “halfway house” could be viewed as flight); Commonwealth v. Toney, 433 N.E.2d 425, 431-432 (Mass. 1982) (after homicide, inability of law enforcement officers to locate defendant at her home or workplace or by contacting four sisters and one cousin amounted to evidence of flight). Or it may show only that he left the environs after the crime, see United States v. Beahm, 664 F.2d 414, 419-420 (4th Cir. 1981) (on receipt of note from FBI requesting interview three weeks after crime, defendant went from Virginia to Florida; not flight). Or it may show that he was arrested in another jurisdiction, with no indication when he left the area, see United States v. Howze, 668 F.2d 322, 324-325 (7th Cir. 1982) (charged with robbing bank in Illinois, defendant was arrested four months later in Minnesota; court should reconsider whether these facts indicate flight). Yet even in such cases, the inference of flight might be persuasive if other factors are present. See United States v. Martinez, 681 F.2d 1248, 1254-1259 (10th Cir. 1982) (attorney disappeared after television and newspaper reports said he was wanted in connection with letter bombs, abandoning family and law practice, allowing driver’s license to lapse and failing to attend mother’s funeral; seven years later he was arrested entering from Mexico with false name and passport; trial judge erred in excluding proof of these facts to show flight; defendant “had to know” he was wanted, and there was enough evidence that he disappeared shortly after issuance of arrest warrant).

4. Courts often suggest that relevancy depends on the reasonableness of the assumption that defendant knew he was under investigation and that this inference becomes weaker as lapsed time between the crime and alleged flight increases. See United States v. Jackson, 572 F.2d 636, 640-641 (7th Cir. 1978).

5. Important to the prosecutor is an instruction that invites the jury to consider flight as evidence of possible guilt. Kevin F. O’Malley, Jay E. Grenig, and Honorable William C. Lee, Federal Jury Practice and Instruction §14.08 (5th ed. 2000); United States v. Blue Thunder, 604 F.2d 550, 556 (8th Cir.) (approving flight instruction), cert. denied, 444 U.S. 902 (1979). If defendant’s conduct cannot support an inference of flight, it may be reversible error to invite the jury to consider flight as evidence of possible guilt. See United States v. Myers, 550 F.2d 1036, 1048-1051 (5th Cir. 1977) (conviction reversed).

6. Similar kinds of proof include evidence that the accused (1) employed false identification or aliases, (2) destroyed or concealed evidence (“spoliation”), (3) fabricated evidence or suborned perjury, (4) killed, threatened, or otherwise impeded witnesses for the prosecution, (5) sought to escape detention, (6) attempted suicide, or (7) sought to bribe public officials. See generally Mueller and Kirkpatrick, Evidence §4.4 (3d ed. 2003); Hutchins and Slesinger,
A. Logical Relevance


5. Relevance Reconsidered: The Problem of Induction

We have looked at the difference between inductive and deductive reasoning. Logicians who specialize in epistemology have paid close attention to induction. They have classified it, exposed its central dilemma, refined and defended it. The problem of induction is largely a problem of relevance, and the challenge to logicians is the challenge of FRE 401.

Varieties of inductive reasoning. Logicians divide inductive logic into four categories.

1. Inductive generalization. In this form, the inquirer draws an inference from a sample of observed instances to a conclusion about further instances not observed:

All observed jadestones are green;

Therefore the next jadestone we see will be green.

or

Studies show that smokers suffer eventually from lung cancer much more often than people who do not smoke;

Therefore, smokers in general are much more likely to suffer from lung cancer than nonsmokers.

In the first example the premise is in a sense categorical (all observed samples are "green"), but it tacitly concedes that not all jadestones have actually been seen, so the conclusion (although stated categorically) cannot be said to be certain. In the second example the premise is qualified (it says "more often" rather than "always"), and the conclusion is also qualified (it says "more likely"), and sometimes such a qualified premise may be set out with numerical precision using a percentage, which adds precision to the conclusion. As the smoking example suggests, induction can involve predicting future consequences.

2. Inductive analogy. Here the reasoning proceeds from resemblances between known instances and some aspects of the instance under study, then suggests an inference that an unknown aspect of the latter follows a known aspect of the former:

Known instances a, b, and c have qualities (or behave in the manner of) Q, R, and S;

Instance d (under study) resembles a, b, and c in that it too has qualities (or behaves in the manner of) Q and R;

Therefore, instance d probably has the quality (or behaves in the manner of) S.
Reasoning by analogy is common, in everyday thinking and evaluating evidence at trial: You need clothes cleaned and pressed in a hurry. Three times before you chose Q-Cleaners and they promised the job done by Friday, but the clothes were not ready until Monday and were badly done. (So you wouldn’t go to the same place with the same request a fourth time; you’d choose another cleaner.) On numerous prior occasions construction cranes collapsed under load, and it was discovered that the accidents resulted from the failure of clamp-like fittings that secure the support cables; when another crane with similar fittings collapses, the court rejects arguments by the maker of the clamps that they could not cause such accidents. See Jones & Laughlin Steel Corp. v. Matherne, 348 F.2d 394 (5th Cir. 1965).

3. Inductive inference to cause. In this form, the inductive argument proceeds upon observation of an event that seems to be the “effect” of something else, and draws an inference that a previous event or condition was the cause. Carelessly advanced, this form of argument falls into the fallacy captured in the Latin expression post hoc ergo propter hoc (“after this, therefore on account of this”). In litigation, reconstruction of accidents involves reasoning of this sort, as does much other proof.

4. Inductive explanation or hypothesis. In the three forms of argument described above, the conclusion involves a particular assertion, but inductive argument may be more in the nature of hypothesis, advanced as the best explanation of observed phenomena. Scientists and detectives reason in this way, seeking to account for or explain observed data, as do prosecutors and law enforcement officers seeking to explain how a web of circumstantial proof establishes defendant’s guilt.

The dilemma of inductive logic. For more than two centuries, philosophers have been plagued by doubt concerning induction. The Scottish philosopher David Hume voiced that doubt:

[A]ll inferences from experience suppose, as their foundation, that the future will resemble the past, and that similar powers will be conjoined with similar sensible qualities. If there be any suspicion that the course of nature may change, and that the past may be no rule for the future, all experience becomes useless, and can give rise to no inference or conclusion. It is impossible, therefore, that any arguments from experience can prove this resemblance of the past to the future; since all these arguments are founded on the supposition of that resemblance.


When we make an inductive statement, . . . such as: “The sun always rises” or “All larks build their nests on the ground,” we are stating something more than experience tells us. We jump to a conclusion the evidence does not strictly warrant. What experience does tell us is that in the past the sun has always risen and larks have built their nests on the ground. . . . But experience does not tell us that the sun will rise tomorrow, [or] that larks will build their nests on the ground next spring. . . .

J. Brennan, Handbook of Logic 185 (1957). And the twentieth-century English philosopher Bertrand Russell captured the Humean dilemma thus:
A. Logical Relevance

A chicken may have been fed by a certain man throughout its life, and have come to look to him confidently for food; but one day he wrings its neck instead. It would have been better for the chicken if its inductive inferences had been less crude.


Why then has inductive argument survived?

Hume thought that induction is not so much a reflective process as the result of habit, for that alone “is the great guide of human life,” which “renders our experience useful to us, and makes us expect, for the future, a similar train of events with those which have appeared in the past.” D. Hume, id. at 44 (36). He did not mean to slight human worth or mental agility in drawing that conclusion. Russell again:

Experience of apples causes you to expect confidently that this apple, which you are about to eat, will taste like an apple and not like a beefsteak. The inductive logician tries to turn this into an argument: “Since the former apples tasted like apples, so will this one.” But in fact former apples are probably not in your thoughts. You have an expectation about this apple, which has causes in your physiology, but not grounds in your thinking. When the logician tries to find grounds, he also tries to weaken your confidence; he tells you it is only probable that this apple will not taste like a beefsteak. At this point you will probably say: “Away with logicians! They only try to confuse me about things that everybody knows perfectly well.” But what everybody knows, or thinks he knows, are the conclusions of inductions, not their connection with the premises. It is the body rather than the mind that does the connecting of premises and conclusions in an induction.

B. Russell, id. at 73-74.

Defense of inductive logic. John Stuart Mill (1806-1873) defended induction, arguing that the cornerstone of inductive logic is the principle that nature is uniform. Unfortunately this conclusion too is inductive, resting on the premise that induction has proved reliable in the past and should remain so. Hence the logic is circular:

You may say: “Well, at least you must admit that induction works.” “Has worked, you mean,” the skeptic will reply: for it is only induction itself that assures us that what has worked will work. Perhaps tomorrow stones will be nourishing and bread will be poison, the sun will be cold and the moon hot. The cause of our disbelief in such possibilities is our animal habits; but these equally might change, and we might suddenly begin to expect the opposite of everything that we expect at present.

B. Russell, id. at 74-75. But Mill's defense is not so easily dismissed:

Mill was aware of this difficulty, and argued that the law of uniformity was exceptional among inductive statements. He was convinced that the usual challenge. . . . could not be brought against this single, all-embracing principle, unique in its comprehensive generality, verified by evidence from all possible quarters, with no known case to the contrary.
J. Brennan, id. at 187.

A more serious challenge rests on the vagueness in the idea of uniformity, because every event supporting the notion can be counted a favorable instance, and an unexplained event tempts the response that "if only we knew all the attendant circumstances, we should see that this too is an instance of Nature's uniformity." Id. Modern commentators emphasize that uniformities can be found in any sequence of observations, hence that the notion of general uniformity in nature is "trivial." See Skyrms, The Goodman Paradox and the New Riddle of Induction, in New Readings in Philosophical Analysis 489 (H. Feigl, W. Sellars, and K. Lehrer eds. 1972).

*The dilemma cut to size.* Modernists have recast the basic inquiry, concerning themselves less with justifying inductive reasoning than with finding principled distinctions between sound and unsound inductive arguments:

That a given piece of copper conducts electricity increases the credibility of statements asserting that other pieces of copper conduct electricity, and thus confirms the hypothesis that all copper conducts electricity. But the fact that a given man now in this room is a third son does not increase the credibility of statements asserting that other men now in this room are third sons, and so does not confirm the hypothesis that all men now in this room are third sons. Yet in both cases our hypothesis is a generalization of the evidence statements. The difference is that in the former case the hypothesis is a *lawlike* statement; while in the latter case, the hypothesis is merely a contingent or accidental generality. Only a statement that is *lawlike*—regardless of its truth or falsity or its scientific importance—is capable of receiving confirmation from an instance of it; accidental statements are not. Plainly, then, we must look for a way of distinguishing *lawlike* from accidental statements.


So how do we distinguish between "lawlike" and "accidental" statements—between reliable and spurious hypotheses about the world? Try your hand at pure inductive logic in a legal context.

**PROBLEM 2-C. Too Much Wax on the Floor?**

Juliette Bryant, a 60-year-old married woman, went grocery shopping at her local Alpha Market on Tuesday, January 3. The weather was unseasonably warm and dry.

While pushing a cart down one of the aisles, Mrs. Bryant fell and sustained a fractured distal of the lower one-third of the right fibula (the small bone that goes into the ankle). Her foot and leg had to be put in a cast for six weeks, and she was hospitalized for 30 days. According to her doctor's testimony, she developed traumatic arthritis causing chronic partial disability that might be permanent.

Bryant and her husband sue Alpha Market, claiming that it failed to maintain its floor in a safe condition. At trial she shows that each Saturday night Alpha cleans the floor by scrubbing with water and detergents, followed by machine-scrubbing to remove old wax and dirt and then the application of a
solution of new wax and water. The evidence indicates that the amount of water in the solution determines how much wax adheres to the floor, and that improper mixtures lead the wax to “cake” and become slick. This procedure was followed on the Saturday before the mishap, and the store was closed on the following Sunday and Monday in observance of the New Year’s holiday. Mrs. Bryant was among the earliest customers on Tuesday morning.

Plaintiffs call Mr. Walters, the manager of Alpha Market, as an “adverse witness.” Over Alpha’s objection, plaintiffs get Walters to admit that “twice before I slipped and fell on the floor when it was overwaxed,” and that he received “several other reports” of customers falling in the past year.

Should plaintiffs have been permitted to ask Walters about his prior falls? About the reports he received that others fell?

B. PRAGMATIC RELEVANCE

1. Prejudice and Confusion

It is said that FRE 401 giveth, but FRE 403 taketh away. The logical relevancy standard in FRE 401 is satisfied by evidence having even slight probative worth, but FRE 403 lets the judge exclude relevant evidence on account of any “danger” described there (“unfair prejudice, confusion of the issues, or misleading the jury”) or any of the “considerations” also set out there (“undue delay, waste of time, or needless presentation of cumulative evidence”).

FRE 403 confers broad discretion on the trial judge. Note, however, that FRE 403 is cast in language favoring admissibility. Evidence is to be excluded only if probative value is “substantially outweighed” by the various dangers and considerations listed. Apparently evidence is to be admitted if probative worth and (for instance) the danger of unfair prejudice are in equal balance. Does it make sense to set a low standard of relevance and then authorize exclusion in broad terms? Does the cast of FRE 403 mean that this power should be exercised sparingly?

STATE v. CHAPPLE
Arizona Supreme Court
660 P.2d 1208 (Ariz. 1983)

[Alleged first-degree murder, arising out of apparent dispute over drug money. Victim Bill Varnes was found in the bedroom of a house trailer, dead of a gunshot wound in the head. At his trial, defendant Dolan Chapple claimed to have been in another state at the time. He was convicted on the basis of testimony by Malcolm Scott and Pamela Buck, who were themselves involved in the drug transaction and who did not actually see the killing. They placed one Dee at the scene of the crime, however, and Buck testified that Dee had confessed to killing Varnes. And both Scott and Buck identified defendant as Dee by picking out his picture from a photographic display.]
FELDMAN, J.

Defendant contends that the trial court erred by admitting pictures of the charred body and skull of the victim, Bill Varnes. The four pictures were admitted in conjunction with the testimony of Detective Hanratty, the investigating officer, and Dr. Thomas Jarvis, the medical examiner. In vivid color, the photographs portray Varnes' burned body, face and skull, the entry wound of the bullet, a close-up of the charred skull with a large bone flap cut away to show the red-colored, burned dura matter on the inside rim of the skull with the pink brain matter beneath and a pencil pointing to the location of the bullet embedded in the brain. The last photograph shows the brain as the bullet is being removed. On appeal, defendant contends that these pictures were gruesome and inflammatory and therefore should not have been admitted.

We have previously stated the law on this issue as follows:

Photographs having probative value are admissible in evidence whether they are in black and white or color. They must, of course, be relevant to an issue in the case and may be admitted in evidence to identify the deceased, to show the location of the mortal wounds, to show how the crime was committed and to aid the jury in understanding the testimony of the witnesses. If the photographs have any bearing upon any issue in the case, they may be received although they may also have a tendency to prejudice the jury against the person who committed the offense. The discretion of the trial court will not be disturbed on appeal unless it has been clearly abused.


The facts of this case and the presence of the issue of inflammatory photographs in many other cases recently argued to this court lead us to reexamine the often quoted language from State v. Mohr. That language should not be interpreted to mean that any photograph which is relevant may be admitted despite its tendency to prejudice the jury. If this were the rule, any photograph of the deceased in any murder case would be admissible because the fact and cause of death are always relevant in a murder prosecution. Relevancy is not the sole test of admissibility for the trial court. Where the offered exhibit is of a nature to incite passion or inflame the jury—and the photographs in the case at bench certainly fall within that category—the court must go beyond the question of relevancy and consider whether the probative value of the exhibit outweighs the danger of prejudice created by admission of the exhibit.

State v. Beers, 448 P.2d 104, 108-110 (Ariz. App. 1968). . . . We first adopted this rule in these words:

Relevancy is thus not the sole test of the admissibility of evidence; admissibility depends, rather, on a balancing of the various effects of the admission of such evidence, considered in the light of recognized rules of law governing the administration of criminal justice.

The. . . test has since been codified in Arizona Rule 403.

Thus, the correct rule is that exhibits which may tend to inflame the jury must first be found relevant. The trial court must then consider the probative value of the exhibits and determine whether it outweighs the danger of preju-
8. Pragmatic Relevance

dice. . . . In making this determination, the trial court must examine the purpose of the offer. In State v. Thomas, 515 P.2d 865 (Ariz. 1973), we identified the following uses for which photographs of a corpse may be admitted in a homicide prosecution: to prove the corpus delicti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree of atrocity and the location of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state’s theory of how and why the homicide was committed. If any of these questions is contested, either expressly or implicitly, then the trial court may find that the photographs have more than mere technical relevance; it may find that the photographs have “bearing” to prove a contested issue in the case and may, therefore, be admissible notwithstanding a tendency to create prejudice.

However, if the photographs have no tendency to prove or disprove any question which is actually contested, they have little use or purpose except to inflame and would usually not be admissible.

In this case the State had the burden of proving all the elements of first degree murder as well as responding to defendant’s sole argument that he was not Dee. In meeting this burden, the State not only had to establish that the defendant was at the scene of the crime, but also that he was responsible for murder. The State argues that the photographs were relevant to these purposes for several of the reasons enumerated in Thomas, supra. We agree that the photographs were relevant to the issues raised by the State’s burden of establishing a case for first degree murder. We also agree with the State’s claim that the photographs are useful to prove that Dee (who told Buck that he had “shot that ____ in the head”) had committed one of the killings.

While both of these arguments establish the relevancy of the photographs, under the facts of this case we find that they had little probative value. The fact that Varnes was killed, the medical cause of his death, and what was done with his body after death were not in controversy. The defense did not dispute, controvert or contradict the State’s testimony from the two witnesses on this subject, Detective Hanratty and Dr. Jarvis, and even offered to stipulate to the cause of death. The facts illustrated in the photographs were simply not in dispute or at issue. As the prosecution accurately told the jury in final argument, the only issue to be tried was whether Malcolm Scott and Pamela Buck were correct in identifying the defendant as Dee.

While the exhibits did illustrate the testimony of Hanratty and Jarvis and thus helped the jury comprehend that testimony, there was simply no conflict with regard to the point at which the bullet entered Varnes’ skull, the depth of its penetration, the lobe of the brain in which it was lodged, the damage which it did, or over whether it or some other condition had caused death. Nor was there any value to the photographs on the theory that they were

7. The trial judge admitted three of the photographs over objection, informing the jurors that the photographs were “distasteful, perhaps to some even shocking. The . . . sole purpose for which you are to consider their admission into evidence, is the fact that they do show where the slug which the detective described was in the skull of one of the victims.” The detective and medical examiner both testified without contradiction to the area of the brain in which the bullet was found and the cumulative effect of the photographs could serve no purpose under these facts. We do not believe that the court’s statement to the jury regarding the purpose of the admission can be relied upon to negate the admittedly “shocking” effect of the photographs.
relevant to Buck's testimony that after the killings Dee admitted that he had shot Varnes in the head. This admission may well serve to establish that Dee was the one who killed Varnes, but defendant did not deny that Dee had killed Varnes by shooting him in the head. Defendant argued only that he was not Dee. The photographs showing the bullet hole in the skull and the bullet in the burned brain were not probative on the only issue being tried, which was whether defendant was Dee.

In summary, the narrow issue on which this case turned was identification. The matters illustrated by the photographs were cumulative of uncontradicted and undisputed testimony, as well as the subject of a stipulation offered by the defendant. We find, therefore, that the photographs in question had little probative value on the issues being tried and that their admission in evidence could have almost no value or result except to inflame the minds of the jury. Under such circumstances, there was nothing for the trial court to weigh, nothing on which its discretion could be exercised, and the admission of the photographs was error.

In reaching this conclusion, we recognize that the state cannot be compelled to try its case in a sterile setting. Exhibits which have the tendency to cause prejudice may often be admissible despite offers to stipulate or the absence of controverting or contradicting evidence. Many times the accuracy of a witness' testimony is not conceded and can be better understood when illustrated by photographs. Testimony may be difficult to comprehend without photographs, or exhibits may corroborate or illustrate controverted testimony. In such cases, the exhibits have probative value on issues expressly or tacitly in dispute. In every case in which there is probative value to the exhibit, it is for the trial court to weigh that value against the danger of prejudice and its conclusion on this point will not be disturbed absent a clear abuse of discretion.

In this case, however, there was nothing of significance to weigh and the only possible use of the photographs would have been to inflame the minds of the jury or to impair their objectivity. Since there was so little probative value to these photographs and since their capacity to inflame is obvious, the admission was legally erroneous and an abuse of discretion.

[The conviction is reversed on account of errors in admitting the photographs and excluding expert testimony offered by the defense concerning the reliability of eyewitness identification.]

---

OLD CHIEF v. UNITED STATES (II)
Supreme Court of the United States
519 U.S. 172 (1997)

JUSTICE SOUTER delivered the opinion of the Court.

[Recall that Johnny Lynn Old Chief was charged with being a felon in possession of a firearm. Recall too that he was also charged with assault with a dangerous weapon and use of a firearm in a crime of violence. The prior conviction involved an assault causing serious bodily injury, so the defense offered to stipulate to the conviction in hope of keeping details from the jury. Early in the opinion, the Court concludes that the name of the prior conviction]
B. Pragmatic Relevance

is relevant, that the defense offer to stipulate did not make this point irrelevant, and that it is important for a variety of reasons to admit evidence rather than try cases on stipulated facts. See Old Chief (I) in section A of this chapter, supra. Here the Court addresses the matter of unfair prejudice under FRE 403.

As for the analytical method to be used in FRE 403 balancing, two basic possibilities present themselves. An item of evidence might be viewed as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded. Or the question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case as the court understands it when the ruling must be made. This second approach would start out like the first but be ready to go further. On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. As we will explain later on, the judge would have to make these calculations with an appreciation of the offering party’s need for evidentiary richness and narrative integrity in presenting a case, and the mere fact that two pieces of evidence might go to the same point would not, of course, necessarily mean that only one of them might come in. It would only mean that a judge applying FRE 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point. Even under this second approach, as we explain below, a defendant’s FRE 403 objection offering to concede a point generally cannot prevail over the Government’s choice to offer evidence showing guilt and all the circumstances surrounding the offense.

The first understanding of the rule is open to a very telling objection. That reading would leave the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance. He could choose the available alternative carrying the greatest threat of improper influence, despite the availability of less prejudicial but equally probative evidence. The worst he would have to fear would be a ruling sustaining a FRE 403 objection, and if that occurred, he could simply fall back to offering substitute evidence. This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.

6. It is important that a reviewing court evaluate the trial court’s decision from its perspective when it had to rule and not indulge in review by hindsight. . . .

7. . . . [O]ur holding is limited to cases involving proof of felony status. On appellate review of a FRE 403 decision, a defendant must establish abuse of discretion, a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon.
Rather, a reading of the companion to FRE 403, and of the commentaries that went with them to Congress, makes it clear that what counts as FRE 403 "probative value" of an item of evidence, as distinct from FRE 401 "relevance," may be calculated by comparing evidentiary alternatives. The ACN to FRE 401 explicitly say that a party's concession is pertinent to the court's discretion to exclude evidence on the point conceded. . . . As already mentioned, the Notes make it clear that such rulings should be made not on the basis of FRE 401 relevance but on "such considerations as waste of time and undue prejudice (see FRE 403). . . ." The ACN to FRE 403 then take up the point by stating that when a court considers "whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may . . . be an appropriate factor." . . . Thus the notes leave no question that when FRE 403 confers discretion by providing that evidence "may" be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives.

In dealing with the specific problem raised by §922(g)(1) and its prior conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, but will be substantial whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious, and Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charge against him.8

The District Court was also presented with alternative, relevant, admissible evidence of the prior conviction by Old Chief's offer to stipulate, evidence necessarily subject to the District Court's consideration on the motion to exclude the record offered by the Government. Although Old Chief's formal offer to stipulate was, strictly, to enter a formal agreement with the Government to be given to the jury, even without the Government's acceptance his proposal amounted to an offer to admit that the prior-conviction element was satisfied, and a defendant's admission is, of course, good evidence. See FRE 801(d)(2)(A).

Old Chief's proffered admission would, in fact, have been not merely relevant but seemingly conclusive evidence of the element. The statutory language in which the prior-conviction requirement is couched shows no congres-

8. It is true that a prior offense may be so far removed in time or nature from the current gun charge and any others brought with it that its potential to prejudice the defendant unfairly will be minimal. Some prior offenses, in fact, may even have some potential to prejudice the Government's case unfairly. Thus an extremely old conviction for a relatively minor felony that nevertheless qualifies under the statute might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession. Since the Government could not, of course, compel the defendant to admit formally the existence of the prior conviction, the Government would have to bear the risk of jury nullification, a fact that might properly drive the Government's charging decision.
sional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies, and Old Chief clearly meant to admit that his felony did qualify, by stipulating “that the Government has proven one of the essential elements of the offense.” As a consequence, although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior conviction element that would not have been covered by the stipulation or admission. Logic, then, seems to side with Old Chief.

[Here Court discusses “descriptive richness,” “moral underpinnings” of the law, and jury “expectations.” See Old Chief (I) in section A of this chapter, supra.]

[Recognition that the prosecution] needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant’s legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him. As in this case, the choice of evidence for such an element is usually not between eventful narrative and abstract proposition, but between propositions of slightly varying abstraction, either a record saying that conviction for some crime occurred at a certain time or a statement admitting the same thing without naming the particular offense. The issue of substituting one statement for the other normally arises only when the record of conviction would not be admissible for any purpose beyond proving status, so that excluding it would not deprive the prosecution of evidence with multiple utility; if, indeed, there were a justification for receiving evidence of the nature of prior acts on some issue other than status (i.e., to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,” FRE 404(b)), FRE 404(b) guarantees the opportunity to seek its admission. Nor can it be argued that the events behind the prior conviction are proper nourishment for the jurors’ sense of obligation to vindicate the public interest. The issue is not whether concrete details of the prior crime should come to the jurors’ attention but whether the name or general character of that crime is to be disclosed. Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose; the fact of the qualifying conviction is alone what matters under the statute. . . . Finally, . . . proof of the defendant’s status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense. Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant’s subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.

Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. . . . In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially
outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.\textsuperscript{10}

The judgment is reversed, and the case is remanded to the Ninth Circuit for further proceedings consistent with this opinion.\textsuperscript{11}

It is so ordered.

\textit{Justice O'Connor, with whom The Chief Justice, Justice Scalia, and Justice Thomas join, dissenting.}

[The dissent argues that the relevant statute shows that Congress thought jurors would learn “the name and basic nature” of the prior offense. The statute uses the term “crime punishable by imprisonment for a term exceeding one year,” and does not refer merely to “felons,” and it does provide that certain “business crimes” and misdemeanors that happen to be punishable by imprisonment of two years or less. Hence “crime” is not an “abstract or metaphysical” concept, and the government must prove that the defendant “committed a particular crime.”

More importantly, one is not found guilty of a crime or felony, but of “a specified offense.” Thus the prior case found that Old Chief “did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury,” and the name and nature of his crime were “inseparable from the fact of his earlier conviction.”

Still more troubling is the majority’s argument that the general principle favoring evidentiary depth has “virtually no application” here, for a jury is “as likely to be puzzled” by a “missing chapter” relating to a prior felony conviction as it would be by a concession of any other element in the crime.]

\textbf{NOTES ON PREJUDICE, GRUESOME PHOTOGRAPHS, AND PRIOR CRIMES}

1. What is “prejudice” in \textit{Chapple}? What is it in \textit{Old Chief}? Are defendants complaining that the evidence (photographs and prior conviction) “hurt” or “harms” their case? Doesn’t all relevant evidence do that? \textit{Chapple} and \textit{Old Chief} agree that a stipulation offered by the defense is not enough by itself to require

\textsuperscript{10} There may be yet another means of proof besides a formal admission on the record that, with a proper objection, will obligate a district court to exclude evidence of the name of the offense. A redacted record of conviction is the one most frequently mentioned. Any alternative will, of course, require some jury instruction to explain it (just as it will require some discretion when the indictment is read). A redacted judgment in this case, for example, would presumably have revealed to the jury that Old Chief was previously convicted in federal court and sentenced to more than a year’s imprisonment, but it would not have shown whether his previous conviction was for one of the business offenses that do not count, under §921(a)(2). Hence, an instruction, with the defendant’s consent, would be necessary to make clear that the redacted judgment was enough to satisfy the status element remaining in the case. The Government might, indeed, propose such a redacted judgment for the trial court to weigh against a defendant’s offer to admit, as indeed the government might do even if the defendant’s admission had been received into evidence.

\textsuperscript{11} In remanding, we imply no opinion on the possibility of harmless error, an issue not passed upon below.
exclusion of evidence. As you know from Old Chief (I), the reason has to do with the definition of relevant evidence and with certain policies. Yet a proffered stipulation clearly means there is less need for the evidence, so the risk of prejudice (or "unfair prejudice") weighs more heavily in the balance and may require exclusion of the evidence.

2. As noted in Chapple, courts often admit photographs of the victim in homicide cases. Defendants often offer to stipulate to the appearance of the scene and cause of death—points they are unlikely to contest anyway—in hope of keeping such pictures from the jury. But prosecutors have a laundry list of points on which such photographs bear: To establish cause of death, to show position of the body, to show nature and relationship of wounds, to prove viciousness of attack, and so forth. On one or more of these arguments, prosecutors regularly prevail, and some modern authority holds that the logic of Old Chief in requiring courts to accept defense offers to stipulate in felon-in-possession cases does not require courts to exclude bloody photographs in homicide trials. See Edwards v. United States, 767 A.2d 241 (D.C. Ct. App. 2001) (in trial for murder of 2-year-old placed in tub of hot water, admitting photographs of body despite defense offer to stipulate to the identity of the body and the cause of death; Old Chief did not require otherwise).

3. Often the cases hold, like Chapple, that the mere fact that photographs are "gruesome" does not mean they should be excluded. See State v. Smith, 684 N.E.2d 660, 687-688 (Ohio 1997) (admitting "gruesome" photographs of body, crime scene, and autopsy; details included "the depressed skull fracture caused by a hammer-like object" which conflicted with defendant's testimony about what he had done). Indeed, they are sometimes admitted because they demonstrate atrocity. See State v. Green, 48 P.3d 1276, 1278 (Kan. 2002) (in trial for "incredibly violent and gruesome homicide" where death was caused by "massive blows to the head" that "did horrific damage to the face and skull" and "near decapitation resulted from multiple sawing motions from a sharp object," admitting photographs to help medical examiner describe cause of death; fact that juror fainted at the sight was irrelevant: "Gruesome crimes result in gruesome photographs"); Commonwealth v. Rogers, 222 N.E.2d 766, 772 (Mass.) ("repulsive pictures of mutilated corpse, which left no gruesome detail of this macabre event to the imagination" were relevant on question whether homicide was committed with "extreme atrocity and cruelty"), cert. denied, 389 U.S. 991 (1967); Hopkinson v. State, 632 P.2d 79, 139 (Wyo. 1981) (photographs of victim who had been "brutally tortured before his death"; manner of death was relevant to prosecutor's theory, which was that defendant, who was himself in prison at time of slaying, arranged killing for revenge: "[I]t has never been held that probative evidence is inadmissible solely because of repugnancy. Murder is repugnant"), cert. denied, 455 U.S. 922 (1982). Color slides are sometimes allowed, magnifying the awful image of violent death. See Goff v. State, 430 So. 2d 896, 898-899 (Ala. Crim. App. 1983) (rejecting claim that color slides of victim in hospital should have been excluded because they "produced a magnification of the wounds and a distortion of the injuries"; the slides were "just enlargements").

4. Sometimes courts exclude gruesome photographs under FRE 403 when probative worth is minimal and inflammatory impact is great. The chance for exclusion improves when the numbing impact of such pictures results from
changed conditions, so they are “misleading” under FRE 403 as well as prejudicial. See People v. Coleman, 451 N.E.2d 973, 977-978 (Ill. App. 1983) (reversible error to admit “color slide of the decedent’s decomposing, maggot-infested, partially autopsied body”); Terry v. State, 491 S.W.2d 161, 164 (Tex. Crim. App. 1973) (reversible error to admit pictures of mouth-old murder victim, showing “massive mutilation” caused by autopsy and depicting “severed parts of a human body”). And see Ritchie v. State, 632 P.2d 1244, 1245-1246 (Okla. Crim. 1981) (reversible error to display enlarged photograph of three-year-old victim taken before attack, surrounded by photographs of his body afterwards and during subsequent autopsy; jury “should not have been concerned with what the child looked like prior to the offense,” and “use of a billboard to display the numerous photographs could have served no other purpose than to prejudice and arouse the passions,” and “the billboard became an item of evidence notwithstanding the fact that it was never introduced”).

5. The majority in Old Chief is right, isn’t it, that the felon-in-possession charges against did not turn on the nature of the prior conviction? That is to say, Johnny Lynn Old Chief had been convicted of felonies that were not in the exempt category relating to “business practices,” so it made no difference to the present charges whether he had been convicted of burglary, embezzlement, murder, or something else. It follows, doesn’t it, that telling the jury the nature of the convictions served no legitimate purpose? And it’s obvious, isn’t it, that proving that Old Chief had been convicted of assault might incline the jury to conclude that he was up to no good when found in possession of a gun, and that he is a bad person who deserves to go to jail? As the Court notes, prior criminal acts are often relevant in a very different way: They may shed light on points such as motive (defendant had committed a robbery, so he needed to steal a car to get away) or intent (defendant had often sold cocaine, so this time when he possessed cocaine he probably intended to sell it). In such cases, Old Chief says, a defense offer to stipulate will not likely tip the balance as it did in this instance. Still, courts often exclude prior crimes in this setting when relevance seems attenuated and the risk of prejudice seems large. You will take up this issue in Chapter 5 of this book. At least one commentator thinks that the typical outcomes (bloody photographs are routinely admitted; prior crimes are often excluded) are backwards. See Michael Risinger, John Henry Wigmore, Johnny Lynn Old Chief, and “Legitimate Moral Force”: Keeping the World Safe for Heartstrings and Gore, 49 Hastings L.J. 403, 421 (1998) (arguing that proof of “bloody photos and weeping widows” ought to be more readily excludable than prior convictions, which at least are not “wholly irrelevant by anyone’s definition,” but that “the opposite is in fact the case” and Old Chief does not change this practical reality).

6. Old Chief determines an issue of federal evidence law, so its holding does not bind states. That means that states could, if they chose, continue to admit proof of the names of prior convictions in state felon-in-possession cases. Not surprisingly, however, Old Chief has proven influential in state courts and its reasoning has been applied in other areas. See, e.g., Carter v. State, 824 A.2d 125 (Md. 2003) (trial for possession of regulated firearm by one previously convicted of crime of violence); State v. James, 81 S.W.3d 751 (Tenn. 2002) (trial for escape by convicted felon); But see Rigby v. State, 826 S.2d 694 (Miss. 2002) (in trial on felony DUI charges, prior DUI convictions were admissible
B. Pragmatic Relevance

despite defense offer to stipulate; in Old Chief, the nature of prior convictions
did not matter; here they do); Cox v. State, 819 S.2d 705, 715 (Fla. 2002) (in
penalty phase of trial for commission of crime while under sentence for previous
violent felony, defendant could not exclude proof of prior conviction by offer
to stipulate), cert. denied, 123 S.Ct. 8899 (2003).

7. Old Chief is careful to say that its holding applies only to felon-in-
possession cases. You will see that prior crimes are often proved in efforts to
show particular points like "intent" or "motive" under FRE 404. Old Chief says
that this situation is very different. We revisit this issue in Chapter 5, infra.

PROBLEM 2-D. The Battered Wife

Virginia died of a stab wound in her chest, and the state has charged her
ex-husband Donald with murder and, in the alternative, manslaughter. Donald
has pleaded innocent to the charges, claiming that the killing was accidental.

There is no doubt of the cause of death. Virginia’s body was found in the
trailer where she lived with Todd and Jason (children of hers from a previous
marriage), dead from massive hemorrhaging caused by a chest wound. Nor is
there any doubt that Donald played a role in her death. The evidence shows
that he called the sheriff’s office at 2:00 a.m., saying that he had just stabbed
his wife and giving the address of the trailer. (Officers who went to the scene
found the children asleep.)

During the state’s case-in-chief, the prosecutor proves cause of death (stab
wound) and introduces a knife said to be the fatal weapon, along with lab
analysis connecting the blood on the knife to Virginia, forensic testimony that
a knife of that size made the wound, and evidence that Donald’s latent finger-
prints were found on it.

During the defense case, Donald testifies that he spent the evening at the
trailer watching television with Virginia while the children slept, and that the
two quarreled when she said she was going to leave him and take Todd and
Jason with her. He testifies that he “asked her not to go, and told her how
important her children had become to him, and that he would try to get a
court order to stop her from leaving.” He testifies that Virginia then attacked
him with a baseball bat and admits that he picked up the knife from the
countertop, but says, “She just fell into the blade, and I didn’t even know she
was hurt, at least not right away.”

During its case-in-rebuttal, the state offers testimony by a counselor at a
Shelter for Battered and Abused Women that two years earlier Virginia had
sought refuge there for about 30 days, during which time she divorced Donald.

Donald objects to the testimony of the counselor at the shelter, arguing
that it is irrelevant and prejudicial. Should that testimony get in? How is it
relevant? How is it prejudicial?

PROBLEM 2-E. The Exploding Gas Tank

Struck from behind by a vehicle exceeding the speed limit on the highway,
the car in which Risner was riding as a passenger bursts into flames as a result
of a ruptured fuel tank. Within 24 hours Risner dies from burns sustained in the accident, and his widow thereafter sues the automaker, alleging that negligent design of the fuel tank caused Risner’s death—that if the tank had been properly designed it would not have ruptured when the car was struck from behind.

At trial, defendant automaker introduces testimony by a state trooper that the impacting vehicle was going about 68 mph at the time of impact. The automaker also introduces a certified copy of a guilty plea, entered by the driver of the impacting vehicle to charges of involuntary manslaughter arising from the accident. In the end, the jury returns a verdict for defendant.

Mrs. Risner appeals, urging that the trial court should have excluded the guilty plea under FRE 403. In response, defendant automaker argues that the plea was properly received to show the speed of the impacting vehicle and establish cause of death.

Who should prevail in these arguments and why?

2. Limited Admissibility—Confining the Impact of Proof

It is a perennial headache for judges and trial lawyers that evidence tends to prove too much.

Time and again evidence that seems perfect to prove one point also tends to prove another, on which it is incompetent. Or the other point is itself highly prejudicial. Or evidence is admissible in support of one claim but not another, or admissible against one party but not another. Rule 403 permits the trial judge to balance probative worth against risks of “unfair prejudice” or “confusion” of issues or “misleading the jury” and admit or exclude accordingly.

Rule 105 authorizes a very different approach: Admit the evidence, on the point for which or against the parties as to whom it is competent, but give “limiting instructions” to prevent misuse on other issues or as against other parties. More often than not courts admit evidence having unwanted spillover effect, and parties raising objection on this ground must content themselves with a limiting instruction. The reason is practical necessity, for little proof would be admissible if its relevance or impact in the case had to match exactly its competency. Thus a great deal of evidence is admitted for purposes of impeachment despite the fact that it cannot properly be considered as proof of any number of other points that it may seem to establish, and out-of-court statements and prior criminal acts may be proved in different contexts despite rules restricting their use.

PROBLEM 2-F. “My Insurance Will Cover It”

While driving on the left (inside) lane of a busy four-lane street in Miami, Lina hears a sudden metallic scraping and feels her (new shiny white) Chrysler being shoved roughly leftward. Myra, who is driving in the right (outside) lane hears the same awful noise, and feels her (bright red) Porsche being nudged sharply to the right. The two regain control of their cars. Lina drops back behind Myra, and they pull over to the curb and inspect the damage.
B. Pragmatic Relevance

They exchange names and addresses, and Lina says: “Whoever screws up, her insurance pays. I’m sure my insurance will cover it. They’ll pay for what happened to your Porsche.”

It takes more than $3,000 to fix Myra’s Porsche and almost as much to repair Lina’s Chrysler. Despite their promising amicable beginning, the two women do not manage to work out their differences amicably. Myra sues, and Lina counterclaims.

At trial, Myra proposes to testify to what Lina said.

Lina objects, invoking FRE 411, which says that evidence of liability insurance cannot be offered to prove that a person “acted negligently or otherwise wrongfully.” But Myra insists: “What Lina said is admissible to prove she was negligent. She admitted it, for heaven’s sake.”

How should the court rule, and why?

NOTES ON LIMITED ADMISSIBILITY

1. You will see that what a party says is usually admissible against her, under the admissions doctrine contained in Rule 801(d)(2)(A). See Chapter 4B1, infra. Myra is right that nothing prevents use of a statement by Lina to prove she was negligent. But Lina is also right that under Rule 411 the fact of insurance cannot be used to prove negligence. See Chapter 5E, infra. The challenge is to sort out the admissible from the inadmissible aspects of the proffered evidence. There’s no way, is there, that Myra could testify to part of what Lina said? Should Lina’s statement be excluded altogether under Rule 403 or admitted for a limited purpose under Rule 105? Should Lina ask for a limiting instruction? What would it say?

2. As a practical matter, there is no alternative to the doctrine of limited admissibility, is there? Consider these statements in defense of the doctrine:

To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions.


Unless we proceed on the basis that the jury will follow the court’s instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on the faith that the jury will endeavor to follow the court’s instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice.

Delli Paoli v. United States, 352 U.S. 232, 242-243 (1957) (but there are “practical limitations” on doctrine of limited admissibility). The Court is right, isn’t it?

3. In Opper and Delli Paoli, the Court struggled with limited admissibility in a recurrent situation—the criminal trial of several defendants, where the
prosecutor offers a statement by one that mentions others. Often such a statement is admissible against the person who made it, but not against others. The question was whether the Constitution could tolerate receipt of such a statement against its maker, with a limiting instruction to protect the others. Finally the Court concluded that even clear limiting instructions were not good enough, noting that the prosecutor could sever and proceed separately against the various defendants. Bruton v. United States, 391 U.S. 123 (1968) (set forth and examined in detail in Chapter 4B1, infra).

3. Completeness—Providing Context

Another headache for judges and trial lawyers comes from the fact that a bit of evidence that might be competent on a point is so connected with other evidence that it would be a distortion to consider the one without the other. Sometimes the difficulty is that there is not enough competent evidence to make the point fairly. But usually the problem is that the proponent chooses to present a small piece of a larger picture and thus distorts meaning.

Here again FRE 403 authorizes one approach (balance, and admit or exclude the whole accordingly). And at least in connection with “a writing or recorded statement,” FRE 106 authorizes another: The adverse party may require introduction of “any other part” of the statement that “ought in fairness to be considered contemporaneously” with the part already offered. This “rule of completeness,” as it is sometimes called, obviously could apply to statements that have not been written or recorded and to other sorts of evidence as well, and trial courts have authority enough under Rules 401 through 403 and 611 to apply the same principle to such other proof.

PROBLEM 2-G. “Power Rollback Caused the Crash”

While serving as a Navy flight instructor, Lieutenant Commander Erin Ranney died in a T44 training aircraft that crashed while climbing and turning hard right during “touch-and-go’s” (exercises in which the plane lands, then accelerates and takes off again). Her student, Ensign Dan Knowls, also died in the crash. Jim Ranney, her surviving husband and also a Navy flight instructor, sued manufacturer Rockwood Aircraft.

Jim Ranney thinks that sudden failure of engine power at a crucial moment during take-off caused the crash. He personally investigated the plane and the scene and the available records, and wrote a detailed letter to Commander Martin concluding that “power rollback caused the crash.”

At trial, Ranney presents his evidence of power rollback, mostly in the form of expert testimony developed for trial. During the defense case, Rockwood introduces official findings based on Commander Martin’s investigation, that pilot error caused the crash. Those findings suggest that Knowls was in the left student seat in control of the plane, that Erin Ranney did not at first see a second craft approaching from the left because Knowls blocked her view, and that when she did see the second plane she took the controls and banked right. The findings indicate that Knowls “released the stick” to let her do what she
had to do, but that he had improperly trimmed the plane (the trim tabs were set wrong). Releasing the stick brought the nose up, causing a sudden loss of airspeed leading to stall and crash.

Counsel for Rockwood calls Jim Ranney as an adverse witness, and asks about several comments in his letter. In one, he said the plane "violated pattern integrity as it turned crosswind" when his wife "reacted instinctively and abruptly by initiating a hard right turn" away from the nearby craft. In another, he said Erin Ranney was under "unnecessary pressure" and tried to "cancel the exercise because Knowls was tired and emotionally drained." Counsel for Ranney rose to examine:

Ranney Counsel: In the same letter you were just asked about, didn't you conclude that power rollback caused the crash?

Rockwood Counsel: Well, I'm going to have to object to that, your Honor. We went into the letter because he wrote it and we can do that, but he can't offer his own letter because it's hearsay. Of course he can go over the passages about how fatigued his wife was, and how she was out of the pattern, but he's getting into other subjects now. It's hearsay and beyond the direct.

Ranney Counsel: Your honor, he's trying to pick and choose. If he's going to use the letter, he can't distort it. We need to correct that.

The Court: I'm going to sustain the objection. If you want to ask your client what he learned about the crash by investigating, I'll let you get into that again, just to clear up what he thinks. But don't go into other parts of the letter.

After a jury verdict and judgment for the defense, Jim Ranney appeals, arguing that the court erred under FRE 106 in restricting redirect. What result, and why?

NOTES ON THE COMPLETENESS DOCTRINE

1. FRE 106 invites the adverse party to "require" the proponent to offer another "writing" (or "other part" of a writing) at the same time as the writing (or part) being offered. But in the Problem counsel for Ranney acted to bring out additional parts of the Ranney letter during what amounted to "friendly cross-examination" after counsel for Rockwood had brought out part of the letter on direct. Indeed, counsel for Ranney might have deferred this effort until putting on his case-in-rebuttal. Although framed as what one commentator calls an "interruption rule," FRE 106 clearly authorizes adverse parties to answer an incomplete presentation later in trial, thus also serving as a "rebuttal rule." See generally Dale Nance, A Theory of Verbal Completeness, 80 Iowa L. Rev. 825, 847-849 (1995).

2. Later you will see that what Ranney wrote in his letter could be used against him as his admission, but Ranney could not normally put the letter in evidence himself, since the admissions doctrine does not authorize one to introduce his own statements. (Probably the letter does not fit the exception for public records, although Commander Martin's official findings might fit his exception.) Does this fact make a difference? Some courts take the view that FRE 106 affects only the order or sequence of proof, which would mean that
it does not authorize a person in Ranney's position to offer his own letter later in the trial. The better view, however, is that FRE 106 can sometimes "trump" hearsay and other objections when necessary to provide context. For a good development of this view, see Dale Nance, Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence, 75 Texas L. Rev. 51 (1996).

4. "The Shortness of Life"

Trial judges can exclude even probative evidence not only because of prejudice and confusion—factors likely to distort or undermine the jury's decisionmaking process—but also for more mundane reasons. FRE 403 speaks of "undue delay, waste of time, or needless presentation of cumulative evidence." Here the concern is purely practical, and this aspect of judicial power amounts to what Holmes called "a concession to the shortness of life." Reeve v. Dennett, 11 N.E. 938, 943 (Mass. 1887).

Thus courts may limit the number of witnesses called to prove any particular point. See Michelson v. United States, 335 U.S. 469, 480 (1948) (judge may control number of character witnesses called by the accused); Mills v. Nahabedian, 824 A.2d 500, 503 (R.I. 2003) (in doctor's suit alleging that odors from new carpet made her patients ill, trial judge properly limited number of witnesses that plaintiff could call to five). And judges may exclude, as cumulative, evidence that is duplicative of that already presented. See United States v. Crosby, 713 F.2d 1066, 1071-1072 (5th Cir.) (judge properly excluded journal entries and poetry offered to support defense of post-traumatic stress disorder from Vietnam experience, for these were "cumulative of other testimony"), cert. denied, 464 U.S. 1001 (1983). Judges may also insist that a trial continue once it has begun and deny requests for time to locate new witnesses or evidence.

Consider the following explanation for these powers:

The court's time is a public commodity that should not be squandered. Witnesses and jurors have private lives, and ought not to be asked to give more of their time than is necessary to resolve disputes. A tireless or resourceful litigant should not have unlimited freedom to wear down his opponent by repetitious proof or unnecessary waiting. In short, FRE 403 is evidence law's answer to the adage, "Enough is enough."


5. The Functions of Judge and Jury

Recall that the trial judge alone determines questions of "admissibility" under Rule 104(a) (Chapter 1D4, supra). When it comes to relevancy, he is not always the sole decisionmaker. Sometimes he shares responsibility with the jury, and it is fair to say that roles of judge and jury in these cases are commingled, even confused.

Simple relevance. The judge alone decides whether a particular point, which a proffered item of evidence concededly tends to establish or refute, is "conse-
B. Pragmatic Relevance

sequentia” within the meaning of FRE 401. Only a judge is qualified to decide this point, for it turns on substantive and procedural rules, which establish and limit the issues. See Prather v. Prather, 650 F.2d 88, 90 (5th Cir. 1981) (in suit on oral contract, court erred in admitting statements by plaintiff describing his understanding of the terms, instructing jury to determine whether his belief was relevant; whether state of mind is a relevant issue “is for the court to determine,” and if it had performed this duty it would have concluded that declarant’s state of mind was “not a relevant issue”).

Also the judge decides whether proffered evidence really has a tendency in reason to prove the point for which it is offered. This question is sometimes described as one of “simple” (as opposed to “conditional”) relevance. But it is up to the jury to “weigh” the evidence, as Rule 104(e) implicitly recognizes. “Simple relevance” (or “admissibility”) is often clearly distinguishable from “weight,” but these matters occupy a continuum and merge in an indistinct haze in the middle. Telling simple relevancy from weight is like distinguishing between cases that go to the jury because reasonable minds could assess the evidence differently and cases that require a directed verdict because only one outcome is reasonable.

*Conditional relevancy.* Rule 104(b) provides that when relevance turns on “the fulfillment of a condition of fact,” the judge performs only a screening function: When different answers are reasonable, the jury decides. That is, the juror decides whether the condition is satisfied. Conditionally relevant evidence is admitted “upon, or subject to” introduction of enough other evidence to support the appropriate jury “finding.”

There are a few well-understood instances of “conditional relevancy” in operation. As you have seen (Chapter 1D4, supra), questions of authenticity (like connecting the gun found by Lieutenant Goldbloom to the crime) fall into this category, as does the question whether a witness has personal knowledge. The ACN to FRE 104 advances two other examples, said to be in this category: “[W]hen a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it”; when a letter apparently from Y is offered as his admission, “it has no probative value unless Y wrote or authorized it.” In the first case, relevance of the statement turns on satisfying the condition of proving that X heard it. In the second, relevance of the letter turns on satisfying the condition of proving that Y wrote it.

Yet distinguishing “conditional relevancy” under FRE 104(b) from “simple” relevancy and other questions of “admissibility” under FRE 104(a) can be surprisingly difficult. Try your hand at the following problem.

**PROBLEM 2-H. The Bicycle Brake**

Seven-year-old Raysha borrows her older brother’s 24-inch bicycle and rides down the steep hill in front of her home. She brakes to keep the speed down, but at a curve in the road the brakes fail. The bicycle hits the curb, throwing Raysha over the handlebars into a tree, fracturing her skull. Three years later, her parents sue the manufacturer and the retailer, claiming that the brake was defectively designed because of the use of a plastic cap. The cap fit onto a short metal tube in the wheel hub that permitted the mechanism to be oiled, and
plaintiffs assert that the metal threads on the tube destroyed those in the cap, resulting in its loss, then loss of oil, introducing dust and dirt in the mechanism, ultimately causing brake failure. At trial Raysha’s brother testifies that the cap was missing at the time of the accident.

Plaintiffs then offer testimony by Mundel, a consulting engineer who examined the bicycle two years after the accident, to the effect that the brake did not work properly.

Defendants object, claiming that plaintiffs failed to lay the necessary “foundation” by establishing that the bicycle was in substantially the same condition when examined by Mundel as it was on the day of the accident. To overcome this objection, plaintiffs call Carter, a mechanical engineer who experimented with the bicycle a few weeks after the accident. He attached to the pedal a piece of steel about as heavy as Raysha and rode down the hill about 40 times, to simulate what would happen if she applied the brake. (Carter could not support plaintiff’s case, for he experienced no “total loss” of braking power.) Raysha’s father testifies that at all other times since the accident the bicycle was not used, but was kept in storage in the basement. The defense continues to object, arguing now that Carter’s experiments altered the condition of the brake.

The trial court excludes Mundel’s testimony, finding that plaintiffs failed to establish that the bicycle was in the same condition when Mundel inspected it as it was at the time of the accident. The court directs a verdict for defendants.

Raysha’s parents appeal. Does Mundel’s testimony raise a problem of simple relevancy within FRE 104(a) or one of “conditional relevancy” within FRE 104(b)? Whichever it is, did the trial judge err in excluding it?

NOTES ON CONDITIONAL RELEVANCY

1. Can testimony by Mundel be relevant if the condition of the bicycle was substantially changed when he inspected it, because of passage of time or Carter’s experiments? If Mundel thinks he has something useful to say about the bicycle, don’t we have an issue of “admissibility” of expert testimony?

2. Lawsuits tend to spill beyond neat boundaries, and one side often charges that the other behaved in ways suggesting that its case is weak or false. When such attacks are mounted in sloppy or cavalier fashion, the trial judge can block the effort: Sometimes there is no evidence on which a jury could base a finding of the necessary condition under Rule 104(b). Sometimes the judge decides the point as a matter of admissibility under Rule 104(a), and the decision is that the proof is inadmissible. Consider these examples:

(a) In a trial for manslaughter committed during an aborted drug transaction, defendant objected to evidence that he threatened his girlfriend from jail. The theory was that he was trying to force her to marry him in the belief that being married would keep her from testifying. The reviewing court found that a necessary condition was not satisfied: While attempts to suppress testimony suggest consciousness of guilt, the state “failed to make the threats relevant” because it did not actually show that defendant had that purpose. See Standifer v. Commonwealth, 2003 WL 21254858 (Ky. 2003) (reversing on other grounds).
(b) In a suit against owners of a mobile home park, defendants showed that they received threatening phonecalls from plaintiff’s ex-boyfriend expressing “in aggressive and profane terms” an intent to harm one of the defendants “for harassing and inflicting distress on plaintiff.” Exclusion was proper, however, because a court can require a “foundational showing” that the ex-boyfriend was acting “as an agent for plaintiff,” and defendants “never attempted to show agency,” offering only the content of the tape and plaintiff’s testimony that she “talked to the ex-boyfriend because he is her child’s father.” This proof did not show that plaintiff “knew of the threats or authorized them.” See Sweet v. Roy, 801 A.2d 694, 705 (Vt. 2002).

(c) In a trial for sexually assaulting four-year-old MM, defendant sought to cross-examine her about charges that one Ashley had molested her before, arguing that these charges were false and that they bore on MM’s credibility. The intermediate appellate court thought the jury should decide whether the previous charges were false under Rule 104(b), but the state supreme court concluded that “the trial judge should make a preliminary determination based on a preponderance of the evidence that the statements are false.” Here he could reasonably decide that defendant had not proved the falsity of the prior charges. State v. West, 24 P.3d 648, 652-655 (Hi. 2001) (conviction reinstated).

3. The government condemns the Cook farm in Kentucky to make way for the Taylorsville Reservoir. The Cooks reject as inadequate the $90,000 offered by the government, arguing that this valuation rests on farm use, and that the property can be subdivided into recreational parcels and sold for $225,000. They introduce testimony by a planning coordinator that the county is feeling population pressures, as children return to rural homes and urbanites seek recreational property. They also offer testimony by a real estate broker, estimating value for recreational use. Should he be allowed to testify? See United States v. 478.34 Acres of Land, 578 F.2d 156 (6th Cir. 1978) (error to exclude broker’s testimony, for FRE 104(b) requires jury to decide whether potential for recreational use is shown).

4. Recall Problem 2-A (Was He Going Too Fast?). Should the trial court, before admitting Hill’s testimony as to speed of Gadsby’s vehicle 30 miles before the accident, require proof that driving conditions were the same between the place where Hill saw Gadsby and the place of the accident? Does that problem too present an issue of “conditional relevance”?

5. Consider examples of conditional relevancy (like those given by the Advisory Committee), in which both of two seemingly independent facts must be established before a critical conclusion is possible—notification by spoken word, for example, in which speaking and hearing are necessary to the conclusion. Are you satisfied that evidence of one without the other is “irrelevant” under FRE 104? See Ball, The Myth of Conditional Relevancy, 14 Ga. L. Rev. 435 (1980) (arguing that unless the trier has determined that one of two necessary facts does not exist, evidence tending to prove either one is relevant, and that FRE 104(b) should be repealed).

6. The concept of conditional relevance connects with a larger phenomenon that modern commentators call the problem of “conjunction.” The fortunes of a litigant may depend on acceptance of testimony by two witnesses and thus on the “conjunction” of what they say. Here the relevance of what each says might be said to be conditional on what the other says. Consider an
example drawn from the Advisory Committee’s Note: X sues Y on a debt, and X’s case depends on proving that Y admitted the debt by letter. The Note describes this situation as one of conditional relevance, and the judge will likely admit testimony by X that he received the letter, as well as testimony by some third person Z that Y wrote or authorized it.

If the proof shows a 60 percent likelihood that X received such a letter and a 60 percent likelihood that Y authorized it, should the jury find for X? The “product rule” describes the “conjunct” probability that two independent events occur: If there is a 50 percent likelihood of getting a head or a tail on a single flip of a coin, the product rule tells us that there is a 25 percent likelihood of getting a head (or a tail) on both of two flips (50 percent × 50 percent). In the suit of X against Y, applying this rule suggests that the evidence favoring X reaches only a likelihood of 36 percent. See generally Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 Harv. L. Rev. 1357, 1388 (1985) (in this situation a jury “will not consider and accept each of the witness’s accounts separately”; it will not “ignore questionable aspects of one witness’s testimony when considering the other’s,” but will “consider the conjunction of the two accounts” in deciding the issue).

C. THE RELEVANCE OF PROBABILISTIC ANALYSIS

The task of the trier of fact is usually to determine whether plaintiff in a civil suit has proved his case by a preponderance of the evidence, which is usually defined in terms of establishing that the necessary facts are more probably true than not. The task in a criminal prosecution is to determine whether the prosecutor has proved guilt beyond a reasonable doubt, which also suggests probability but at a much higher level.

Seldom does the degree of probability suggested by evidence lend itself readily to mathematical expression or attain numeric precision. But probabilistic evidence is sometimes offered, and in certain kinds of cases (such as discrimination suits and litigation over paternity) mathematical proof has become common.

\[ \text{PEOPLE v. COLLINS} \]
California Supreme Court
438 P.2d 33 (Cal. 1968)

SULLIVAN, J.

We deal here with the novel question whether evidence of mathematical probability has been properly introduced and used by the prosecution in a criminal case. While we discern no inherent incompatibility between the disciplines of law and mathematics and intend no general disapproval or disparagement of the latter as an auxiliary in the fact-finding processes of the former, we cannot uphold the technique employed in the instant case. As we explain in detail infra, the testimony as to mathematical probability infected the case
C. The Relevance of Probabilistic Analysis

with fatal error and distorted the jury's traditional role of determining guilt or innocence according to long-settled rules. Mathematics, a veritable sorcerer in our computerized society, while assisting the trier of fact in the search for truth, must not cast a spell over him. We conclude that on the record before us defendant should not have had his guilt determined by the odds and that he is entitled to a new trial. We reverse the judgment.

A jury found defendant Malcolm Ricardo Collins and his wife defendant Janet Louise Collins guilty of second degree robbery. Malcolm appeals from the judgment of conviction. Janet has not appealed.

On June 18, 1964, about 11:30 A.M. Mrs. Juanita Brooks, who had been shopping, was walking home along an alley in the San Pedro area of the City of Los Angeles. She was pulling behind her a wicker basket containing groceries and had her purse on top of the packages. She was using a cane. As she stooped down to pick up an empty carton, she was suddenly pushed to the ground by a person whom she neither saw nor heard approach. She was stunned by the fall and felt some pain. She managed to look up and saw a young woman running from the scene. According to Mrs. Brooks the latter appeared to weigh about 145 pounds, was wearing "something dark," and had hair "between a dark blond and a light blond," but lighter than the color of defendant Janet Collins' hair as it appeared at trial. Immediately after the incident, Mrs. Brooks discovered that her purse, containing between $35 and $40, was missing.

About the same time as the robbery, John Bass, who lived on the street at the end of the alley, was in front of his house waterer his lawn. His attention was attracted by "a lot of crying and screaming" coming from the alley. As he looked in that direction, he saw a woman run out of the alley and enter a yellow automobile parked across the street from him. He was unable to give the make of the car. The car started off immediately and pulled wide around another parked vehicle so that in the narrow street it passed within six feet of Bass. The latter then saw that it was being driven by a male Negro, wearing a mustache and beard. At the trial Bass identified defendant as the driver of the yellow automobile. However, an attempt was made to impeach his identification by his admission that at the preliminary hearing he testified to an uncertain identification at the police lineup shortly after the attack on Mrs. Brooks, when defendant was beardless.

In his testimony Bass described the woman who ran from the alley as a Caucasian, slightly over five feet tall, of ordinary build, with her hair in a dark blond ponytail, and wearing dark clothing. He further testified that her ponytail was "just like" one which Janet had in a police photograph taken on June 22, 1964.

On the day of the robbery, Janet was employed as a housemaid in San Pedro. Her employer testified that she had arrived for work at 8:50 A.M. and that defendant had picked her up in a light yellow car about 11:30 A.M. On that day, according to the witness, Janet was wearing her hair in a blonde

---

2. Other witnesses variously described the car as yellow, as yellow with an off-white top, and yellow with an egg-shell white top. The car was also described as being medium to large in size. Defendant drove a car at or near the times in question which was a Lincoln with a yellow body and a white top.
ponytail but lighter in color than it appeared at trial. There was evidence from
which it could be inferred that defendants had ample time to drive from Janet's
place of employment and participate in the robbery. Defendants testified, how-
ever, that they went directly from her employer's house to the home of friends,
where they remained for several hours.

In the morning of June 22, Los Angeles Police Officer Kinsey, who was
investigating the robbery, went to defendants' home. He saw a yellow Lincoln
automobile with an off-white top in front of the house. He talked with defend-
ants. Janet, whose hair appeared to be a dark blonde, was wearing it in a
ponytail. Malcolm did not have a beard. The officer explained to them that
he was investigating a robbery specifying the time and place; that the victim
had been knocked down and her purse snatched; and that the person responsi-
bile was a female Caucasian with blonde hair in a ponytail who had left the
scene in a yellow car driven by a male Negro. He requested that defendants
accompany him to the police station at San Pedro and they did so. There, in
response to police inquiries as to defendants' activities at the time of the robbery,
Janet stated, according to Officer Kinsey, that her husband had picked her up
at her place of employment at 1 P.M. and that they had then visited at the home
of friends in Los Angeles. Malcolm confirmed this. Defendants were detained
for an hour or two, were photographed but not booked, and were eventually
released and driven home by the police.

Late in the afternoon of the same day, Officer Kinsey, while driving home
from work in his own car, saw defendants riding in their yellow Lincoln. Al-
though the transcript fails to disclose what prompted such action Kinsey pro-
ceeded to place them under surveillance and eventually followed them home.
He called for assistance and arranged to meet other police officers in the
vicinity of defendants' home. Kinsey took a position in the rear of the premises.
The other officers, who were in uniform and had arrived in a marked police
car, approached defendants' front door. As they did so, Kinsey saw defendant
Malcolm Collins run out the back door toward a rear fence and disappear
behind a tree. Meanwhile the other officers emerged with Janet Collins whom
they had placed under arrest. A search was made for Malcolm who was found
in a closet of a neighboring home and also arrested. Defendants were again
taken to the police station, were kept in custody for 48 hours, and were again
released without any charges being made against them.

Officer Kinsey interrogated defendants separately on June 23 while they
were in custody and testified to their statements. . . . According to the officer,
Malcolm stated that he sometimes wore a beard but that he did not wear a
beard on June 18 (the day of the robbery), having shaved it off on June 2,
1964. He also explained two receipts for traffic fines totaling $35 paid on June
19, which receipts had been found on his person, by saying that he used funds

3. There are inferences which may be drawn from the evidence that Janet attempted to
alter the appearance of her hair after June 18. Janet denies that she cut, colored or bleached her
hair at any time after June 18, and a number of witnesses supported her testimony.
5. Evidence as to defendant's beard and mustache is conflicting. Defense witnesses appeared
to support defendant's claims that he had shaved his beard on June 2. There was testimony that
on June 19 when defendant appeared in court to pay fines on another matter he was bearded.
By June 22 the beard had been removed.
won in a gambling game at a labor hall. Janet, on the other hand, said that the $35 used to pay the fines had come from her earnings.6

On July 9, 1964, defendants were again arrested and were booked for the first time. While they were in custody and awaiting the preliminary hearing, Janet requested to talk with Officer Kinsey. There followed a lengthy conversation during the first part of which Malcolm was not present. During this time Janet expressed concern about defendant and inquired as to what the outcome would be if it appeared that she committed the crime and Malcolm knew nothing about it. In general she indicated a wish that defendant be released from any charges because of his prior criminal record and that if someone must be held responsible, she alone would bear the guilt. The officer told her that no assurances could be given, that if she wanted to admit responsibility disposition of the matter would be in the hands of the court and that if she committed the crime and defendant knew nothing about it the only way she could help him would be by telling the truth. Defendant was then brought into the room and participated in the rest of the conversation. The officer asked to hear defendant's version of the matter, saying that he believed defendant was at the scene. However, neither Janet nor defendant confessed or expressly made damaging admissions although constantly urged by the investigating officer to make truthful statements. On several occasions defendant denied that he knew what had gone on in the alley. On the other hand, the whole tone of the conversation evidenced a strong consciousness of guilt on the part of both defendants who appeared to be seeking the most advantageous way out. . . . [S]ome parts of the foregoing conversation were testified to by Officer Kinsey and in addition a tape recording of the entire conversation was introduced in evidence and played to the jury.

At the seven-day trial the prosecution experienced some difficulty in establishing the identities of the perpetrators of the crime. The victim could not identify Janet and had never seen defendant. The identification by the witness Bass, who observed the girl run out of the alley and get into the automobile, was incomplete as to Janet and may have been weakened as to defendant. There was also evidence, introduced by the defense, that Janet had worn light-colored clothing on the day in question, but both the victim and Bass testified that the girl they observed had worn dark clothing.

In an apparent attempt to bolster the identifications, the prosecutor called an instructor of mathematics at a state college. Through this witness he sought to establish that, assuming the robbery was committed by a Caucasian woman with a blond ponytail who left the scene accompanied by a Negro with a beard and mustache, there was an overwhelming probability that the crime was committed by any couple answering such distinctive characteristics. The witness testified, in substance, to the "product rule," which states that the probability of the joint occurrence of a number of mutually independent events

6. The source of the $35, being essentially the same amount as the $35 to $40 reported by the victim as having been in her purse when taken from her the day before the fines were paid, was a significant factor in the prosecution's case. Other evidence disclosed that defendant and Janet were married on June 2, 1964, at which time they had only $12, a portion of which was spent on a trip to Tijuana. Since the marriage defendant had not worked, and Janet's earnings were not more than $12 a week, if that much.
is equal to the product of the individual probabilities that each of the events will occur.\(^8\) Without presenting any statistical evidence whatsoever in support of the probabilities for the factors selected, the prosecutor then proceeded to have the witness assume probability factors for the various characteristics which he deemed to be shared by the guilty couple and all other couples answering to such distinctive characteristics.\(^10\)

Applying the product rule to his own factors the prosecutor arrived at a probability that there was but one chance in 12 million that any couple possessed the distinctive characteristic of the defendants. Accordingly, under this theory, it was to be inferred that there could be but one chance in 12 million that defendants were innocent and that another equally distinctive couple actually committed the robbery. Expanding on what he had thus purported to suggest as a hypothesis, the prosecutor offered the completely unfounded and improper testimonial assertion that, in his opinion, the factors he had assigned were "conservative estimates" and that, in reality "the chances of anyone else besides these defendants being there, . . . having every similarity, . . . is somewhat like one in a billion."

Objections were timely made to the mathematician's testimony on the grounds that it was immaterial, that it invaded the province of the jury, and that it was based on unfounded assumptions. The objections were "temporarily overruled" and the evidence admitted subject to a motion to strike. When that motion was made at the conclusion of the direct examination, the court denied it, stating that the testimony had been received only for the "purpose of illustrating the mathematical probabilities of various matters, the possibilities for them occurring or re-occurring."

Both defendants took the stand in their own behalf. They denied any

---

8. In the example employed for illustrative purposes at the trial, the probability of rolling one die and coming up with a "2" is 1/6, that is, any one of the six faces of a die has one chance in six of landing face up on any particular roll. The probability of rolling two "2's" in succession is 1/6 \times 1/6, or 1/36, that is, on only one occasion out of 36 double rolls (or the roll of two dice), will the selected number land face up on each roll or die.

10. Although the prosecutor insisted that the factors he used were only for illustrative purposes—to demonstrate how the probability of the occurrence of mutually independent factors affected the probability that they would occur together—he nevertheless attempted to use factors which he personally related to the distinctive characteristics of defendants. In his argument to the jury he invited the jurors to apply their own factors, and asked defense counsel to suggest what the latter would deem as reasonable. The prosecutor himself proposed the individual probabilities set out in the table below. Although the transcript of the examination of the mathematics instructor and the information volunteered by the prosecutor at that time create some uncertainty as to precisely which of the characteristics the prosecutor assigned to the individual probabilities, he restated in his argument to the jury that they should be as follows:

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Individual probability</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Partly yellow automobile</td>
<td>1/10</td>
</tr>
<tr>
<td>B. Man with mustache</td>
<td>1/4</td>
</tr>
<tr>
<td>C. Girl with ponytail</td>
<td>1/10</td>
</tr>
<tr>
<td>D. Girl with blond hair</td>
<td>1/3</td>
</tr>
<tr>
<td>E. Negro man with beard</td>
<td>1/10</td>
</tr>
<tr>
<td>F. Interracial couple in car</td>
<td>1/1000</td>
</tr>
</tbody>
</table>

In his brief on appeal defendant agrees that the foregoing appeared on a table presented in the trial court.
knowledge of or participation in the crime and stated that after Malcolm called for Janet at her employer's house they went directly to a friend's house in Los Angeles where they remained for some time. According to this testimony defendants were not near the scene of the robbery when it occurred. Defendant's friends testified to a visit by them "in the middle of June" although she could not recall the precise date. Janet further testified that certain inducements were held out to her during the July 9 interrogation on condition that she confess her participation.

Defendant makes two basic contentions before us: First, that the admission in evidence of the statements made by defendants while in custody on June 23 and July 9, 1964, constitutes reversible error. . . . and second, that the introduction of evidence pertaining to the mathematical theory of probability and the use of the same by the prosecution during the trial was error prejudicial to defendant. We consider the latter claim first.

As we shall explain, the prosecution's introduction and use of mathematical probability statistics injected two fundamental prejudicial errors into the case: (1) The testimony itself lacked an adequate foundation both in evidence and in statistical theory; and (2) the testimony and the manner in which the prosecution used it distracted the jury from its proper and requisite function of weighing the evidence on the issue of guilt, encouraged the jurors to rely upon an engaging but logically irrelevant expert demonstration, foreclosed the possibility of an effective defense by an attorney apparently unschooled in mathematical refinements, and placed the jurors and defense counsel at a disadvantage in sifting relevant fact from inapplicable theory.

We initially consider the defects in the testimony itself. As we have indicated, the specific technique presented through the mathematician's testimony and advanced by the prosecutor to measure the probabilities in question suffered from two basic and pervasive defects—an inadequate evidentiary foundation and an inadequate proof of statistical independence. First, as to the foundation requirement, we find the record devoid of any evidence relating to any of the six individual probability factors used by the prosecutor and ascribed by him to the six characteristics as we have set them out in footnote 10, ante. To put it another way, the prosecution produced no evidence whatsoever showing, or from which it could be in any way inferred, that only one out of every ten cars which might have been at the scene of the robbery was partly yellow, that only one out of every four men who might have been there wore a mustache, that only one out of every ten girls who might have been there wore a ponytail, or that any of the other individual probability factors listed were even roughly accurate.12

The bare, inescapable fact is that the prosecution made no attempt to offer any such evidence. Instead, through leading questions having perfuncto-
rily elicited from the witness the response that the latter could not assign a probability factor for the characteristics involved, the prosecutor himself suggested what the various probabilities should be and these became the basis of the witness' testimony (see fn. 10, ante). It is a curious circumstance of this adventure in proof that the prosecutor not only made his own assertions of these factors in the hope that they were "conservative" but also in later argument to the jury invited the jurors to substitute their "estimates" should they wish to do so. We can hardly conceive of a more fatal gap in the prosecution's scheme of proof. A foundation for the admissibility of the witness' testimony was never even attempted to be laid, let alone established. His testimony was neither made to rest on his own testimonial knowledge nor presented by proper hypothetical questions based upon valid data in the record. . . .

But, as we have indicated, there was another glaring defect in the prosecution's technique, namely an inadequate proof of the statistical independence of the six factors. No proof was presented that the characteristics selected were mutually independent, even though the witness himself acknowledged that such condition was essential to the proper application of the "product rule" or "multiplication rule." To the extent that the traits or characteristics were not mutually independent (e.g., Negroes with beards and men with mustaches obviously represent overlapping categories), the "product rule" would inevitably yield a wholly erroneous and exaggerated result even if all of the individual components had been determined with precision.

In the instant case, therefore, because of the aforementioned two defects—the inadequate evidentiary foundation and the inadequate proof of statistical independence—the technique employed by the prosecutor could only lead to wild conjecture without demonstrated relevancy to the issues presented. It acquired no redeeming quality from the prosecutor's statement that it was being used only "for illustrative purposes" since, as we shall point out, the prosecutor's subsequent utilization of the mathematical testimony was not confined within such limits.

We now turn to the second fundamental error caused by the probability testimony. Quite apart from our foregoing objections to the specific technique employed by the prosecution to estimate the probability in question, we think that the entire enterprise upon which the prosecution embarked, and which

13. The prosecutor asked the mathematics instructor:

Now, let me see if you can be of some help to us with some independent factors, and you have some paper you may use. Your specialty does not equip you, I suppose, to give us some probability of such things as a yellow car as contrasted with any other kind of car, does it? . . . I appreciate the fact that you can't assign a probability for a car being yellow as contrasted to some other car, can you?

A. No, I couldn't.

15. Assuming arguendo that factors $E$ and $E$ (see fn. 10, ante) were correctly estimated, nevertheless it is still arguable that most Negro men with beards also have mustaches (exhibit 3 herein, for instance, shows defendant with both a mustache and a beard, indeed in a hirsute continuum); if so, there is no basis for multiplying 1/4 by 1/10 to estimate the proportion of Negroes who wear beards and mustaches. Again, the prosecution's technique could never be meaningfully applied, since its accurate use would call for information as to the degree of interdependence among the six individual factors. Such information cannot be compiled, however, since the relevant samples necessarily remain unknown. (See fn. 10, ante.)
was directed to the objective of measuring the likelihood of a random couple possessing the characteristics allegedly distinguishing the robbers, was gravely misguided. At best, it might yield an estimate as to how infrequently bearded Negroes drive yellow cars in the company of blonde females with ponytails.

The prosecution’s approach, however, could furnish the jury with absolutely no guidance on the crucial issue: *Of the admittedly few such couples, which one, if any, was guilty of committing this robbery?* Probability theory necessarily remains silent on that question, since no mathematical equation can prove beyond a reasonable doubt (1) that the guilty couple in fact possessed the characteristics described by the People’s witnesses, or even (2) that only one couple possessing those distinctive characteristics could be found in the entire Los Angeles area.

As to the first inherent failing we observe that the prosecution’s theory of probability rested on the assumption that the witnesses called by the People had conclusively established that the guilty couple possessed the precise characteristics relied upon by the prosecution. But no mathematical formula could ever establish beyond a reasonable doubt that the prosecution’s witnesses correctly observed and accurately described the distinctive features which were employed to link defendants to the crime. Conceivably, for example, the guilty couple might have included a light-skinned Negress with bleached hair rather than a Caucasian blonde; or the driver of the car might have been wearing a false beard as a disguise; or the prosecution’s witnesses might simply have been unreliable.  

The foregoing risks of error permeate the prosecution’s circumstantial case. Traditionally, the jury weighs such risks in evaluating the credibility and probative value of trial testimony, but the likelihood of human error or of falsification obviously cannot be quantified; that likelihood must therefore be excluded from any effort to assign a number to the probability of guilt or innocence. Confronted with an equation which purports to yield a numerical index of probable guilt, few juries could resist the temptation to accord disproportionate weight to that index; only an exceptional juror, and indeed only a defense attorney schooled in mathematics, could successfully keep in mind the fact that the probability computed by the prosecution can represent, at best, the likelihood that a random couple would share the characteristics testified to by the People’s witnesses—not necessarily the characteristics of the actually guilty couple.

As to the second inherent failing in the prosecution’s approach, even assuming that the first failing could be discounted, the most a mathematical computation could ever yield would be a measure of the probability that a random couple would possess the distinctive features in question. In the present case, for example, the prosecution attempted to compute the probability that a random couple would include a bearded Negro, a blonde girl with a ponytail, and a partly yellow car; the prosecution urged that this probability was no more

---

16. In the instant case, for instance, the victim could not state whether the girl had a ponytail, although the victim observed the girl as she ran away. The witness Bass, on the other hand, was sure that the girl whom he saw had a ponytail. The demonstration engaged in by the prosecutor also leaves no room for the possibility, although perhaps a small one, that the girl whom the victim and the witness observed was [not], in fact, the same girl.
than one in 12 million. Even accepting this conclusion as arithmetically accurate, however, one still could not conclude that the Collinses were probably the guilty couple. On the contrary, as we explain in the Appendix, the prosecution's figures actually imply a likelihood of over 40 percent that the Collinses could be "duplicated" by at least one other couple who might equally have committed the San Pedro robbery. Urging that the Collinses be convicted on the basis of evidence which logically establishes no more than this seems as indefensible as arguing for the conviction of X on the ground that a witness saw either X or X's twin commit the crime.

Again, few defense attorneys, and certainly few jurors, could be expected to comprehend this basic flaw in the prosecution's analysis. Conceivably even the prosecutor erroneously believed that his equation established a high probability that no other bearded Negro in the Los Angeles area drove a yellow car accompanied by a ponytailed blonde. In any event, although his technique could demonstrate no such thing, he solemnly told the jury that he had supplied mathematical proof of guilt.

Sensing the novelty of that notion, the prosecutor told the jurors that the traditional idea of proof beyond a reasonable doubt represented "the most hackneyed, stereotyped, trite, misunderstood concept in criminal law." He sought to reconcile the jury to the risk that, under his "new math" approach to criminal jurisprudence, "on some rare occasion. . . an innocent person may be convicted." "Without taking that risk," the prosecution continued, "life would be intolerable. . . because. . . there would be immunity for the Collinses, for people who chose not to be employed to go down and push old ladies down and take their money and be immune because how could we ever be sure they are the ones who did it?"

In essence this argument of the prosecutor was calculated to persuade the jury to convict defendants whether or not they were convinced of their guilt to a moral certainty and beyond a reasonable doubt. Undoubtedly the jurors were unduly impressed by the mystique of the mathematical demonstration but were unable to assess its relevancy or value. Although we make no appraisal of the proper applications of mathematical techniques in the proof of facts, we have strong feelings that such applications, particularly in a criminal case, must be critically examined in view of the substantial unfairness to a defendant which may result from ill conceived techniques with which the trier of fact is not technically equipped to cope. We feel that the technique employed in the case before us falls into the latter category.

We conclude that the court erred in admitting over defendant's objection the evidence pertaining to the mathematical theory of probability and in denying defendant's motion to strike such evidence. The case was apparently a close one. The jury began its deliberations at 2:46 P.M. on November 24, 1964, and retired for the night at 7:46 P.M.; the parties stipulated that a juror could be excused for illness and that a verdict could be reached by the remaining 11 jurors; the jury resumed deliberations the next morning at 8:40 A.M. and returned verdicts at 11:58 A.M. after five ballots had been taken. In the light of the closeness of the case, which as we have said was a circumstantial one, there is a reasonable likelihood that the result would have been more favorable to defendant if the prosecution had not urged the jury to render a probabilistic verdict. In any event, we think that under the circumstances the "trial by
mathematics" so distorted the role of the jury and so disadvantaged counsel for the defense, as to constitute in itself a miscarriage of justice. After an examination of the entire cause, including the evidence, we are of the opinion that it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the above error. The judgment against defendant must therefore be reversed.

In view of the foregoing conclusion, we deem it unnecessary to consider whether the admission of defendants' extrajudicial statements constitutes error.

The judgment is reversed.

APPENDIX

If "Pr" represents the probability that a certain distinctive combination of characteristics, hereinafter designated "C," will occur jointly in a random couple, then the probability that C will not occur in a random couple is \(1 - Pr\). Applying the product rule (see fn. 8, ante), the probability that C will occur in none of N couples chosen at random is \((1 - Pr)^N\), so that the probability of C occurring in at least one of N random couples is \([1 - (1 - Pr)^N]\).

Given a particular couple selected from a random set of N, the probability of C occurring in that couple (i.e., Pr), multiplied by the probability of C occurring in none of the remaining N - 1 couples (i.e., \((1 - Pr)^{N-1}\)), yields the probability that C will occur in the selected couple and in no other. Thus the probability of C occurring in any particular couple, and in that couple alone, is \([(Pr) \times (1 - Pr)^{N-1}]\). Since this is true for each of the N couples, the probability that C will occur in precisely one of the N couples, without regard to which one, is \[\{(Pr) \times (1 - Pr)^{N-1}\}\] added N times, because the probability of the occurrence of one of several mutually exclusive events is equal to the sum of the individual probabilities. Thus the probability of C occurring in exactly one of N random couples (any one, but only one) is \[\{(N) \times (Pr) \times (1 - Pr)^{N-1}\}\].

By subtracting the probability that C will occur in exactly one couple from the probability that C will occur in at least one couple, one obtains the probability that C will occur in more than one couple: \([1 - (1 - Pr)^N] - [(N) \times (Pr) \times (1 - Pr)^{N-1}]\). Dividing this difference by the probability that C will occur in at least one couple (i.e., dividing the difference by \([1 - (1 - Pr)^N]\)) then yields the probability that C will occur more than once in a group of N couples in which C occurs at least once.

Turning to the case in which C represents the characteristics which distinguish a bearded Negro accompanied by a ponytailed blonde in a yellow car, the prosecution sought to establish that the probability of C occurring in a random couple was 1/12,000,000—i.e., that Pr = 1/12,900,000. Treating this conclusion as accurate, it follows that, in a population of N random couples, the probability of C occurring exactly once is \[\{(N) \times (1/12,000,000) \times (1 - 1/12,000,000)^{N-1}\}\]. Subtracting this product from \([1 - (1 - 1/12,000,000)^N]\), the probability of C occurring in at least one couple, and dividing the resulting difference by \([1 - (1 - 1/12,000,000)^N]\), the probability that C will occur in at least one couple, yields the probability that C will occur more than once in
a group of $N$ random couples of which at least one couple (namely, the one seen by the witnesses) possesses characteristics $C$. In other words, the probability of another such couple in a population of $N$ is the quotient $A/B$, where $A$ designates the numerator $\{1 - (1 - 1/12,000,000)^N\} - \{(N \times 1/12,000,000) \times (1 - 1/12,000,000)^{N-1}\}$, and $B$ designates the denominator $\{1 - (1 - 1/12,000,000)^N\}$.

$N$, which represents the total number of all couples who might conceivably have been at the scene of the San Pedro robbery, is not determinable, a fact which suggests yet another basic difficulty with the use of probability theory in establishing identity. One of the imponderables in determining $N$ may well be the number of $N$-type couples in which a single person may participate. Such considerations make it evident that $N$, in the area adjoining the robbery, is in excess of several million; as $N$ assumes values of such magnitude, the quotient $A/B$ computed as above, representing the probability of a second couple as distinctive as the one described by the prosecution’s witnesses, soon exceeds 4/10. Indeed, as $N$ approaches 12 million, this probability quotient rises to approximately 41 percent. We note parenthetically that if $1/N = P_x$, then as $N$ increases indefinitely, the quotient in question approaches a limit of $(e - 2)/(e - 1)$, where “$e$” represents the transcendental number (approximately 2.71828) familiar in mathematics and physics.

Hence, even if we should accept the prosecution’s figures without question, we would derive a probability of over 40 percent that the couple observed by the witnesses could be “duplicated” by at least one other equally distinctive interracial couple in the area, including a Negro with a beard and mustache, driving a partly yellow car in the company of a blonde with a ponytail. Thus the prosecution’s computations, far from establishing beyond a reasonable doubt that the Collinses were the couple described by the prosecution’s witnesses, imply a very substantial likelihood that the area contained more than one such couple, and that a couple other than the Collinses was the one observed at the scene of the robbery.

Traynor, C.J., and Peters, Tobriner, Mosk, and Burke, J.J., concur.

McComb, J.

I dissent. I would affirm the judgment in its entirety.

NOTES ON COLLINS

1. The Court in Collins makes important technical criticisms of the prosecutor’s mathematical theory and its application. The court also raises policy-based objections that seem to apply even if these technical problems could be overcome. What are these objections?

2. For a moment, forget the policy-based objections. Assume the identical case of Collins-2 arises, but now the prosecutor has proof of the relative frequency of the qualities of the guilty couple and shows they are independent. He makes the same statistical argument. In Collins, doesn’t the court tell us that the argument would still be mathematically misconceived? Why is that so? In thinking about this question, consider a parlor trick. The wizard puts three complete decks of cards in a hopper and mixes them. Blindfolded, he draws a card,
C. The Relevance of Probabilistic Analysis

which turns out to be the Queen of Hearts. He replaces it and mixes the cards again, and (blindfolded) draws a second card. Lo, it too is the Queen of Hearts. His patter runs as follows:

The 156 cards in the hopper make three complete decks, so the proportion of hearts and queens is the same that we find in a single deck. The probability of drawing a heart is one in four because a quarter of the cards in each deck are hearts. And the probability of drawing a queen is one in 13 because each suit has 13 cards, only one of which is a queen.

Knowing we drew a heart tells us nothing about the likelihood that we drew a queen. The reason is that even among hearts we still have only one chance in 13 of getting the queen. And conversely, knowing we drew a queen tells us nothing about the likelihood that we drew a heart. The reason is that even among queens we have only one chance in four of getting a heart. In short, being a heart and being a queen are independent qualities.

So what’s the probability that we will draw a Queen of Hearts? Easy: It may be calculated by the product rule, and it comes to 1/52, which is 1/4 times 1/13.

Now, you just saw me draw the Queen of Hearts twice in a row. That astonishing feat was not accidental, and only the wizard can do it. There’s only one chance in 52 of drawing such a card, so there’s only one chance in 52 that the Queen of Hearts I picked on the second draw is a different card from the one I picked on the first draw. Imagine getting the same card twice. Try it if you think it’s easy.

Isn’t this patter similar to the prosecutor’s argument in Collins? Admittedly it was a coincidence (perhaps magic) that the wizard drew a Queen of Hearts twice in a row. But the likelihood that he drew a different Queen of Hearts the second time is 2/3, isn’t it? (Given three decks and replacement of the first draw, there were three Queens of Hearts in the hopper each time.) So when he said the likelihood is only 1/52 that the second card was different, he was exaggerating, if not just plain wrong.

When the wizard got 1/52 with the product rule, what does it describe? Doesn’t it describe the same kind of thing that 1/12,000,000 describes in Collins? And just as 1/52 in the parlor trick does not accurately describe the likelihood that the wizard drew a different card the second time, so 1/12,000,000 in Collins does not accurately describe the likelihood that defendants are different from the culprits.

3. The Appendix in Collins addresses the problem of distribution. Even if a particular outcome is likely to occur half the time (or half the people are likely to have brown eyes), it does not follow that this predicted frequency will be seen in a particular series of events or a particular sample. There may be a probability that half the coin tosses produce heads, but in any series of ten tosses we might get heads four times or even ten times, or not at all. Similarly in Collins, if the estimates are taken as describing the frequency of the observed characteristics in the known universe, they do not necessarily describe the frequency of those characteristics in Los Angeles. In one population of 12 million couples, we might find two or three matching the description of the culprits; in another, we might find none. The Appendix calculates the likelihood of finding more than one such “magic couple,” given that we know one exists in a population of 12 million couples. If the calculations are right in Collins,
how do they affect the prosecutor's argument? If we had evidence of the frequency of the important characteristics in Los Angeles itself, would the Appendix still make an important point?

4. You might think nobody would be foolish enough to make the mistake that the prosecutor made in Collins, but even now such mistakes are sometimes made. See, e.g., Wilson v. State, 803 A.2d 1034, 1047 (Ct. App. Md. 2002) (reversing conviction of father for murder of infant son where prosecutor argued, on basis of statistical evidence of rarity of SIDS deaths, that the chance was only “1 in 10 million that the man sitting here is innocent”). In two settings, the product rule has smoother sailing. One involves the use of DNA evidence, where prosecutors routinely show that the genetic profile of the defendant, as measured by analyzing samples of blood or other fluid or tissue taken from him, matches the genetic profile of the apparent culprit, as measured by analyzing samples found at the crime scene. Here prosecutors routinely offer proof of the probability that these characteristics would be found in the population as a whole. See, e.g., State v. Belken, 633 N.W.2d 786, 790, 799-801 (Iowa 2001) (in trial for kidnapping and sexual abuse, admitting evidence that defendant’s DNA matched that found at crime scene, and that there was “a random match probability of 1 in 431 billion”). As in the Collins case, such probabilities describe scarcity, and do not describe the probability that defendant is guilty, or even the probability that he left the sample found at the crime scene. The other setting in which statistical evidence is routinely accepted is paternity cases, where a “match” between the profile of the paternal gene in the child and the genes of the defendant generates a similar statistic: “Only one in ten million men chosen at random would have this genetic profile.” In this setting, courts also admit expert testimony describing the “probability of paternity,” in which essentially an expert testifies as follows: “Based on these probabilities, we can say that there is a 97 percent probability that defendant is the father.” See, e.g., Child Support Enforcement Agency v. Doe, 51 P.3d 366 (Hawaii 2002) (99.96 percent probability of paternity). We revisit these issues in Chapter 9D, infra.


PROBLEM 24. The Exploding Tire

Herb Lewis installs tires and batteries for the Auto Service Center operated by Nationwide Mercantile. One day he begins to mount four snow tires on a car. He finishes three and places the fourth on the wheel rim. Inflating it, he watches the bead rise along the inner edges of the rim, waiting for the “pop” when it would jump and firmly seat itself in the lip of the rim. This time the bead strikes the lip and the tire explodes, sending Herb to the emergency room with serious injuries. Len Small, manager of the Service Center, gathered up the burst tire and sent it to be tested by Failsafe Automotive Laboratory.

Herb sues Grather Tire Company, alleging that it made the tire and it was defective. During his case-in-chief, Herb seeks to establish (1) through testimony by Len Small that Grather made the exploding tire, and (2) through testimony
C. The Relevance of Probabilistic Analysis

by Michael Treaver (who tested the tire Failsafe got from Small) that the tire was defective. Unfortunately, Small did not note the markings on the tire, and Treaver failed to record them in his report, so nobody knows who made the exploding tire.

Herb seeks to elicit from Small that Grather made 80 percent of the tires at the Service Center, and that four other manufacturers account for the remaining 20 percent in about equal proportion. Grather objects, arguing that the court should not permit “gambling odds” testimony and that “mere numbers” cannot support a verdict.

Should Small and Treaver be allowed to testify? If there is no other proof that Grather made the tire that injured Herb, should such testimony suffice to take the issue to the jury?

NOTES ON PROBABILISTIC PROOF IN CIVIL CASES

1. In civil litigation ordinarily the burden of persuasion is framed in terms of a “preponderance” of the evidence. When it comes time to instruct the jury, the most natural explanation involves saying that the party bearing the burden must establish that the matters in question are “more likely so than not so.” See generally Kevin F. O’Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions §104.01 (5th ed. 2000) (preponderance instruction using that phrase). Of course “more likely so than not so” stops short of quantifying the necessary probability. Arguably it means the evidence “preponderates” even if it just barely favors the party bearing the burden—a layperson might express that notion as a 51 percent likelihood (or “odds” of 51:49). If this likelihood satisfies the preponderance standard, should a plaintiff like Herb Lewis be permitted to take his case to the jury? If the answer is yes, are we on a slippery slope that leads to the conclusion that plaintiff should also get his case to the jury on proof that defendant made 51 out of 100 tires in the shop?

2. Recall the famous case of the two careless hunters who both negligently fired guns. Sympathizing with the plaintiff because he could not show which one fired the shot that hurt him, the California court put the burden on each defendant to prove he did not cause the injury. See Summers v. Tice, 199 P.2d 1 (Cal. 1948). Recall too that the idea behind Summers came to life in theories of market-share liability and enterprise liability in cases like Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal.) (market share; antimiscarriage drug DES), cert. denied, 449 U.S. 912 (1980), and Hall v. E.I. Du Pont De Nemours & Co., 545 F. Supp. 353 (E.D.N.Y. 1972) (enterprise; blasting caps). Under Sindell’s market-share liability theory, a plaintiff who sues makers of identical products may get a judgment against them all, with each to pay the percentage corresponding to its market share. Later the California court cleared up an ambiguity in Sindell by holding that recovery is limited to the proportion of total damages corresponding to the combined market share of the defendants sued. Brown v. Superior Court, 751 P.2d 923 (Cal. 1988). Under Hall’s enterprise liability theory, a plaintiff who sues all or most makers of essentially identical dangerous products may hold each liable on a theory of joint liability, and may win a judgment for the full amount of damages. Are there good reasons to adopt
substantive theories of market-share or enterprise liability in cases like *Sindell* and *Hall* (with the result that plaintiffs can recover) but not in cases like *The Exploding Tire*? That question seems more substantive than evidential, doesn’t it? If *The Exploding Tire* is different from cases like *Sindell* and *Hall*, does it make sense to adhere to an evidential standard that rejects “naked numerical proof”?

3. Consider the following arguments against allowing the party bearing the burden of persuasion to prevail on the basis of “numbers alone.” Doing so would be bad because it would

(a) Lead to the unjust result that each of 100 similar plaintiffs win, even though the evidence means that defendant should be liable to only 80;

(b) Permit recovery on proof inherently inferior to particularized evidence, which at least tends “directly” to establish critical points;

(c) Misinterpret reality, because particularized proof usually exists and failing to offer it suggests not so much that it isn’t there, but that it is unfavorable to the party relying on numerical probabilities;

(d) Create an undesirable counterincentive, discouraging active pursuit of particularized proof;

(e) Either (1) leave nothing for the jury to decide in the exercise of reason, so that it would have to be directed to find in accordance with the numbers (thus significantly and undesirably reducing its role), or (2) render the jury’s work transparent, thus subjecting particular juries and the institution of jury trial to criticism, since observers will see that juries decide cases “by” or “against” the “odds”;

(f) Undesirably quantify the margin for error tolerated in the system, revealing that a civil claimant may recover nothing even when the probability is as high as .49 that he should have won;

(g) Lessen public respect for and acceptance of courts by showing that they “gamble” on serious matters.


4. Consider the problem of “conjunction.” Lewis must prove (a) that Grather made the tire and (b) that it was defective. He can prevail only by established the conjunction of both elements. Assume this time that the proof is not “nakedly” quantified, but the evidence suggests that each element is “probably” established: Small remembers that the exploded tire was made by Grather, but his credibility is impaired by cross-examination; Treaver gives a hedged opinion that the tire was defective. If we were to quantify the evidence ourselves, we might conclude there is an 80 percent likelihood that Grather made the tire Small sent to Failsafe and a 60 percent likelihood that it was
C. The Relevance of Probabilistic Analysis

defective. A jury might do the same thing, assigning rough numeric values to the proof. Who should win, Lewis or Grather? If, as seems true here, the two probabilities are independent, doesn’t the product rule tell us the “conjoint” likelihood of the two facts crucial to Lewis is only 48 percent? One astute commentator argues that juries do not “assess the conjunction of the elements of a case,” and instead (quite properly) determine each element separately. Trials, it is argued, generate a kind of history:

Any narrative history recounts the occurrence of many events. If we asked what the conjunctive probability of the narrative’s independent elements is and dismissed the narrative when this probability was low, then we would have no history. We would constantly face a paradox. We could accept the truth of each event comprising the narrative but could not accept the narrative itself. We could believe every element that the historian recounted, but we could not believe the history as a whole.


5. Recall that the problem of conjunction also affects different items of proof directed at single elements in a case (item 5 in Notes on Conditional Relevancy, supra). Why should the factfinder “conjoin” separate items of proof relating to a single element in a case (thus diminishing aggregate likelihood) but not the proofs of separate elements?