

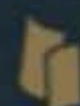


UNIVERSITY
CASEBOOK SERIES®

Evidence

FOURTH EDITION

GEORGE FISHER

 FOUNDATION
PRESS

FOUNDATION PRESS EDITORIAL BOARD

SAUL LEVMORE

DIRECTING EDITOR

William B. Graham Distinguished Service Professor of Law and
Former Dean of the Law School
University of Chicago

GUY-URIEL E. CHARLES

Charles J. Ogletree Jr. Professor of Law
Harvard Law School

NORA FREEMAN ENGSTROM

Ernest W. McFarland Professor of Law
Stanford Law School

DANIEL A. FARBER

Sho Sato Professor of Law
University of California at Berkeley

HEATHER K. GERKEN

Dean and the Sol & Lillian Goldman Professor of Law
Yale University

SAMUEL ISSACHAROFF

Bonnie and Richard Reiss Professor of Constitutional Law
New York University

HAROLD HONGJU KOH

Sterling Professor of International Law and
Former Dean of the Law School
Yale University

THOMAS W. MERRILL

Charles Evans Hughes Professor of Law
Columbia University

HILLARY A. SALE

Agnes Williams Sesquicentennial Professor of Law
Associate Dean for Strategy, and Professor of Management
Georgetown University

UNIVERSITY CASEBOOK SERIES®

EVIDENCE

FOURTH EDITION

GEORGE FISHER

Judge John Crown Professor of Law
Stanford Law School

 FOUNDATION
PRESS

The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

University Casebook Series is a trademark registered in the U.S. Patent and Trademark Office.

© 2002 FOUNDATION PRESS

© 2008, 2013 THOMSON REUTERS/FOUNDATION PRESS

© 2023 LEG, Inc. d/b/a West Academic

860 Blue Gentian Road, Suite 350

Eagan, MN 55121

1-877-888-1330

Printed in the United States of America

ISBN: 978-1-64020-160-6

For Wendy, our profile in courage.

PREFACE

My aim in writing this book has been above all to create an evidence book students will love. And if this goal has proved past my reach, I hope the book at least grabs and holds students' interest. The challenge is to present the law's gritty details in a way students find intellectually compelling and sometimes even fun. I've followed several strategies—some substantive, some stylistic, some purely pedagogical:

Focus on the Criminal Context: Courtrooms come alive when examined through a criminal law lens. Criminal cases seem earthier and more vital than mill-run civil actions. And in the criminal realm issues of racial justice, now gripping our national consciousness, come to the fore. The pages ahead therefore focus on criminal cases and scenarios. But because some evidence rules operate mainly on the civil side and because I've aimed to cover every important evidence topic, some civil cases join the mix. Still, whenever the doctrine has let me choose, I feature the rough-and-tumble and wrenching tensions of the criminal process.

Highlight History: Most evidence casebooks add intellectual content by exploring the epistemology of proof. Though the goal is worthy, the approach seems doubtful. Epistemology never grabbed students in my day, and I suspect it would work no better today. But the history of evidence law sometimes fascinates. Consider how the racial politics of the Civil War era stalled the inevitable collapse of many ancient witness competency rules. (See pages 389–396) Or take the back story of *Mutual Life Insurance Co. v. Hillmon* of 1892, a grisly tale of dirty dealings on the frontier. (See page 539.) And the history of the 1960s classic, *People v. Collins*, reveals the hidden hand of a future legal legend, then a 25-year-old law clerk, who ghostwrote much of the famous opinion. (See pages 88–92.) History is not just for fun, of course. Studying the stories behind the law strengthens students' grasp of the principles that drive our evidence rules and deepens understanding of how the law works today.

Make It Timely: Rich in history, evidence law is also a happening field. Since launching the *Crawford* revolution in 2004, the Supreme Court has decided ten major cases in a quixotic quest to define how tightly the Sixth Amendment Confrontation Clause constrains admission of hearsay against criminal defendants. Chapter 8 details the latest skirmishes among the Court's warring factions and ventures predictions about where the Justices will steer the doctrine next. Meanwhile the National Academy of Sciences lit a brushfire with its 2009 report scorching the methods and standards of the so-called forensic "sciences." Suddenly it was thinkable that courts might yield to timeworn defense demands, now girded by the NAS report, to bar or limit expert testimony about fingerprint or handwriting identification or hair or firearms analysis. Chapter 9 traces the defense bar's rising hopes, largely disappointed, of undermining such familiar forensic techniques. When the President's Council of Advisors on Science and Technology announced the results of a second investigation of the forensic sciences in 2016, it found little progress to celebrate.

Amid this strife in the courts and on commissions, change has come also from rule writers. In 2022 the evidence advisory committee introduced or advanced *eight* pending rule amendments. One of the most consequential will tighten the terms of Rule 702 to help guard against claims by forensic experts that their techniques yield irrefutable evidence of guilt. And a newly proposed Rule 611(d) will clarify the status of such illustrative aids as charts and diagrams and PowerPoint presentations and set the terms of their use at trial.

Meanwhile the nation's urgent focus on racial justice has prompted courts and scholars to look at all law, including evidence law, through a lens focused on the distortions of race. Whether the topic is eyewitness identification or witness impeachment or character attack or jury deliberation, examination of background racial dynamics deepens and enriches the analysis.

Confrontation law upended; forensic sciences attacked; evidence rules recast; racial justice demanded—these seismic events compelled this new edition, which strives to make students surehanded authorities on the latest rules and caselaw.

Mix It Up: But rules and caselaw are not all of law. Other sources—news accounts, journal articles, behavioral and scientific studies—inform law and are informed by it. Exploring the doctrine from many perspectives helps students see how evidence law suits (or doesn't suit) our whole system of justice. Moreover, many students like flowcharts, diagrams, and tables because visual images of the law can reveal its structure more clearly than any verbal description. The odd map, photo, cartoon, or poem can enlighten analysis or reflect the force of the law in action. Cases, too, remain a critical component. Real-world disputes breathe life into law, and disagreements among parties challenge students to flex their advocacy skills. And case-based narratives stick in the mind. Wrapping a rule's tangled verbiage around a memorable story makes that rule easier to remember and apply later.

Use Real-Life Problems: Problems also are essential, but pose hazards. Students seem to resent the hidden hand of the law professor, guiding them toward supposedly spontaneous moments of intellectual discovery. There are many forms of this pedagogical ruse, though rhetorical questions and elaborate hypotheticals are the two most obvious. I've avoided rhetorical questions almost entirely. As for hypotheticals, I think the best problems spring from life. So whenever possible, I have based problems on facts quoted from cases or news articles, complete with citations. My hope is that students will ask themselves, "How would a good lawyer attack this problem?" rather than "What is the professor driving at?"

Help Students Swim: I never have succeeded in teaching all of the Rules' intricacies through caselaw and commentary—and I doubt even the best student could learn evidence law without some straightforward guidance through doctrinal labyrinths. So at critical junctures in the book, I've laid out the details of doctrine as clearly as I can. The introductions to propensity evidence and hearsay, which address some of the toughest territory in evidence law, aim to give students a firm base on which to build the unwieldy doctrines of these two realms. They are just two of dozens of areas where I've felt a quick, treatise-like interjection could resolve confusion.

Fight the Bulge: A malady strikes casebooks as they age into later editions. New cases come along, and new studies and news stories follow. Earnest authors add them to the mix. Meanwhile, older cases, past their prime, somehow elude the author's sharpened pencil and survive into the next edition. Page counts swell, margins shrink, and smaller fonts strain students' eyes and patience. I've resolved to fight the bulge, erasing one old case for each new case and resisting temptation to cover every topic. I hope the book remains short enough that professors can assign and students can enjoy every page.

These have been my strategies. I hope they will work for you. But if I have taken a misguided course or missed a fruitful one, I trust that you (both students and professors) will let me know. The next edition will profit from your thoughts.

—GF

October 2022

ACKNOWLEDGMENTS

In the twenty-odd years since the first edition of this casebook began to take form, a small army of students, librarians, and colleagues have lent me their labor and expertise. Both friends and friendly strangers have sent ideas and citations and the best sorts of criticisms. There are too many such folks for me to remember, much less to list. I regret any I leave unnamed.

I've leaned on no one so heavily as the cadre of student researchers who have dug out forgotten cases and obscure articles. They have cite-checked, proofread, and indexed. They have assembled fifty-state surveys of odd aspects of evidence law. They have converted hand-drawn charts and diagrams into blueprint-quality art forms. They have offered student-sensitive insights, warning me when my drafts are confusing, long-winded, or dull. And many have gone on to lead admirable careers. My thanks to Billy Abbott, Stephanie Alessi, Matt Alexander, Justin Barnard, Luis Bergolla, Fred Bloom, Binyamin Blum, Jake Gardener, Christine Hwang, Vivek Kothari, Steve Mansell, Katherine McCarron, Mark Menzies, Jenny Moroney, Tom Newcomb, Duane Pozza, Anitha Reddy, Karen Saah, Zoe Scharf, Gabe Schlabach, Elise Sugarman, Anthony Sun, and Nathan Tauger. To Sydney Kirlan-Stout goes credit not only for making unnumbered contributions to this volume, but for engineering the rulebook that accompanies this edition.

The endlessly resourceful members, past and present, of Stanford's Crown Law Library helped both students and me in myriad ways. Among those who saved us from ignorance and error are Alba Holgado, Sonia Moss, Richie Porter, Rachael Samberg, Kate Wilko, George Wilson, and Sarah Wilson. And Bobbi Fuller (on the last edition) and Pat Sheeler (on this one) performed miraculous administrative feats, keeping our gears in motion when deadlines loomed.

From colleagues who have used or reviewed the book, I've received countless thoughtful suggestions and sharp-eyed corrections. With a repeated apology to those I'm forgetting, I will attempt a list: Michael Ariens, Peter Ausili, Michael Avery, Charles Baron, Shima Baradaran Baughman, Norman Bay, Jeff Bellin, Judge Isaac Borenstein, Mark Brodin, Darryl Brown, Bill Causey, Rosanna Cavallaro, Ed Cheng, Katherine Darmer, Michael Dimino, Ingrid Eagly, Jeff Fisher, Bill Fortune, John Garvey, Jonah Gelbach, Mark Godsey, Bob Gordon, Michael Gottesman, Lisa Griffin, Erica Hashimoto, Bruce Hay, David Kaye, Kate Kruse, Lash LaRue, Melanie Leslie, Andy Levy, Craig Lewis, Lane Liroff, Kevin McMunigal, Deborah Merritt, Colin Miller, Jennifer Mnookin, Joëlle Moreno, Fred Moss, Ann Murphy, Emily Murphy, Dale Nance, Deirdre O'Connor, Katherine Pearson, Judge Paul Plunkett, Richard Polenberg, Phil Pucillo, Judge Timothy Rice, Mark Rienzi, Tanina Rostain, Margaret Ryan, Rob Steinbuch, Ben Trachtenberg, Rick Underwood, Si Wasserstrom, Marianne Wesson, Dan Williams, Tom Workman, and Kathryne Young. I owe a special debt to Dan Capra, who holds the clue to every recent and forthcoming change in the Federal Rules and has shared his knowledge generously and patiently.

Many kind folks scattered across the country have added color and depth to important cases. Gene Talerico of the Lackawanna County District Attorney's Office and André Stuart of 21st Century Forensic Animations helped secure the animation featured in *Commonwealth v. Serge* (page 61). Jake Ersland of the National Archives at Kansas City dug out and scanned the photos that accompany *Mutual Life Insurance Co. v. Hillmon* (page 547). David Mark of the Bristol County District Attorney's Office helped gain access to the 911 call examined in *Commonwealth v. Nesbitt* (page 657). Judge Jeffrey Alker Meyer graciously supplied the images that accompany his ruling in *United States v. Oreckinto* (page 925). And Christopher Holm of Lucasfilm Ltd. bestowed permission to reprint the famous image at issue in *Seiler v. Lucasfilm* (page 939).

To the exceptionally talented and astonishingly patient production crew at Foundation Press goes all credit for the handsomely proportioned pages, the easy-reading text, and the meticulous error detection. Cathy Lundeen labored till the moment of her retirement to make every page perfect. Megan Hoffman then took the helm and scrubbed the final proofs of every minor flaw. Greg Olson and the rest of his crew—Michele Bassett and Laura Holle—suffered the headaches caused by my missed deadlines with seemingly bottomless patience and complete professionalism. And Editor in Chief Staci Herr, aided by acquisitions editor John Moen, steered this volume to print with quiet competence and understated command. Together these good people, with their Midwestern warmth and humor, have given corporate headquarters an unusually homey name.

I owe a special thanks to Professor David Leonard, who together with Professor Rosanna Cavallaro read the entire manuscript of the first draft of this book. Though David had his own casebook in the works, he offered his wise counsel on page after page of mine. David died much too young in 2010. He has been spoken of in death as he was in life as one of the nicest persons any of us has known.

Let me note finally the sad passing in 2017 of my mentor in evidence law, my colleague Miguel Méndez. From the day I arrived at Stanford in 1995, Miguel offered me guidance and friendship and constant support. He was pure integrity, decent to the core.

SUMMARY OF CONTENTS

[PREFACE](#)

[ACKNOWLEDGMENTS](#)

[TABLE OF CASES](#)

[TABLE OF SECONDARY AUTHORITIES](#)

[Introduction](#)

UNIT I RELEVANCE

[Chapter 1 General Principles of Relevance](#)

[A. Probativeness and Materiality](#)

[B. Conditional Relevance](#)

[C. Probativeness Versus the Risk of Unfair Prejudice](#)

[Chapter 2 The Specialized Relevance Rules](#)

[A. Subsequent Remedial Measures](#)

[B. Compromise Offers and Payment of Medical Expenses](#)

[C. Liability Insurance](#)

[D. Pleas in Criminal Cases](#)

[Chapter 3 Character Evidence](#)

[A. The Character-Propensity Rule](#)

[B. Routes Around the Box](#)

[C. The *Huddleston* Standard](#)

[D. Propensity Evidence in Sexual Assault Cases](#)

[E. Proof of the Defendant's and the Victim's Character](#)

[F. Evidence of Habit](#)

[Chapter 4 Impeachment and Character for Truthfulness](#)

[A. Modes of Impeachment](#)

[B. Impeachment by Opinion, Reputation, and Cross-Examination About Past Lies](#)

[C. Impeachment with Past Convictions](#)

[D. Rehabilitation](#)

[E. Use of Extrinsic Evidence](#)

[Chapter 5 The Rape Shield Law](#)

[A. Historical Backdrop](#)

[B. The Shield Law](#)

[C. The Law in Force](#)

UNIT II RELIABILITY

[Chapter 6 Competency of Witnesses](#)

[Chapter 7 The Rule Against Hearsay](#)

[A. Historical Prelude](#)

[B. Defining Hearsay](#)

[C. Opposing Parties' Statements](#)

[D. Past Statements of Witnesses and Past Testimony](#)

[E. Hearsay Exceptions Under Rule 804: "Declarant Unavailable"](#)

[F. Exceptions Under Rule 803: Declarant's Availability Immaterial](#)

[G. Residual Exception](#)

[Chapter 8 Confrontation and Compulsory Process](#)

[A. The Confrontation Clause and Hearsay](#)

[B. The *Bruton* Doctrine](#)

[C. Compulsory Process](#)

[Chapter 9 Lay Opinions and Expert Testimony](#)

[A. Lay Opinions](#)

[B. Expert Testimony](#)

Chapter 10 Authentication, Identification, and the “Best Evidence” Rule

- A. Authentication and Identification
- B. The “Best Evidence Rule”

UNIT III PRIVILEGES

Chapter 11 Privileges: General Principles

- A. Rule 501’s Origins and Application
- B. Witnesses’ Privileges vs. Defendants’ Need for Evidence

Chapter 12 The Lawyer–Client Privilege and the Privilege Against Self-Incrimination

- A. Scope of the Lawyer–Client Privilege
- B. The Crime-Fraud Exception
- C. Government Lawyers
- D. The Lawyer–Client Privilege and the Privilege Against Self-Incrimination

Chapter 13 Familial Privileges

- A. The Marital Privileges
- B. A Parent–Child Privilege?

Conclusion Evidence Law and Jury Mistrust

INDEX

TABLE OF CONTENTS

[PREFACE](#)

[ACKNOWLEDGMENTS](#)

[TABLE OF CASES](#)

[TABLE OF SECONDARY AUTHORITIES](#)

[Introduction](#)

[Tanner v. United States: Historical Prelude](#)

[Focus on FRE 606\(b\)](#)

[Tanner v. United States](#)

[Warger v. Shauers: Case Note](#)

[Peña-Rodriguez v. Colorado: Case Note](#)

[Problem 1.1 "The Cosby Show"](#)

[Tanner, Warger, & Peña-Rodriguez: Afterthoughts](#)

[UNIT I. RELEVANCE](#)

[Chapter 1 General Principles of Relevance](#)

[A. Probableness and Materiality](#)

[Focus on FRE 401 & 402](#)

[1. Probableness](#)

[George F. James, Relevancy, Probability and the Law](#)

[Problem 1.1 "Show Me the Body"](#)

[Problem 1.2 Passports](#)

[Problem 1.3 Polygraph Consent](#)

[2. Materiality](#)

[Problem 1.4 Knowledge](#)

[Problem 1.5 Voluntary Intoxication](#)

[United States v. James](#)

[United States v. James: Afterthoughts](#)

[Problem 1.6 Violin Case](#)

[B. Conditional Relevance](#)

[Focus on FRE 104\(b\)](#)

[Problem 1.7 Threat to Disclose](#)

[Bill D'Agostino, Fitzhugh Case: Judge Allows Paternity Motive](#)

[Cox v. State](#)

[Cox v. State: Afterthoughts](#)

[C. Probableness Versus the Risk of Unfair Prejudice](#)

[Focus on FRE 403](#)

[Rule 403: Phrase by Phrase](#)

[1. Photos and Other Inflammatory Evidence](#)

[State v. Bochanski](#)

[Rebecca Hofstein Grady et al., Impact of Gruesome Photographic Evidence on Legal Decisions: A Meta-Analysis](#)

[Problem 1.8 "Start Practicing Your Pentangeli"](#)

[The Government Accuses Roger Stone of Being a Disorganized](#)

[Figure Who Committed a Crime](#)

[Commonwealth v. Serge](#)

[Commonwealth v. Serge: Afterthoughts](#)

[United States v. James](#)

[2. Evidence of Flight](#)

[United States v. Myers](#)

[United States v. Myers: Afterthoughts](#)

[Problem 1.9 Fleeing Trouble I](#)

[Problem 1.10 Fleeing Trouble II](#)

[Jasmine B. Gonzales Rose, Toward a Critical Race Theory of](#)

[Evidence](#)

[Problem 1.11 Staying Put](#)

[3. Probability Evidence](#)

[People v. Collins](#)

[People v. Collins: Historical Postscript](#)

[4. Effect of Stipulations](#)

[Focus on FRE 102](#)
[United States v. Jackson](#)
[Old Chief v. United States](#)

Chapter 2 The Specialized Relevance Rules

[Specialized Relevance Rules: Analytical Charts](#)

[Specialized Relevance Rules Flowchart](#)

A. Subsequent Remedial Measures

[Focus on FRE 407](#)

[Problem 2.1 Wolf Attack](#)

[Tuer v. McDonald](#)

[Problem 2.2 Wood Chipper](#)

[Problem 2.3 Taser Training](#)

[Notes on Rule 407: Subsequent Remedial Measures](#)

B. Compromise Offers and Payment of Medical Expenses

[Focus on FRE 408 & 409](#)

[Bankcard America, Inc. v. Universal Bancard Systems, Inc.](#)

[Problem 2.4 Hotel Inspection](#)

[Notes on Rule 408: Compromise and Offers to Compromise](#)

[Benjamin J. McMichael et al., "Sorry" Is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability](#)

[Risk](#)

[Comparing Rules 408 \(Compromise\) and 409 \(Medical Expenses\)](#)

C. Liability Insurance

[Focus on FRE 411](#)

[Ventura v. Kyle](#)

[Problem 2.5 Claims Adjuster](#)

[Problem 2.6 Malpractice Insurer](#)

[Problem 2.7 Failure to Report](#)

[Shari Seidman Diamond & Neil Vidmar, Jury Room Ruminations on Forbidden Topics](#)

D. Pleas in Criminal Cases

[Focus on FRE 410](#)

[Problem 2.8 Prosecutor's Offer](#)

[United States v. Biaggi](#)

[Problem 2.9 Mariotta's Retrial](#)

[Notes on Rule 410: Pleas, Plea Discussions, and Related Statements](#)

[The Specialized Relevance Rules: Afterthoughts](#)

Chapter 3 Character Evidence

A. The Character-Propensity Rule

[Focus on FRE 404\(a\)\(1\)](#)

[Man, Girl Sought in Street Fight Fatal to Youth](#)

[Girl Wife Held with Husband in Fatal Shooting](#)

[Zackowitz Goes to Death Chair Week of May 5](#)

[People v. Zackowitz](#)

[People v. Zackowitz: Afterthoughts](#)

[The Propensity Box](#)

[Focus on FRE 404\(b\)](#)

[Character Evidence Flowchart](#)

[Miguel A. Méndez, Character Evidence Reconsidered: "People Do Not Seem to be Predictable Characters."](#)

B. Routes Around the Box

1. Proof of Knowledge

[Problem 3.1 Hacker](#)

[Problem 3.2 Drug Seller](#)

[Problem 3.3 Train Crash](#)

2. Proof of Motive

[Taryn Finley, Cop Who Killed Sam DuBose Was Wearing a Confederate Flag Shirt](#)

[Problem 3.4 Confederate Flag](#)

[Problem 3.5 Rap Lyrics](#)

[Livia Albeck-Ripka, A Bill Limits Rap Lyrics as Evidence](#)

[Problem 3.6 US v. Peltier I](#)

3. Proof of Identity

[Problem 3.7 US v. Peltier II](#)

[Problem 3.8 Lottery Lists](#)
[Problem 3.9 Cycling Brochures](#)
[United States v. Trenkler](#)
[United States v. Stevens](#)
[United States v. Stevens: Afterthoughts](#)
[Problem 3.10 Misreading Stevens](#)

4. [Narrative Integrity \(Res Gestae\)](#)

[Problem 3.11 Russian Roulette](#)
[United States v. DeGeorge](#)

5. [Absence of Accident](#)

[Problem 3.12 Cleaning His Gun](#)
[Problem 3.13 Cruelty to Dogs](#)
[Alan Gathright, Rebuttal OKd if Burnett Testifies That Leo Bit Him](#)

6. [Doctrine of Chances](#)

[The Brides Case, Prisoner on Trial at the Old Bailey,](#)
[Brides in Baths, Prisoner Sentenced to Death,](#)
[Rex v. Smith: Afterthoughts](#)

C. [The Huddleston Standard](#)

[Huddleston v. United States](#)
[Problem 3.14 Past Acquittal](#)

D. [Propensity Evidence in Sexual Assault Cases](#)

[Focus on FRE 413, 414, & 415](#)
[Lannan v. State](#)
[State v. Kirsch](#)
[Problem 3.15 Common Plan and Domestic Violence](#)
[Notes on Rules 413, 414, and 415](#)
[Floor Statement of the Principal House Sponsor, Representative Susan Molinari, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases](#)
[Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases](#)
[Sally Quinn, Baggage Check: How Far Should We Go?](#)
[Katharine K. Baker, Once a Rapist? Motivational Evidence and Relevancy in Rape Law](#)
[United States v. Guardia](#)
[United States v. Guardia: Postscript](#)
[United States v. Mound](#)
[United States v. Mound: Postscript](#)

E. [Proof of the Defendant's and the Victim's Character](#)

[Focus on FRE 404\(a\)\(2\)\(A\), 404\(a\)\(2\)\(B\), & 405\(a\)](#)
[Michelson v. United States](#)
[Michelson v. United States: Afterthoughts](#)
[Focus on FRE 405\(b\)](#)
[Distinguishing Proof of Character Under Rule 405\(b\)](#)
[Problem 3.16 "I Wouldn't Shoot Anybody"](#)
[Problem 3.17 Character of Victim I](#)
[Problem 3.18 Character of Victim II](#)
[Problem 3.19 Character of Victim III](#)

F. [Evidence of Habit](#)

[Focus on FRE 406](#)
[Halloran v. Virginia Chemicals Inc.](#)
[Halloran v. Virginia Chemicals Inc.: Afterthoughts](#)
[Problem 3.20 Steroids](#)

[Chapter 4 Impeachment and Character for Truthfulness](#)

A. [Modes of Impeachment](#)

[Impeachment Evidence Flowchart](#)

B. [Impeachment by Opinion, Reputation, and Cross-Examination About Past Lies](#)

[Focus on FRE 404\(a\)\(3\), 607, & 608](#)
[United States v. Whitmore](#)

[H. Richard Uviller, Credence, Character, and the Rules of Evidence:
Seeing Through the Liar's Tale](#)

[Problem 4.1 Bar Fight](#)

[Character and Credibility: Study Guide \(Part I\)](#)

[Problem 4.2 Lawyer's Lies](#)

[Jonathan D. Glater, Character to Be a Major Issue in Tyco Trial](#)

C. Impeachment with Past Convictions

[Focus on FRE 609](#)

1. The History and Theory of Rule 609

[Rule 609 and Defendant Testimony: Historical Prelude](#)

[Anna Roberts, Conviction by Prior Impeachment](#)

[Theodore Eisenberg & Valerie P. Hans, Taking a Stand on Taking
the Stand: The Effect of a Prior Criminal Record on the
Decision to Testify and on Trial Outcomes](#)

2. Rule 609 in Force

[Problem 4.3 Impeachment Modes](#)

[United States v. Brewer](#)

[Character and Credibility: Study Guide \(Part II\)](#)

[Problem 4.4 Weighing Tests](#)

[Problem 4.5 Meter Fixing](#)

[Rule 609: Case Notes on Appellate Review](#)

[Roselle L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction
Evidence to Decide on Guilt](#)

D. Rehabilitation

[Problem 4.6 Rehabilitating the Witness](#)

[Character and Credibility: Study Guide \(Part III\)](#)

[Problem 4.7 Bolstering](#)

E. Use of Extrinsic Evidence

[Problem 4.8 Offering Proof](#)

[Character and Credibility: Study Guide \(Part IV\)](#)

[Problem 4.9 Selfish Lies](#)

Chapter 5 The Rape Shield Law

A. Historical Backdrop

[People v. Abbot](#)

[State v. Sibley](#)

[John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law](#)

B. The Shield Law

[Susan Estrich, Real Rape](#)

[Focus on FRE 412](#)

[Sherry F. Colb, "Whodunit" Versus "What Was Done": When to
Admit Character Evidence in Criminal Cases](#)

[Harriett R. Galvin, Shielding Rape Victims in the State and Federal
Courts: A Proposal for the Second Decade](#)

C. The Law in Force

1. Other Sexual Behavior or Sexual Predisposition

[Problem 5.1 Marriage and Sexuality](#)

2. Explaining the Source of Physical Evidence

[Problem 5.2 Images](#)

3. Past Sexual Behavior with the Accused

[Problem 5.3 Emails](#)

4. Past Allegedly False Accusations

[State v. Smith](#)

[Problem 5.4 Smith on Remand](#)

[Problem 5.5 Old Accusation](#)

[Problem 5.6 Sexting, Texting](#)

5. 404(b)—Style Uses of Evidence of Past Sexual Behavior

a. Proof of Bias

[Olden v. Kentucky](#)

[Problem 5.7 Bad Trouble](#)

[Olden v. Kentucky: Afterthoughts](#)

b. Narrative Integrity (Res Gestae)

[Stephens v. Miller](#)

- [Problem 5.8 Retrying Stephens](#)
- c. [Defendant's State of Mind](#)
- [United States v. Knox](#)
- [United States v. Knox: Afterthoughts](#)

6. [A Glance at Civil Cases](#)

- [Problem 5.9 Jones v. Clinton](#)
- [Neil A. Lewis, President's Accuser May Be Questioned on Her Sexual Past](#)

UNIT II. RELIABILITY

Chapter 6 Competency of Witnesses

[Historical Prelude: Rules of Witness Competency and the Clash Between North and South](#)

[Focus on FRE 601, 602, 603, & 610](#)

[Competency Rules Today](#)

Chapter 7 The Rule Against Hearsay

A. Historical Prelude

[The Trial of Sir Walter Raleigh, Knt. at Winchester, for High Treason \(1603\)](#)

B. Defining Hearsay

1. The Basic Rule

[Focus on FRE 801\(a\)-\(c\) & 802](#)

[Hearsay: An Introduction](#)

[Hearsay Evidence Flowchart](#)

[Problems](#)

[Problem 7.1 Affidavit](#)

[Problem 7.2 Gesture](#)

[Problem 7.3 Quoting Herself](#)

[Problem 7.4 Blood Test](#)

[Problem 7.5 Boasts](#)

[Problem 7.6 Ineffective Assistance](#)

[Problem 7.7 Declarations](#)

2. Defining Assertions

[Judson F. Falknor, The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct](#)

[Problem 7.8 Ship Inspection](#)

[Problem 7.9 Amchitka Holiday](#)

[The Nature of Assertions](#)

[Hearsay Quiz](#)

3. Exceptions to the Hearsay Rule: An Introduction

C. Opposing Parties' Statements

1. The Party's Own Words

[Focus on FRE 801\(d\)\(2\)\(A\)](#)

[Problem 7.10 Billables](#)

[Problem 7.11 He Said She Said](#)

2. Adoptive Admissions

[Focus on FRE 801\(d\)\(2\)\(B\)](#)

[Problem 7.12 Currency Seizure Report](#)

[Problem 7.13 Buddies](#)

[Problem 7.14 Jailhouse Meeting](#)

3. Statements of Agents

[Focus on FRE 801\(d\)\(2\)\(C\) & \(D\)](#)

[Pet Wolf Bites Boy in U. City](#)

[Mahlandt v. Wild Canid Survival & Research Center, Inc.](#)

[Problem 7.15 Shovel and Bucket](#)

4. Coconspirators' Statements

[Focus on FRE 801\(d\)\(2\)\(E\) & 104\(a\)](#)

[Bourjaily v. United States](#)

[Bourjaily v. United States: Afterthoughts](#)

[Problem 7.16 Translation](#)

D. Past Statements of Witnesses and Past Testimony

1. Introduction

Past Statements of Witnesses and Past Testimony Chart
Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept

2. Inconsistent Statements Offered to Impeach

Focus on FRE 613

United States v. Barrett

Problem 7.17 Stop Sign

Problem 7.18 Fine Watches

United States v. Ince

Problem 7.19 Why Such Excitement?

Miranda and Silence

Miranda and Silence

3. Inconsistent Statements Offered Substantively

Focus on FRE 801(d)(1)(A)

Problem 7.20 Mother Says

4. Past Consistent Statements

Focus on FRE 801(d)(1)(B)

Tome v. United States

5. Statements of Identification

Focus on FRE 801(d)(1)(C)

National Research Council, Identifying the Culprit: Assessing Eyewitness Testimony

Problem 7.21 Composite Sketch

United States v. Owens

Problem 7.22 Accident or Abuse?

E. Hearsay Exceptions Under Rule 804: "Declarant Unavailable"

1. Past Testimony

Focus on FRE 804(a) and 804(b)(1)

Volland-Golden v. City of Chicago

Problem 7.23 Pretrial Testimony

2. Statements Against Interest

Focus on FRE 804(b)(3)

Problem 7.24 Ask Magnolia

Williamson v. United States

Problem 7.25 Alice's Restaurant

Problem 7.26 Accomplices

Problem 7.27 "Bucky Wasn't Involved"

3. Dying Declarations

Focus on FRE 804(b)(2)

William Shakespeare: On Truth and Dying

Problem 7.28 Clyde Mattox

Problem 7.29 Suicide Note

Shepard v. United States

Focus on FRE 806

Shepard v. United States: Afterthoughts

Bryan A. Liang, Shortcuts to "Truth": The Legal Mythology of

Dying Declarations

4. Forfeiture by Wrongdoing

Focus on FRE 804(b)(6)

United States v. Gray

Rule 804(b)(6): Forfeiture by Wrongdoing

F. Exceptions Under Rule 803: Declarant's Availability Immaterial

1. Present Sense Impressions and Excited Utterances

Focus on FRE 803(1) & (2)

Problem 7.30 Dog Mauling I

Jaxon Van Derbeken, Dog-Mauling Judge OKs Testimony

Problem 7.31 Dog Mauling II

United States v. Boyce

Timothy T. Lau, Reliability of Present Sense Impression Hearsay Evidence

Justin Peters, Was George Zimmerman's 911 Call a Clever Piece of Propaganda?

2. Statements of Then-Existing Condition

Focus on FRE 803(3)

Mutual Life Insurance Co. v. Hillmon

[Problem 7.32 Kidnapper](#)

[Shepard v. United States](#)

[Mutual Life Insurance Co. v. Hillmon: Historical Postscript](#)

3. Statements for Medical Diagnosis or Treatment

Focus on FRE 803(4)

[Problem 7.33 Elder Abuse](#)

[State v. Smith](#)

[Problem 7.34 Twisted Arm](#)

[Melody R. Herbst et al., Young Children's Understanding of the Physician's Role and the Medical Hearsay](#)

[Exception](#)

[Problem 7.35 Food Poisoning](#)

4. Refreshing Memory and Recorded Recollections

Focus on FRE 803(5) & 612

[Problem 7.36 License Plate](#)

[Johnson v. State](#)

5. Business Records

Focus on FRE 803(6) & (7)

[Palmer v. Hoffman: Historical Prelude](#)

[Palmer v. Hoffman](#)

[Problem 7.37 Lawn Mower](#)

[United States v. Vigneau](#)

6. Public Records and Reports

Focus on FRE 803(8) & (10)

[Beech Aircraft Corp. v. Rainey](#)

[Police Reports and Business Records](#)

G. Residual Exception

Focus on FRE 807

[New Courthouse, Badly Damaged by Fire This Morning—Dome Burned Off](#)

[Dallas County v. Commercial Union Assurance Co.](#)

[Dallas County v. Commercial Union Assurance Co.: Afterthoughts](#)

[Rule 807 and Demise of the "Near-Miss" Theory](#)

Chapter 8 Confrontation and Compulsory Process

A. The Confrontation Clause and Hearsay

[Mattox v. United States](#)

[Confrontation Clause and Hearsay: Case Notes](#)

[I. The Mattox Era](#)

[II. The Roberts Era](#)

[III. The Crawford Era](#)

[Crawford v. Washington](#)

[Crawford v. Washington: The Court's Contested Originalism](#)

[Robert Tharp, Domestic Violence Cases Face New Test](#)

[Crawford v. Washington: Afterthoughts](#)

[Post-Crawford Confrontation Caselaw](#)

[Whorton v. Bockting: Case Note](#)

[Giles v. California: Case Note](#)

[Problem 8.1 Forfeiture Motion](#)

[Michigan v. Bryant](#)

[Problem 8.2 "Ralph Nesbitt"](#)

[Problem 8.3 Dealing in Progress](#)

[Bullcoming v. New Mexico](#)

[Brian Ballou & Andrea Estes, 'I Messed Up Bad. It's My Fault,'](#)

[Chemist Says](#)

[Problem 8.4 Via Skype](#)

[Williams v. Illinois: Case Note](#)

[Ohio v. Clark: Case Note](#)

[Focus on FRE 106](#)

[Hemphill v. New York: Case Note](#)

[Firm Footholds and the Confrontation Flowchart](#)

[Hearsay and Confrontation Flowchart](#)

[Problem 8.5 Deliver After Death](#)

[Carrie Antlfinger, Court Considers Letter Predicting Death](#)

[Problem 8.6 Medical Records](#)

[Problem 8.7 DOVE Interview](#)

[The Confrontation Frontier: Surveying the Future of the Crawford Doctrine](#)

[Crawford and Its Progeny: Have They Helped or Hurt Criminal Defendants?](#)

[The Trial of Sir Walter Raleigh: Historical Postscript](#)

B. [The Bruton Doctrine](#)

[Bruton v. United States](#)

[Problem 8.8 "Dog O' War"](#)

[Jaxon Van Derbeken, Witness Links Attorneys to Prison Gang Testimony in Dog-Mauling Trial](#)

[Gray v. Maryland](#)

[Problem 8.9 "He, She, or They"](#)

C. [Compulsory Process](#)

[Jack Nelson, Supreme Court to Rule on Mississippi Shootout](#)

[John P. MacKenzie, Confession Case Reverses Usual Roles](#)

[Chambers v. Mississippi](#)

[Chambers v. Mississippi: Historical Postscript](#)

[Holmes v. South Carolina: Case Note](#)

[Chapter 9 Lay Opinions and Expert Testimony](#)

A. [Lay Opinions](#)

[Focus on FRE 701](#)

[Problem 9.1 Despondently](#)

[Problem 9.2 How Old?](#)

[Lay Opinions: An Introduction](#)

[Problem 9.3 White Powder](#)

[United States v. Ganier](#)

[United States v. Ganier: Afterthoughts](#)

[Problem 9.4 Hieroglyphics](#)

B. [Expert Testimony](#)

1. [Who Qualifies as an Expert?](#)

[Focus on FRE 702](#)

[Problem 9.5 Horticulturist](#)

[Brian Richardson, Man Says He Helped Bring Drugs to State](#)

[United States v. Johnson](#)

[The Proof of the Pudding](#)

[Jinro America, Inc. v. Secure Investments, Inc.](#)

[Problem 9.6 Drug Argot](#)

2. [\(Im\)proper Topics of Expert Testimony](#)

[Focus on FRE 702\(a\) & 704](#)

a. [Matters of Common Knowledge](#)

[Problem 9.7 Confusion?](#)

[Problem 9.8 Housing Ads](#)

[Problem 9.9 Slip and Fall](#)

b. [Opinions on Law and Opinions on Ultimate Issues](#)

[Problem 9.10 Defendant's Intent](#)

[Hygh v. Jacobs](#)

c. [Opinions on Witness Credibility](#)

[Problem 9.11 Officers' Truthfulness](#)

[Problem 9.12 Rap Lyrics = Truth?](#)

[State v. Batangan](#)

[State v. Batangan: Afterthoughts](#)

d. [Opinions on Eyewitness Identification](#)

[State v. Guilbert](#)

[Problem 9.13 Street Corner Stickup](#)

3. [Proper Bases of Expert Opinion Testimony](#)

[Focus on FRE 702\(b\), 703, & 705](#)

[Rule 703: An Introduction](#)

[In re Melton: Case Note](#)

[Problem 9.14 Rwandan Roadblock](#)

[Problem 9.15 Doctor's Note](#)

4. Assessing the Reliability of Expert Scientific Testimony

a. The Doctrine

Frye v. United States

Daubert v. Merrell Dow Pharmaceuticals, Inc.

Daubert v. Merrell Dow: Afterthoughts

Gina Kolata, Judge Rules Breast Implant Evidence Invalid

Susan Haack, An Epistemologist in the Bramble-Bush: At the Supreme Court with Mr. Joiner

b. A Focus on Polygraph Evidence

D. Michael Risinger, Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?

United States v. Scheffer: Case Note

Martha J. Farah et al., Functional MRI-based Lie Detection: Scientific and Societal Challenges

United States v. Semrau

Problem 9.16 Polygraph Consent II

Henry T. Greely, Mind Reading, Neuroscience, and the Law

5. Assessing the Reliability of Non-Scientific Expertise

a. The Doctrine

Kumho Tire Company v. Carmichael

Rule 702: Public Comments on 2000 Amendment

Problem 9.17 Hedonics

b. A Focus on Syndrome Evidence

Kenneth J. Weiss & Alisa R. Gutman, Testifying about Trauma: A Call for Science and Civility

Tardif v. City of New York

William M. Grove & R. Christopher Barden, Protecting the Integrity of the Legal System: The Admissibility of Testimony from Mental Health Experts Under Daubert/Kumho Analyses

Problem 9.18 Dueling Doctors

Problem 9.19 Separation Violence

6. Assessing the Reliability of the Forensic Sciences

The Fate of the Forensic Sciences

Chapter 10 Authentication, Identification, and the "Best Evidence"

Rule

A. Authentication and Identification

Focus on FRE 901 & 902

Introduction

1. Documents

Problem 10.1 "To Send Money"

Problem 10.2 Handwriting Opinion

United States v. Stelmokas

Problem 10.3 Anonymous Note

2. Text Messages and Phone Calls

Problem 10.4 Delo's Texts

State v. Benton

Problem 10.5 Calling Small

3. Photographs, Videotapes, and Internet Images

State v. Luke

United States v. Oreckinto

Problem 10.6 Posting While Driving

Problem 10.7 Serge Animation

B. The "Best Evidence Rule"

Focus on FRE 901 & 902

Introduction

Problem 10.8 Perjury Trial

Problem 10.9 Alice's Restaurant II

Seiler v. Lucasfilm: Prequel

Seiler v. Lucasfilm

Problem 10.10 GPS Data

United States v. Jackson

UNIT III. PRIVILEGES

Chapter 11 Privileges: General Principles

A. Rule 501's Origins and Application

Focus on FRE 501

Rule 501: Historical Prelude

Focus on Proposed FRE 504

Jaffee v. Redmond

Problem 11.1 Relayed Threats

In re: Grand Jury Subpoena, Judith Miller

Adam Liptak, Reporter Jailed After Refusing to Name Source

Noam N. Levey, House Extends Law to Protect Reporters

In re: Grand Jury Subpoena, Judith Miller: Postscript

B. Witnesses' Privileges vs. Defendants' Need for Evidence

Problem 11.2 Right Meets Privilege

Focus on Proposed FRE 506 & 511

Devlin Barrett et al., Jail Notes Led to Revelation

Jim Dwyer, In Court, a Priest Reveals a Secret He Carried for 12 Years

Morales v. Portuondo

Morales v. Portuondo: Afterthoughts

Chapter 12 The Lawyer-Client Privilege and the Privilege Against Self-Incrimination

Jeremy Bentham, Rationale of Judicial Evidence

A. Scope of the Lawyer-Client Privilege

Common Elements of the Professional Privileges

1. The Nature of Legal Services

Focus on Proposed FRE 503

People v. Gionis

2. Maintaining Confidentiality

Focus on FRE 502

Problem 12.1 Eavesdropped

Problem 12.2 Dumpster Diving

Williams v. District of Columbia

Problem 12.3 Clawing Back

Mark Herrmann, Inside Straight

Barry R. Temkin, Errant E-Mail

Eileen Libby, The "Oops" Factor

3. Defining Communications: Source of Fees and Client's Identity

Problem 12.4 Unknown Driver

Problem 12.5 Stolen Typewriter

Problem 12.6 Counterfeit Bill

Problem 12.7 Handwriting

4. Duration of the Privilege

Michael Isikoff, Foster Was Shopping for Private Lawyer,

Probers Find

Swidler & Berlin v. United States

B. The Crime-Fraud Exception

Problem 12.8 Custody Dispute

United States v. Zolin

C. Government Lawyers

In Re: Grand Jury Investigation [Rowland]

Problem 12.9 Ex-Governor's Claim

D. The Lawyer-Client Privilege and the Privilege Against Self-Incrimination

1. General Principles

A Guide Through the Doctrinal Thicket

Act of Production

Problem 12.10 Guilty Knowledge

Problem 12.11 Spell Check

Problem 12.12 "I Consent"

2. The Problem of Use Immunity

Use and Transactional Immunity

[United States v. Hubbell](#)
[United States v. Hubbell: *Afterthoughts*](#)

Chapter 13 Familial Privileges

A. The Marital Privileges

1. The Spousal Testimonial Privilege

[Tilton v. Beecher](#)
[Focus on Proposed FRE 505](#)
[Trammel v. United States](#)
[Sam Howe Verhovek, Athlete and Legal Issue on Trial](#)
[The Two Marital Privileges: *Overview*](#)

2. The Marital Confidences Privilege

[Problem 13.1 *Sham Marriage?*](#)
[Problem 13.2 *Office Emails*](#)
[Problem 13.3 *Kitchen Counter Note*](#)
[United States v. Rakes](#)
[Problem 13.4 *Marital Hearsay*](#)

B. A Parent-Child Privilege?

[In re Grand Jury Proceedings](#)

Conclusion Evidence Law and Jury Mistrust

[INDEX](#)

TABLE OF CASES

Principal cases are in bold type. Non-principal cases are in roman type. References are to Pages.

- Abbot, People v.**, 19 Wend. 192 (N.Y. Sup. 1838), 343
Abel, United States v., 469 U.S. 45 (1984), 3, 282, 337
Aboumoussallem, United States v., 726 F.2d 906 (2d Cir. 1984), 452
Accutane Litigation, In re, 234 N.J. 340 (2018), 818
Acevedo-Hernández, United States v., 898 F.3d 150 (1st Cir. 2018), 992
Ackerson v. United States, 273 U.S. 702 (1926), 448
Adams, United States v., 444 F. Supp. 3d 1248 (D. Or. 2020), 901
"Agent Orange" Prod. Liab. Litig., In re, 611 F. Supp. 1223 (E.D.N.Y. 1985), 799
Alexiou v. United States, 39 F.3d 973 (9th Cir. 1994), 1019
Allery, United States v., 526 F.2d 1362 (8th Cir. 1975), 1073
Alperin, United States v., 128 F. Supp. 2d 1251 (N.D. Cal. 2001), 992
Altobello v. Borden Confectionary Products, Inc., 872 F.2d 215 (7th Cir. 1989), 323
Alvey, State v., 458 N.W.2d 850 (Iowa 1990), 363
Aman, United States v., 748 F. Supp. 2d 531 (E.D. Va. 2010), 886
Ammar, United States v., 714 F.2d 238 (3d Cir. 1983), 991
Anderson v. Akzo Nobel Coatings, Inc., 172 Wash. 2d 593 (2011), 817
Arteaga, United States v., 117 F.3d 388 (9th Cir. 1997), 576
Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995), 749
Attorney General v. Hitchcock, 1 Exch. 91, 99 (Eng. 1847), 339
Ault v. International Harvester Co., 13 Cal. 3d 113 (1974), 125
Ausby, United States v., 916 F.3d 1089 (D.C. Cir. 2019), 894
Auster, United States v., 517 F.3d 312 (5th Cir.), 962
Ayers v. Robinson, 887 F. Supp. 1049 (N.D. Ill. 1995), 862
Baines, United States v., 573 F.3d 979 (10th Cir. 2009), 888
Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960), 1016
Baker, State v., 679 N.W.2d 7 (Iowa 2004), 363
Baltimore & Ohio R.R. Co. v. Henthorne, 73 F. 634 (6th Cir. 1896), 186
Bankcard America, Inc. v. Universal Bancard Systems, Inc., 203 F.3d 477 (7th Cir. 2000), 126
Banker v. Nighswander, Martin & Mitchell, 37 F.3d 866 (2d Cir. 1994), 133
Barnard, United States v., 490 F.2d 907 (9th Cir. 1973), 781
Barnes, United States v., 88 Fed. R. Evid. Serv. 1018 (11th Cir. 2012), 890
Barone, United States v., 114 F.3d 1284 (1st Cir. 1997), 510
Barrett v. Acevedo, 169 F.3d 1155 (8th Cir. 1999), 1046
Barrett, United States v., 539 F.2d 244 (1st Cir. 1976), 457, 511
Bass, State v., 224 N.J. 285 (2016), 701
Batangan, State v., 71 Haw. 552 (1990), 778
Batson v. Kentucky, 476 U.S. 79 (1986), 6
Beauchamp, State v., 333 Wis. 2d 1 (2011), 699
Beckham, United States v., 968 F.2d 47 (D.C. Cir. 1992), 435
Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988), 32, 580
Behler v. Harlon, 199 F.R.D. 553 (D. Md. 2001), 336
Bek, United States v., 493 F.3d 790 (7th Cir.), 952
Bell v. United States, 349 U.S. 81 (1955), 799
Benally, United States v., 546 F.3d 1230 (10th Cir. 2008), 22
Bennett, United States v., 363 F.3d 947 (9th Cir. 2004), 943
Benton, State v., 435 S.C. 250 (2021), 913
Berry, State v., 2022 WL 401196 (Tenn. Crim. App. 2022), 913
Beverly, United States v., 369 F.3d 516 (6th Cir. 2004), 894
Biaggi, United States v., 909 F.2d 662 (2d Cir. 1990), 157, 832
Blackmon v. State, 653 P.2d 669 (Alaska Ct. App. 1982), 1003
Blau v. United States, 340 U.S. 332 (1951), 1074
Bocharski, State v., 200 Ariz. 50 (2001), 52
Boggs v. Collins, 226 F.3d 728 (6th Cir. 2000), 369
Bonner, Commonwealth v., 97 Mass. 587 (1867), 302
Bonner, United States v., 302 F.3d 776 (7th Cir. 2002), 335
Borrego, State v., Nos. F12-101, F12-7083 (Fla. Cir. Ct. Oct. 25, 2012), 889
Bourjaily v. United States, 483 U.S. 171 (1987), 443, 760, 877
Boyce, United States v., 742 F.3d 792 (7th Cir. 2014), 528
Boyles, United States v., 57 F.3d 535 (7th Cir. 1995), 384
Brackeen, United States v., 969 F.2d 827 (9th Cir. 1992), 317
Bradbury v. Phillips Petroleum Co., 815 F.2d 1356 (10th Cir. 1987), 133
Branch v. Fid. & Cas. Co. of N.Y., 783 F.2d 1289 (5th Cir. 1986), 133
Brewer, United States v., 451 F. Supp. 50 (E.D. Tenn. 1978), 309
Bridges v. State, 247 Wis. 350 (1945), 422
Brown v. Board of Education, 347 U.S. 483 (1954), 598
Brown, Commonwealth v., 646 Pa. 396 (2018), 701
Browning v. State, 134 P.3d 816 (Okla. Crim. App. 2006), 991
Bruton v. United States, 391 U.S. 123 (1968), 264, 711
Bullcoming v. New Mexico, 564 U.S. 647 (2011), 633, 661
Burnett, People v., 110 Cal. App. 4th 868 (2003), 217
Burr, United States v., 25 F. Cas. 187, F. Cas. No. 14694 (CC Va. 1807), 627
Burston, United States v., 159 F.3d 1328 (11th Cir. 1998), 315
Butler, United States v., 955 F.3d 1052 (D.C. Cir. 2020), 894
California v. Green, 399 U.S. 149 (1970), 606, 710
Campbell, United States v., 732 F.2d 1017 (1st Cir. 1984), 1049
Cano, United States v., 289 F.3d 1354 (11th Cir. 2002), 758
Castillo, United States v., 140 F.3d 874 (10th Cir. 1998), 257
Cattell v. White, 546 U.S. 972 (2005), 370
Chambers v. Mississippi, 405 U.S. 1205 (1972), 738
Chambers v. Mississippi, 410 U.S. 284 (1973), 371, 381, 425, 730, 829, 989

Chaney, *Ex parte*, 563 S.W.3d 239 (Tex. Crim. App. 2018), 900
 Chavez, *United States v.*, 2021 WL 5882466 (N.D. Cal. 2021), 901
 Chesebrough-Pond's, Inc. v. Fabergé, Inc., 666 F.2d 393 (9th Cir.), 769
 Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826), 1016
 Christensen, *State v.*, 414 N.W.2d 843 (Iowa Ct.App. 1987), 384
 Clark, *State v.*, 137 Ohio St. 3d 346 (2013), 683, 685
 Clark, *State v.*, 2011-Ohio-6623 (Ohio Ct. App. 2011), 683, 684
 Clarke, *United States v.*, 2 F.3d 81 (4th Cir. 1993), 601
 Collado, *United States v.*, 957 F.2d 38 (1st Cir. 1992), 905
 Collins, *People v.*, 68 Cal. 2d 319 (1968), 79, 91
 Conley v. Commonwealth, 599 S.W.3d 756 (Ky. 2019), 702
 Conn, *United States v.*, 297 F.3d 548 (7th Cir. 2002), 757
 Connecticut Mut. Life Ins. Co. v. Hillmon, 188 U.S. 208 (1903), 547
 Contra Costa Cnty. Water Dist., *United States v.*, 678 F.2d 90 (9th Cir. 1982), 133
 Cooper, *United States v.*, 767 F.3d 721 (7th Cir. 2014), 476
 Cordeiro, *Commonwealth v.*, 401 Mass. 843 (1988), 384
 Couch v. *United States*, 409 U.S. 322 (1973), 1042
 Council, *United States v.*, 777 F. Supp. 2d 1006 (E.D. Va. 2011), 887
 Cox v. *State*, 696 N.E.2d 853 (Ind. 1998), 45
 Coy v. Iowa, 487 U.S. 1012 (1988), 608
 Crane v. Kentucky, 476 U.S. 683 (1986), 740, 744, 831
 Crawford v. Washington, 541 U.S. 36 (2004), 605, 611, 686, 759
 Crowder, *United States v.*, 87 F.3d 1405 (D.C. Cir. 1996), 186
 Cuesta-Rodriguez v. *State*, 2010 OK CR 23 (2011), 701
 Curbelo, *United States v.*, 726 F.3d 1260 (11th Cir. 2013), 690
 Curcio v. *United States*, 354 U.S. 118 (1957), 1044
 Cutchall, *People v.*, 200 Mich. App. 396 (1993), 76
 Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961), 592
 Daly, *State v.*, 623 N.W.2d 799 (Ia. 2001), 327
 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), 32, 759, 805
 Davis v. Alaska, 415 U.S. 308 (1974), 368, 740
 Davis v. *State*, 207 So. 3d 177 (Fla. 2016), 699
 Davis v. Washington, 547 U.S. 813 (2006), 633, 634, 640, 681, 693
 DeGeorge, *United States v.*, 380 F.3d 1203 (9th Cir. 2004), 213
 DeJesus v. *United States*, 547 U.S. 1048 (2006), 315
 Dickerson v. *United States*, 530 U.S. 428 (2000), 471, 473
 Dietz v. Doe, 131 Wash. 2d 835 (1997), 1017, 1019
 Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022), 1070
 Doe v. *United States*, 487 U.S. 201 (1988), 1045, 1049
 Doe v. *United States*, 666 F.2d 43 (4th Cir. 1981), 382
 Doe, *United States v.*, 465 U.S. 605 (1984), 1042
 Donnelly v. *United States*, 228 U.S. 243 (1913), 737
 Dowling v. *United States*, 493 U.S. 342 (1990), 231, 255
 Doyle v. Ohio, 426 U.S. 610 (1976), 469
 Doyle, *United States v.*, 1 F. Supp. 2d 1187 (D. Ore. 1998), 992
 Dudek, *State ex rel. v. Circuit Court*, 34 Wis. 2d 559 (1967), 1042
 Duenas, *United States v.*, 691 F.3d 1070 (9th Cir. 2012), 502
 Earles, *United States v.*, 113 F.3d 796 (8th Cir. 1997), 600
 Edwards, *People v.*, 57 Cal. 4th 658 (2013), 702
 Edwards, *United States v.*, 159 F.3d 1117 (8th Cir. 1998), 728
 Enjady, *United States v.*, 134 F.3d 1427 (10th Cir. 1998), 257
 Estrada, *United States v.*, 430 F.3d 606 (2d Cir. 2005), 315
 Etkin, *United States v.*, 2008 WL 482281 (S.D.N.Y. 2008), 1077
 Falsetta, *People v.*, 21 Cal. 4th 903 (1999), 242
 Fathera v. Smyrna Police Dept., 646 Fed. Appx. 395 (6th Cir. 2016), 424
 Fearwell, *United States v.*, 595 F.2d 771 (D.C. Cir. 1978), 317
 Ferguson v. Georgia, 365 U.S. 570 (1961), 301
 Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652 (4th Cir. 1988), 133
 Fisher v. *United States*, 425 U.S. 391 (1976), 1041, 1059
 Flecha, *United States v.*, 539 F.2d 874 (2d Cir. 1976), 468, 469, 474
 Fletcher v. Weir, 455 U.S. 603 (1982), 469, 470
 Fomichev, *United States v.*, 899 F.3d 766 (9th Cir. 2018), 1075
 Fonseca, *United States v.*, 435 F.3d 369 (D.C. Cir. 2006), 340
 Ford, *United States v.*, 17 F.3d 1100 (8th Cir. 1994), 315
 Fowler v. Sacramento County Sheriff's Dep't, 421 F.3d 1027 (9th Cir. 2005), 370
 Franklin v. Duncan, 70 F.3d 75 (9th Cir. 1995), 437
 Franklin v. Duncan, 884 F. Supp. 1435 (N.D. Cal. 1995), 437
 Frazier, *United States v.*, 408 F.3d 1102 (8th Cir. 2005), 469, 474
 Frye v. *United States*, 293 Fed. 1013 (D.C. App. 1923), 804
 Gänier, *United States v.*, 468 F.3d 920 (6th Cir. 2006), 750, 751
 Garlick v. Lee, 1 F.4th 122 (2d Cir. 2021), 700
 Gary, *State v.*, 270 Wis.2d 62 (2004), 327
 General Electric Co. v. Joiner, 522 U.S. 136 (1997), 815
 Giles v. California, 554 U.S. 353 (2008), 633, 635, 686
 Gionis, *People v.*, 9 Cal. 4th 1196 (1995), 995, 996
 Gonzales v. Commonwealth, 45 Va.App. 375 (2005), 384
 Gordon v. *United States*, 383 F.2d 936 (D.C. Cir. 1967), 314
 Gorham, *Commonwealth v.*, 99 Mass. 420 (1868), 302
 Grace, *United States v.*, 439 F. Supp. 2d 1125 (D. Mont. 2006), 991
 Grand Jury Investigation [Rowland], *In re*, 399 F.3d 527 (2d Cir. 2005), 1035
 Grand Jury Proceedings, *In re*, 103 F.3d 1140 (3d Cir. 1997), 1084
 Grand Jury Subpoena v. Kitzhaber, 828 F.3d 1083 (9th Cir. 2016), 1041
 Grand Jury Subpoena, Judith Miller, *In re*, 397 F.3d 964 (D.C. Cir. 2005), 962
 Gray v. Maryland, 523 U.S. 185 (1998), 719
 Gray, *United States v.*, 405 F.3d 227 (4th Cir. 2005), 519

Green v. Georgia, 442 U.S. 95 (1979), 740
 Greene, United States v., 995 F.2d 793 (8th Cir. 1993), 161
 Gregory, State v., 198 S.C. 98 (1941), 743
 Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983), 125
 Griswold v. Connecticut, 381 U.S. 479 (1965), 951, 992
Guardia, United States v., 135 F.3d 1326 (10th Cir. 1998), 232, 250, 254, 270
 Guilbert, State v., 306 Conn. 218 (2012), 783
 Guisti, Commonwealth v., 434 Mass. 245 (2001), 384
 Gutierrez-Castro, United States v., 805 F. Supp. 2d 1218 (D.N.M. 2011), 888, 889
 Hadley, United States v., 918 F.2d 848 (9th Cir. 1990), 244
 Hagenkord v. State, 100 Wis.2d 452 (1981), 384
 Hailes v. State, 442 Md. 488 (2015), 699
 Hale, People v., 142 Mich.App. 451 (1985), 384
 Hall v. State, 109 P.3d 409 (Wyo. 2005), 341
Halloran v. Virginia Chemicals Inc., 41 N.Y.2d 386 (1977), 275
 Hammon v. Indiana, 547 U.S. 813 (2006), 685
 Hammon v. State, 809 N.E.2d 945 (Ind. App. 2004), 704
 Hammon v. State, 829 N.E.2d 444 (Ind. 2005), 704
 Hankey, United States v., 203 F.3d 1160 (9th Cir. 2000), 767
 Harden v. Hillman, 993 F.3d 465 (6th Cir. 2021), 26
 Harkins v. State, 122 Nev. 974 (2006), 699
 Harris v. New York, 401 U.S. 222 (1971), 469, 470, 474
 Harris, United States v., 502 F. Supp. 3d 28 (D.D.C. 2020), 901
 Harris, United States v., 657 F. Supp. 2d 1267 (N.D. Fla. 2009), 162
 Harris, United States v., 881 F.3d 945 (6th Cir. 2018), 462
 Hawkins v. United States, 358 U.S. 74 (1958), 1072
 Hayes, United States v., 861 F.2d 1225 (10th Cir. 1988), 587, 590
 Heard, State v., 934 N.W.2d 433 (Ia. 2019), 992
 Hemphill v. New York, 142 S. Ct. 681 (2022), 634, 688
 Hernandez, United States v., 2021 WL 5279638 (E.D. Okla. Nov. 12, 2021), 699
 Herron, United States v., 2014 WL 1871909 (E.D.N.Y.), 777
 Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004), 1045
 Hill, United States v., 643 F.3d 807 (11th Cir. 2011), 757
 Hite, United States v., 364 F.3d 874 (7th Cir. 2004), 211
 Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1942), 570
 Holland v. French, 273 N.C. App. 252 (2020), 462
 Holley v. State, 363 Ga. App. 107 (2022), 931
 Holmes v. South Carolina, 547 U.S. 319 (2006), 741, 742
 Holmes, State v., 361 S.C. 333 (2004), 743
 Hoop, State v., 134 Ohio App. 3d 627 (1999), 991
 Howard v. State, 300 So. 3d 1011 (Miss. 2020), 899
 Howell v. Joffe, 483 F. Supp. 2d 659 (N.D. Ill. 2007), 995
 Howell, United States v., 285 F.3d 1263 (10th Cir. 2002), 315
Hubbell, United States v., 530 U.S. 27 (2000), 627, 1044, 1051
Huddleston v. United States, 485 U.S. 681 (1988), 50, 225, 363, 450, 904
 Hughes v. Meade, 453 S.W.2d 538 (Ky. Ct. App. 1970), 1018
Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992), 772
 Hynix Semiconductor, Inc. v. Rambus, Inc., 75 Fed. R. Evid. Serv. (Callaghan) 1009 (N.D. Cal. 2008), 756
 Idaho v. Wright, 497 U.S. 805 (1990), 607
 Ignasiak, United States v., 667 F.3d 1217 (11th Cir. 2012), 701
Ince, United States v., 21 F.3d 576 (4th Cir. 1994), 453, 463
 Inciso v. United States, 429 U.S. 1099 (1977), 536
 Iron Shell, United States v., 633 F.2d 77 (8th Cir. 1980), 796
 I.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994), 6
Jackson, United States v., 405 F. Supp. 938 (E.D.N.Y. 1975), 75, 94
Jackson, United States v., 488 F. Supp. 2d 866 (D. Neb. 2007), 944
Jaffee v. Redmond, 518 U.S. 1 (1996), 953
James, United States v., 169 F.3d 1210 (9th Cir. 1999), 38, 68, 273
 James, United States v., 712 F.3d 79 (2d Cir. 2013), 700
 Japanese Elec. Prods. Antitrust Litig., In re, 723 F.2d 238 (3d Cir. 1983), 799
 Jarvison, United States v., 409 F.3d 1221 (10th Cir. 2005), 1075
 Jenkins v. Anderson, 447 U.S. 231 (1980), 468, 469, 470
 Jensen, State v., 2021 WL 27, 694
Jinro America, Inc. v. Secure Investments, Inc., 266 F.3d 993 (9th Cir. 2001), 763
 Johnson v. Elk Lake Sch. Dist., 283 F.3d 138 (3d Cir. 2002), 248
 Johnson v. Lutz, 253 N.Y. 124 (1930), 598
 Johnson v. State, 490 S.W.3d 895 (Tex. Crim. App. 2016), 368
Johnson v. State, 967 S.W.2d 410 (Tex. Crim. App. 1998), 563
 Johnson, Commonwealth v., 910 A.2d 60 (Pa. Super. 2006), 77
Johnson, United States v., 575 F.2d 1347 (5th Cir. 1978), 761
 Jones, State v., 135 Ohio St. 3d 10 (2012), 1083
 Jones, State v., 140 Conn. App. 455 (2013), 695
 Jones, State v., 287 Kan. 559 (2008), 699
 Jones, United States v., 28 F.3d 1574 (11th Cir. 1994), 193
 Jordan v. Binns, 712 F.3d 1123 (7th Cir. 2013), 433
 Jordan, United States v., 2014 WL 1796698 (D. Colo. May 6, 2014), 699
 Jovanovic, People v., 700 N.Y.S.2d 156 (App. Div. 1999), 358
 Julian, United States v., 427 F.3d 471 (7th Cir. 2005), 257
 Kansas v. Ventris, 556 U.S. 586 (2009), 469, 470
 Kantengwa, United States v., 781 F.3d 545 (1st Cir. 2015), 803
 Keiser, United States v., 57 F.3d 847 (9th Cir. 1995), 273
 Kennedy v. Coleman, 2016 WL 7475649 (S.D. Ohio Dec. 29, 2016), 699
 Kennedy, State v., 229 W. Va. 756 (2012), 701
 Kerley, United States v., 784 F.3d 327 (6th Cir.), 757
 Kimble, People v., 44 Cal. 3d 480 (1988), 296

Kirsch, State v., 139 N.H. 647 (1995), 232, 238
Knapp v. State, 168 Ind. 153 (1997), 41
Knox, United States v., 1992 WL 97157 (U.S.A.F. Ct. Mil. Rev. 1992), 378
Kozlov, In re, 79 N.J. 232 (1979), 991
Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999), 815, 853
L.J.P., State v., 276 N.J. Super. 429 (1994), 992
Lacher v. Anderson, 526 N.W.2d 108 (N.D. 1994), 149
Lady Ivy's Trial, 10 How. St. Tr. 555 (1684), 1071
Lampliter Dinner Theater, Inc. v. Liberty Mut. Ins. Co., 792 F.2d 1036 (11th Cir. 1986), 133
Langill, State v., 157 N.H. 77 (2008), 884
Lannan v. State, 600 N.E.2d 1334 (Ind. 1992), 232
Laster, United States v., 258 F.3d 525 (6th Cir. 2001), 599
Lea, United States v., 249 F.3d 632 (7th Cir. 2001), 991
Leach, People v., 2012 IL 111534, 701
LeMay, United States v., 260 F.3d 1018 (9th Cir. 2001), 257
Lewis, State v., 235 S.W.3d 136 (Tenn. 2007), 699
Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993), 755
Lilly v. Virginia, 527 U.S. 116 (1999), 610
Lin, United States v., 101 F.3d 760 (D.C. Cir. 1996), 206
Llera Plaza, United States v., 188 F. Supp. 2d 549 (E.D. Pa. 2002), 882
Lopez, United States v., 380 F.3d 538 (1st Cir. 2004), 690
Love, United States v., 2011 WL 2173644 (S.D. Cal. 2011), 886
Loving v. Virginia, 388 U.S. 1 (1967), 93
Luce v. United States, 469 U.S. 38 (1984), 324
Luck, United States v., 852 F.3d 615 (6th Cir. 2017), 992
Luke, State v., 147 Haw. 126 (2020), 913, 918
Lyondell Chem. Co. v. Occidental Chem., Co., 608 F.3d 284 (5th Cir. 2010), 135
Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978), 113, 438
Mangiaracina, People v., 98 Ill.App.3d 606 (1981), 384
Markham v. State, 189 Md. App. 146 (2009), 884
Martin, State v., 695 N.W.2d 578 (Minn. 2005), 699
Martinez, People v., 51 Cal. App. 4th 537 (1996), 273
Maryland v. Craig, 497 U.S. 836 (1990), 608, 625
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), 799
Mattox v. United States, 146 U.S. 140 (1892), 513
Mattox v. United States, 156 U.S. 237 (1895), 603, 710
Maxwell, State v., 139 Ohio St. 3d 12 (2014), 701
Mayhew, United States v., 380 F. Supp. 2d 961 (S.D. Ohio 2005), 699
McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163 (D. Md. 1998), 1003
McDonald v. Pless, 238 U.S. 264 (1915), 23
McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984), 18
McHann v. Firestone Tire & Rubber Co., 713 F.2d 161 (5th Cir. 1983), 134
McInnis v. A.M.F., Inc., 765 F.2d 240 (1st Cir. 1985), 133
McRae, United States v., 593 F.2d 700 (5th Cir. 1979), 52
Mehserle, People v., 206 Cal. App. 4th 1125 (2012), 124
Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), 633, 681, 886
Melendrez v. Superior Court, 215 Cal. App. 4th 1343 (2013), 1027
Melton, In re, 597 A.2d 892 (D.C. 1991), 798
Metropolitan St. Ry. v. Gumbly, 99 F. 192 (2d Cir. 1900), 496
Meyers v. United States, 171 F.2d 800 (D.C. Cir. 1948), 936
Mezzanatto, United States v., 513 U.S. 196 (1995), 160
Michelson v. United States, 335 U.S. 469 (1948), 257
Michigan v. Bryant, 562 U.S. 344 (2011), 633, 642, 685
Millennium Partners, L.P. v. Colmar Storage, LLC, 494 F.3d 1293 (11th Cir. 2007), 124
Miranda v. Arizona, 384 U.S. 436 (1966), 468, 471, 473, 474
Mitchell, United States v., 145 F.3d 572 (3d Cir. 1998), 911
Mitchell, United States v., 633 F.3d 997 (10th Cir. 2011), 160
Montana v. Egelhoff, 518 U.S. 37 (1996), 37
Monterroso, People v., 34 Cal. 4th 743 (2004), 699
Montgomery, State v., 183 P.3d 267 (Wash. 2008), 772
Montgomery, United States v., 384 F.3d 1050 (9th Cir. 2004), 1074, 1078
Moore, United States v., 651 F.3d 30 (D.C. Cir. 2011), 701
Morales v. Portuondo, 154 F. Supp. 2d 706 (S.D.N.Y. 2001), 981
Moscat, People v., 3 Misc.3d 739 (N.Y. Crim. Ct. 2004), 632
Mound, United States v., 149 F.3d 799 (8th Cir. 1998), 255
Mound, United States v., 157 F.3d 1153 (8th Cir. 1998), 256
Murphy v. Waterfront Commission, 378 U.S. 52 (1964), 1043
Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892), 533
Myers, United States v., 550 F.2d 1036 (5th Cir. 1977), 70
Navarette, State v., 2013-NMSC-003 (2013), 701
Nelson, United States v., 277 F.3d 164 (2d Cir. 2002), 425
Nesbitt, Commonwealth v., 452 Mass. 236 (2008), 659, 699
Newman v. State, 384 Md. 285 (2004), 1029
Nimely v. City of New York, 414 F.3d 381 (2d Cir. 2005), 777
Norquay, United States v., 987 F.2d 475 (8th Cir. 1993), 384
O'Neil, Commonwealth v., 51 Mass. App. Ct. 170 (2001), 337
Oates, United States v., 560 F.2d 45 (2d Cir. 1977), 587
Obergefell v. Hodges, 576 U.S. 644 (2015), 1070
Ohio v. Clark, 576 U.S. 237 (2015), 633, 683
Ohio v. Roberts, 448 U.S. 56 (1980), 605, 606, 640
Ohler v. United States, 529 U.S. 753 (2000), 324, 325, 327
Old Chief v. United States, 519 U.S. 172 (1997), 51, 96, 173
Olden v. Kentucky, 488 U.S. 227 (1988), 366
Oreckinto, United States v., 234 F. Supp. 3d 360 (D. Conn. 2017), 925
Osman, Queen v., 15 Cox Crim. Cas. 1 (Eng. N. Wales Cir. 1881), 430

Osterhoudt, In re, 722 F.2d 501 (9th Cir. 1983), 995, 1016
 Otero, United States v., 849 F. Supp. 2d 425 (D.N.J. 2012), 893
 Owens, United States v., 484 U.S. 554 (1988), 489
 Paige, United States v., 464 F. Supp. 99 (E.D. Pa. 1978), 315
 Paiva, United States v., 892 F.2d 148 (1st Cir. 1989), 751
 Palmer v. Hoffman, 318 U.S. 109 (1943), 572
 Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534 (2d Cir. 1992), 442
 Patosky, Commonwealth v., 440 Pa. Super. 535 (1995), 992
 Patterson v. United States, 37 A.3d 230 (D.C. App. 2012), 794
 Patterson, People v., 217 Ill.2d 407 (2005), 703
 Payne v. CSX Transp., Inc., 467 S.W.3d 413 (Tenn. 2015), 817
 Peltier, United States v., 585 F.2d 314 (8th Cir. 1978), 191
 Peña-Rodriguez v. Colorado, 580 U.S. 206 (2017), 21, 978
 Peña-Rodriguez v. People, 350 P.3d 287 (Colo. 2015), 22
 Pennsylvania v. Ritchie, 486 U.S. 39 (1987), 370
 Peoples, United States v., 250 F.3d 630 (8th Cir. 2001), 757
 Pereira v. United States, 347 U.S. 1 (1954), 1074
 Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986), 266
 Perry v. New Hampshire, 565 U.S. 228 (2012), 678
 Pheaster, United States v., 544 F.2d 353 (9th Cir. 1976), 536, 1048
 Phillips, State v., 430 S.C. 319 (2020), 817
 Pic'l, People v., 114 Cal. App. 3d 824 (1981), 296
 Pisari, United States v., 636 F.2d 855 (1st Cir. 1981), 337
 Plunk, United States v., 153 F.3d 1011 (9th Cir. 1998), 767
 Plymate, State v., 345 N.W.2d 327 (Neb. 1984), 244
 Pointer v. Texas, 380 U.S. 400 (1965), 606
 Polidore, United States v., 690 F.3d 705 (5th Cir. 2012), 660
 Prante, People v., 2021 IL App (5th) 200074, 899
 Quad/Graphics, Inc. v. Fass, 724 F.2d 1230 (7th Cir. 1983), 133
 Quinn v. Haynes, 234 F.3d 837 (4th Cir. 2000), 370
 Rakes, United States v., 136 F.3d 1 (1st Cir. 1998), 1079
 Ralston, United States v., 973 F.3d 896 (8th Cir. 2020), 992
 Ramada Development Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981), 129
 Ramos v. Louisiana, 140 S. Ct. 1390 (2020), 8
 Rappy, United States v., 157 F.2d 964 (2d Cir. 1946), 453
 Rathbun v. Brancatella, 93 N.J.L. 222 (1919), 562
 Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991), 124
 Raynor, State v., 337 Conn. 527 (2020), 893
 Redmond v. Kingston, 240 F.3d 590 (7th Cir. 2001), 369
 Reeve v. Dennett, 145 Mass. 23 (1887), 52
 Reid, United States v., 53 U.S. 361 (1852), 23
 Reidhead, State v., 146 Ariz. 314 (Ct. App. 1985), 558
 Reynolds v. United States, 98 U.S. 145 (1879), 638
 Reynolds, United States v., 715 F.2d 99 (3d Cir. 1983), 425
 Ricciardi v. Children's Hospital Medical Center, 811 F.2d 18 (1st Cir. 1987), 803
 Richardson v. Marsh, 481 U.S. 200 (1987), 710
 Ring v. Erickson, 968 F.2d 760 (8th Cir. 1992), 559
 Ring v. Erickson, 983 F.2d 818 (8th Cir. 1992), 559
 Rintala, Commonwealth v., 488 Mass. 421 (2021), 817
 Roberson v. Netherton, 1994 WL 164153 (Tenn. App. Ct. 1994), 149
 Robertson, United States v., 582 F.2d 1356 (5th Cir. 1978), 161
 Robinson, State v., 718 N.W.2d 400 (Minn. 2006), 493
 Rochin v. California, 342 U.S. 165 (1952), 951
 Rochkind v. Stevenson, 471 Md. 1 (2020), 840
 Rock v. Arkansas, 483 U.S. 44 (1987), 396, 742, 829
 Roden, State v., 296 Ore. App. 604 (2019), 900
 Romano, United States v., 46 M.J. 269 (1997), 991
 Rose, State v., 2008 WL 2914326 (Md. Cir. Ct. 2008), 884
 Rose, United States v., 672 F. Supp. 2d 723 (D. Md. 2009), 884
 Rosenfeld v. Oceania Cruises, Inc., 654 F.3d 1190 (11th Cir. 2011), 771
 Russell v. Commonwealth, 2016 WL 1127878 (Ky. Feb. 18, 2016), 699
 Ryan v. State, 988 P.2d 46 (Wyo. 1999), 879
 Salinas v. Texas, 570 U.S. 178 (2013), 469, 471
 Salinas v. Texas, No. 12-246 (Aug. 24, 2012), 471
 Samet, United States v., 466 F.3d 251 (2d Cir. 2006), 908
 Samuels, In re, 507 A.2d 150 (D.C. App. 1986), 801
 Santiago, People v., 2003 N.Y. Slip Op. 51034(U) (Sup. Ct. 2003), 641
 Saunders, United States v., 943 F.2d 388 (4th Cir. 1991), 383
 Schaffer, United States v., 851 F.3d 166 (2d Cir. 2017), 257
 Scheffer, United States v., 523 U.S. 303 (1998), 36, 829
 Schmerber v. California, 384 U.S. 757 (1966), 1048
 Schwarz, United States v., 283 F.3d 76 (2d Cir. 2002), 411
 Seiler v. Lucasfilm, 613 F. Supp. 1253 (N.D. Cal. 1984), 937
 Seiler v. Lucasfilm, 808 F.2d 1316 (9th Cir. 1986), 940
 Semrau, United States v., 693 F.3d 510 (6th Cir. 2012), 841
 Serge, Commonwealth v., 586 Pa. 671 (2006), 61, 931
 Shabazz, State v., 246 Conn. 746 (1998), 274
 Sharon v. Hill, 26 F.337 (C.C.D. Cal. 1885), 346
 Shepard v. United States, 290 U.S. 96 (1933), 514, 537, 801
 Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988), 43
 Shipp, United States v., 422 F. Supp. 3d 762 (E.D.N.Y. 2019), 900
 Shreck, People v., 22 P.3d 68 (Colo. 2001), 817
 Sibley, State v., 131 Mo. 519 & 132 Mo. 102 (1895), 345
 Simmons, United States v., 2018 WL 1882827 (2018), 892
 Simms, State v., 224 N.J. 393 (2016), 795

Simon v. United States, 499 U.S. 904 (1991), 157
 Skinner, State v., 218 N.J. 496 (2014), 188
 Small, State v., 2007 Ohio 6771 (App. Ct. 2007), 917
 Smith v. Commonwealth, 636 S.W.3d 421 (Ky. 2021), 992
 Smith v. United States, 568 U.S. 106 (2013), 701
 Smith, Rex v., 11 Cr. App. R. 229, 84 L.J.K.B. 2153 (1915), 218, 221
 Smith, State v., 743 So. 2d 199 (La. 1999), 359
 Smith, State v., 876 N.W.2d 180 (Iowa 2016), 549
 SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014), 6
 Southard, State v., 347 Ore. 127 (2009), 817
 Stahl, State v., 111 Ohio St. 3d 186 (2006), 695
 Stahl, State v., 2005-Ohio-1137 (Ct. App. 2005), 695
 Stamper, United States v., 106 Fed. Appx. 833 (4th Cir. 2004), 257
 Starzecpyzel, United States v., 880 F. Supp. 1027 (S.D.N.Y. 1995), 880, 901
 Steele, State v., 2021 Utah App. 39 (2021), 355
 Stelmokas, United States v., 100 F.3d 302 (3d Cir. 1996), 908
 Stephens v. Miller, 13 F.3d 998 (7th Cir. 1994), 371
 Stevens, United States v., 935 F.2d 1380 (3d Cir. 1991), 203, 211
 Stone v. United States, 385 F.2d 713 (10th Cir. 1967), 749
 Stuart v. Alabama, 139 S. Ct. 36 (2018), 702
 Stubbs, State v., 78 A.3d 987 (N.J. Super. App. Div. 2013), 435
 Sugden v. Lord St. Leonards, 1 P.D. 154 (1876), 546
 Sugrue, Commonwealth v., 34 Mass. App. Ct. 172 (1993), 992
 Sussman v. Jenkins, 636 F.3d 329 (7th Cir. 2011), 371
 Swan, State v., 114 Wash.2d 613 (1990), 397
 Swidler & Berlin v. United States, 524 U.S. 399 (1998), 1021
 Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., 320 F.3d 1213 (11th Cir. 2003), 756
 Tanner v. United States, 483 U.S. 107 (1987), 5, 10
 Tardif v. City of New York, 344 F. Supp. 3d 579 (S.D.N.Y. 2018), 867
 Taylor Lohmeyer Law Firm P.L.L.C. v. United States, 957 F.3d 505 (5th Cir. 2020), 1017
 Taylor v. Louisiana, 419 U.S. 522 (1975), 6
 Taylor, United States v., 663 F. Supp. 2d 1170 (D.N.M. 2009), 892
 Tennessee v. Street, 471 U.S. 409 (1985), 676
 Thiel v. S. Pac. Co., 328 U.S. 217 (1946), 19
 Thomas, United States v., 20 F.3d 817 (8th Cir. 1994), 384
 Thompson v. State, 393 Md. 291 (2006), 75
 Thornton, United States v., 733 F.2d 121 (D.C. Cir. 1984), 992
 Tibbs, United States v., 2019 WL 4359486 (D.C. Super. Ct. 2019), 901
 Tilton v. Beecher, 2 Abbott's Repts. at 49 (N.Y. 1875), 1061
 Tome v. United States, 513 U.S. 150 (1995), 5, 476
 Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758 (10th Cir. 1997), 133
 Trammel v. United States, 445 U.S. 40 (1980), 1062
 Trenkler, United States v., 61 F.3d 45 (1st Cir. 1995), 194
 Tuer v. McDonald, 347 Md. 507 (1997), 114
 Turner v. State, 953 N.E.2d 1039 (Ind. 2011), 817
 Turner, People v., 10 Cal. 5th 786 (2020), 92
 Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996), 769
 U.S. Dept. of Educ. v. NCAA, 481 F.3d 936 (7th Cir. 2007), 971
 Upjohn Co. v. United States, 449 U.S. 383 (1981), 1042
 Valdez v. Winans, 738 F.2d 1087 (10th Cir. 1984), 991
 Valencia, United States v., 61 F.3d 616 (8th Cir. 1995), 322
 Van Riper v. United States, 13 F.2d 961 (2d Cir. 1926), 448
 Vasquez v. Jones, 496 F.3d 564 (6th Cir. 2007), 371
 Vasquez, People v., 2020 WL 3969860 (Cal. Ct. App. July 14, 2020), 365
 Vavages, United States v., 151 F.3d 1185 (9th Cir. 1998), 992
 Velarde-Gomez, United States v., 269 F.3d 1023 (9th Cir. 2001), 469, 474
 Ventura v. Kyle, 825 F.3d 876 (8th Cir. 2016), 143
 Verdoorn, United States v., 528 F.2d 103 (8th Cir. 1976), 162
 Vigneau, United States v., 187 F.3d 70 (1st Cir. 1999), 576, 906
 Volland-Golden v. City of Chicago, 89 F. Supp. 3d 983 (N.D. Ill. 2015), 494
 Wainwright v. Greenfield, 474 U.S. 284 (1986), 469
 Walker, Commonwealth v., 625 Pa. 450 (2014), 786
 Walker, United States v., 917 F.3d 1004 (8th Cir. 2019), 357
 Warger v. Shauers, 547 U.S. 40 (2014), 18, 19, 21
 Warger v. Shauers, 721 F.3d 606 (8th Cir. 2013), 19
 Washburn, United States v., 728 F.3d 775 (8th Cir. 2013), 160
 Washington v. Texas, 388 U.S. 14 (1967), 740, 741, 744, 989
 Washington, United States v., 498 F.3d 225 (4th Cir. 2007), 410
 Weichell, Commonwealth v., 390 Mass. 62 (1983), 488
 Weil v. Seltzer, 873 F.2d 1453 (D.C. Cir. 1989), 279
 Weiland, United States v., 420 F.3d 1062 (9th Cir. 2005), 587, 590
 Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), 124
 White v. Coplan, 399 F.3d 18 (1st Cir. 2005), 370, 371
 White v. Illinois, 502 U.S. 346 (1992), 609, 635, 636
 White, United States v., 87 Fed. Appx. 566 (6th Cir. 2004), 411
 Whitmore, United States v., 359 F.3d 609 (D.C. Cir. 2004), 285
 Whorton v. Bockting, 549 U.S. 406 (2007), 633, 634
 Whren v. United States, 517 U.S. 806 (1996), 285
 Wicks, United States v., 995 F.2d 964 (10th Cir. 1993), 425
 Williams v. District of Columbia, 806 F. Supp. 2d 44 (D.D.C. 2011), 995, 1004
 Williams v. Fermenta Animal Health Co., 984 F.2d 261 (8th Cir. 1993), 133
 Williams v. Illinois, 567 U.S. 50 (2012), 633, 674, 797
 Williams, People v., 385 Ill. App. 3d 359 (2008), 678
 Williams, State v., 357 Ore. 1 (2015), 242
 Williams, United States v., 447 F.2d 1285 (5th Cir. 1971), 800

Williams, United States v., 458 F.3d 312 (3d Cir. 2006), 211
Williamson v. United States, 512 U.S. 594 (1994), 504
Williamson, State v., 246 N.J. 185 (2021), 699
Wingate, State v., 668 So. 2d 1324 (La. App. 1996), 36
Wolfe v. United States, 291 U.S. 7 (1934), 1074
Wood v. Morbark Industries, 70 F.3d 1201 (11th Cir. 1995), 122
Woods, United States v., 484 F.2d 127 (4th Cir. 1973), 222
Wright v. Tatham, 112 Eng. Rep. 488 (Exch. Ch. 1837), 415, 421
Wyman v. Wyman, 2020 WL 6680355 (D. Colo.), 1011
Yazzie, United States v., 976 F.2d 1252 (9th Cir. 1992), 748
Zackowitz, People v., 254 N.Y. 192 (1930), 167
Zagranski, Commonwealth v., 408 Mass. 278 (1990), 34
Zenni, United States v., 492 F. Supp. 464 (E.D. Ky. 1980), 425
Zola v. Kelley, 149 N.H. 648 (2003), 327
Zolin, United States v., 491 U.S. 554 (1989), 1029
Zurich American Insurance Co. v. Watts Industries, Inc., 417 F.3d 682 (7th Cir. 2005), 134

TABLE OF SECONDARY AUTHORITIES

- 1 DAVID L. FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE* (1997), 816
- 1 DAVID L. FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* (2007–2008), 888
- 1 THOMAS STARKIE, *A PRACTICAL TREATISE ON THE LAW OF EVIDENCE* (Boston, Wells & Lilly 1826), 300
- 2 WEINSTEIN'S EVIDENCE (1986), 134
- 3 WEINSTEIN'S EVIDENCE (1978), 340
- 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765), 932
- 4 WEINSTEIN & BERGER, *WEINSTEIN'S EVIDENCE* (1979), 797
- 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (London: Hunt & Clarke 1827), 993, 1070
- 8 WIGMORE, EVIDENCE (3d ed. 1940), 1070
- 8 WIGMORE, EVIDENCE (McNaughton rev. 1961), 900
- 21,587 *Reasons to Fix Forensic Science* (Editorial), N.Y. TIMES, Apr. 27, 2017, 671
- A DEATH AT CROOKED CREEK: THE CASE OF THE COWBOY, THE CIGARMAKER, AND THE LOVE LETTER (2013), 543
- Allen, Ronald J., *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871 (1992), 49
- ALPER, MARIEL & MATTHEW R. DUROSE, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005–14)*, AT 4 TEL. 2 (BUREAU OF JUSTICE STATISTICS, 2019), 247
- Ames, Seth, *Testimony of Persons Accused of Crime*, 1 AM. L. REV. 443 (1866–1867), 301
- Antlfinger, Carrie, *Court Considers Letter Predicting Death*, CHARLESTON (W.V.) DAILY MAIL, Apr. 17, 2006, 693
- Aparicio, Alexandra, *Her Alone: Feminist Perspectives on the Future of Spousal Privileges*, 87 U. CHI. L. REV. ONLINE 1 (2020), 1070
- Ariens, Michael, *A Short History of Hearsay Reform, with Particular Reference to Hoffman v. Palmer, Eddie Morgan and Jerry Frank*, 28 IND. L. REV. 183 (1995), 569
- Attorney–Client Privilege After Client's Death*, 38 CAL. L. REVISION COMM'N REPORTS 163 (2008), 1027
- Baker, Katharine K., *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563 (1997), 247
- Ball, Vaughn C., *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980), 48
- Ballou, Brian & Andrea Estes, *'I Messed Up Bad. It's My Fault,' Chemist Says*, BOSTON GLOBE, Sept. 27, 2012, 671
- Barrett, Devlin et al., *Jail Notes Led to Revelation: Rev. Waited 12 Years to Bare Slay Confession*, NEW YORK POST, July 18, 2001, 979
- Barrett, Paul M., *Justices Rule Against Business in Evidence Case*, WALL ST. J., June 29, 1993, 816
- Bellin, Jeffrey, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865 (2012), 610
- Ben-Shakhar, Gershon et al., *Trial by Polygraph: Reconsidering the Use of the Guilty Knowledge Technique in Court*, 26 LAW & HUM. BEHAV. 527 (2002), 1048
- Black, Charles L., Jr., *Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 951, 1075
- BLACK'S LAW DICTIONARY (4th ed. 1968), 15
- BLACK'S LAW DICTIONARY (5th ed. 1979), 317
- Brian Richardson, *Man Says He Helped Bring Drugs to State*, TALLAHASSEE DEMOCRAT, Apr. 20, 1977, 760
- Brides in Baths: Prisoner Sentenced to Death: The Closing Scenes*, THE TIMES, July 2, 1915, at 4, 220
- Callen, Craig R., *Rationality and Relevancy: Conditional Relevancy and Constrained Resources*, 2003 MICH. ST. L. REV. 1243, 49
- Cassidy, R. Michael, *Reconsidering Spousal Privileges after Crawford*, 33 AM. J. CRIM. L. 339 (2006), 1071
- Cavallaro, Rosanna, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815 (1996), 382
- Cavoukian, Ann & Ronald J. Heslegrave, *The Admissibility of Polygraph Evidence in Court*, 4 LAW & HUM. BEHAV. 117 (1980), 831
- Cheng, Edward K. & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471 (2005), 817
- Cleary, Edward W., *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978), 5
- Cohen, Jerry, *Justice Invokes Science: Law of Probability Helps Convict Couple*, L.A. TIMES, Dec. 11, 1964, 89
- COKE, SIR EDWARD, *COMMENTARY UPON LITTLETON* (1628), 1070
- Colb, Sherry F., *"Whodunit" Versus "What Was Done": When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. REV. 939 (2001), 351
- COMMISSIONERS ON COMMON LAW PROCEDURE, *SECOND REPORT* 13 (1853), 1073
- D'Agostino, Bill, *Fitzhugh Case: Judge Allows Paternity Motive*, PALO ALTO WEEKLY, June 22, 2001, 44
- Davies, Thomas Y., *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J. L. & POL'Y 349 (2007), 626
- Davies, Thomas Y., *Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557 (2007), 626
- Davies, Thomas Y., *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005), 626
- Diamond, Shari Seidman & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001), 151
- Diamond, Shari Seidman et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U.L. REV. 201 (2006), 8
- DIXON, LLOYD & BRIAN GILL, *CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE DAUBERT DECISION* (2001), 816
- Dwyer, Jim, *In Court, a Priest Reveals a Secret He Carried for 12 Years*, NEW YORK TIMES, July 17, 2001, 980
- Eisenberg, Theodore & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353 (2009), 306
- EKMAN, PAUL, *TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE* (1992), 782
- ESTRICH, SUSAN, *REAL RAPE* (1987), 348
- Falknor, Judson F., *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 U. COLO. L. REV. 133 (1961), 412
- Farah, Martha J. et al., *Functional MRI-based Lie Detection: Scientific and Societal Challenges*, 15 NATURE REVIEWS NEUROSCIENCE 123 (2014), 833
- Farber, Hillary B., *Do You Swear to Tell the Truth, the Whole Truth, and Nothing but the Truth Against Your Child?*, 43 LOY. L.A. L. REV. 551 (2010), 1085
- Felch, Jason & Mara Dolan, *The Science Behind Many Courtroom Claims About Forensic Evidence Is Lacking, a National Panel Says*, L.A. TIMES, Feb. 19, 2009, 886

Fields, Gary, *White House Advisory Council Report Is Critical of Forensics Used in Criminal Trials*, WALL ST. J., Sept. 20, 2016, 898

Fingar, Karen M., *And Justice for All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501 (1996), 242

Finley, Taryn, *Cop Who Killed Sam DuBose Was Wearing a Confederate Flag Shirt*, BLACK VOICES, Nov. 8, 2016, 187

Fisher, George, *Green Felt Jungle: The Story of People v. Collins in EVIDENCE STORIES* (Richard Lempert ed., 2006), 89

Fisher, George, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000), 300

Fisher, George, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575 (1997), 9, 389, 781

Floor Statement of the Principal House Sponsor, Representative Susan Molinari, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases, 140 Cong. Rec. H8991-92, Aug. 21, 1994, 243

Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016) (PCAST Report), at x, 895

Fuentes, Gabriel A., *Toward a More Critical Application of Daubert in Criminal Cases: Fingerprint Opinion Testimony After the National Academy of Sciences Report*, 92 CRIM. L. REP. 135 (2012), 889

Funder, David C., *Towards a Resolution of the Personality Triad: Persons, Situations, and Behaviors*, 40 J. RES. IN PERSONALITY 21 (2006), 184

Galvin, Harriett R., *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986), 353

Gathright, Alan, *Rebuttal OK'd if Burnett Testifies That Leo Bit Him; Witness Says He Beat Another Dog to Death*, SAN FRANCISCO CHRONICLE, June 15, 2001, 217

GILBERT, JEFFREY, *THE LAW OF EVIDENCE* (Dublin, Sarah Cotter 1754), 300, 389, 1071

Ginsberg, Marc, *Insuring Bias: Does Evidence of Common Insurance Demonstrate Relevant Expert Witness Bias in Medical Negligence Litigation?*, 55 DUQ. L. REV. 339 (2017), 150

Girl Wife Held with Husband in Fatal Shooting: Fancied Insult Caused Killing. Police Assert — Third Person Quizzed, BROOKLYN DAILY EAGLE, Jan. 8, 1930, 166

Glater, Jonathan D., *Character to Be a Major Issue in Tyco Trial*, NEW YORK TIMES, May 6, 2004, 298

Grady, Rebecca Hofstein, *Impact of Gruesome Photographic Evidence on Legal Decisions: A Meta-Analysis*, 25 PSYCHIATRY, PSYCH. & L. 503 (2018), 56

Greely, Henry T., *Mind Reading, Neuroscience, and the Law in A PRIMER ON CRIMINAL LAW AND NEUROSCIENCE* (Stephen J. Morse & Adina L. Roskies, eds. 2013), 851

Greenhouse, Linda, *Court Alters Rule on Statements of Unavailable Witnesses*, N.Y. TIMES, Mar. 9, 2004, 703

Gregorian, Dareh, *Trump's Seized Passports Could Be a Problem for Him, Legal Experts Say*, NBCNEWS.COM, Sept. 1, 2022, 35

Groot, Roger D., *The Early-Thirteenth-Century Criminal Jury in TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800* (J.S. Cockburn & Thomas A. Green eds., 1988), 9

Grove, William M. & R. Christopher Barden, *Protecting the Integrity of the Legal System: The Admissibility of Testimony from Mental Health Experts Under Daubert/Kumho Analyses*, 5 PSYCHOL. PUB. POL'Y & L. 224 (1999), 873

Grzybowski, Richard et al., *Firearm/Toolmark Identification: Passing the Reliability Test Under Federal and State Evidentiary Standards*, 35 AFTE J. 209 (2003), 892

Haack, Susan, *An Epistemologist in the Bramble-Bush: At the Supreme Court with Mr. Joiner*, 26 J. HEALTH POL. POL'Y & L. 217 (2001), 824

Haun, Pamela A., *The Marital Privilege in the Twenty-First Century*, 32 U. MEM. L. REV. 137, 1073

Helland, Eric & Jonathan Klick, *Does Anyone Get Stopped at the Gate? An Empirical Assessment of the Daubert Trilogy in the States*, 20 S. CT. ECON. REV. 1 (2012), 819

Herbst, Melody R. et al., *Young Children's Understanding of the Physician's Role and the Medical Hearsay Exception in CHILDREN'S UNDERSTANDING OF BIOLOGY AND HEALTH* (Michael Siegal & Candida C. Peterson eds., 1999), 559

Herrmann, Frank R. & Brownlow M. Speer, *Standing Mute at Arrest as Evidence of Guilt: The "Right to Silence" Under Attack*, 35 AM. J. CRIM. L. 1 (2007), 474

Herrmann, Frank R., *The Uses of History in Crawford v. Washington*, 2 INT'L COMMENTARY ON EVID., No. 1, Art. 5 (2004), 629

Herrmann, Mark, *Inside Straight: Clawback Agreements — An Oft-Missed Tack*, ABOVETHELAW.COM (June 11, 2011), 1012

Hillmon Tells His Story: The Murderer Found in the Mountains of Utah, N.Y. TIMES, Jan. 2, 1894, 546

Howard, Maureen A. & Jeffrey C. Barnum, *Bringing Demonstrative Evidence in from the Cold: The Academy's Role in Developing Model Rules*, 88 TEMP. L. REV. 513 (2016), 66

Hsu, Spencer S., *FBI Admits Flaws in Hair Analysis over Decades*, WASH. POST, Apr. 18, 2015, 894

Imwinkelried, Edward J., *A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused's Uncharged Misconduct*, 50 N.M. L. REV. 1 (2020), 178

Imwinkelried, Edward J., *Formalism versus Pragmatism in Evidence Law: Reconsidering the Absolute Ban on the Use of Extrinsic Evidence to Prove Impeaching, Untruthful Acts That Have Not Resulted in a Conviction*, 48 CREIGHTON L. REV. 213 (2015), 336

Imwinkelried, Edward J., *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741 (2008), 184

Imwinkelried, Edward J., *Some Comments about Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37 (1994), 248

IMWINKELRIED, EDWARD J., *THE NEW WIGMORE* (2002), 950

Imwinkelried, Edward J., *The Use of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575 (1990), 223

Isikoff, Michael, *Foster Was Shopping for Private Lawyer, Probers Find*, WASHINGTON POST, Aug. 15, 1993, 1020

Jail Time for Scooter Libby (Editorial), N.Y. TIMES, July 6, 2007, 976

James, George F., *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941), 33

Johnson, Denise R., *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?*, 7 YALE J.L. & FEMINISM 243 (1995), 363

Jonakait, Randolph N., *"Witnesses" in the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155 (2006), 625

Jonakait, Randolph N., *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219 (2005), 627

Judicial Conference Committee on Rules of Practice and Procedure, *Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges* (June 15, 2007), 1075

Jurs, Andrew W. & Scott DeVito, *A Tale of Two Dauberts: Discriminatory Effects of Scientific Reliability Screening*, 79 OHIO ST. L.J. 1107 (2018), 820

Jurs, Andrew W. & Scott DeVito, *Et Tu, Plaintiffs: An Empirical Analysis of Daubert's Effects on Plaintiffs, and Why Gatekeeping Standards Matter (a Lot)*, 66 *ARK. L. REV.* 975, 820

Jurs, Andrew W. & Scott DeVito, *The Stricter Standard: An Empirical Assessment of Daubert's Effect on Civil Defendants*, 62 *CATH. U.L. REV.* 675, 820

KATZ, JAY, *EXPERIMENTATION WITH HUMAN BEINGS* (1972), 10

KAYE, D., D. BERNSTEIN, & J. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* (2d ed. 2011), 676, 797

Kaye, David H., *Ultracrepidarianism in Forensic Science: The Hair Evidence Debacle*, 72 *WASH. & LEE L. REV. ONLINE* 227 (2015), 895

Kirkpatrick, Laird C., *Nontestimonial Hearsay After Crawford, Davis, and Bockting*, 19 *REGENT U. L. REV.* 367 (2007), 707

Knight, III, Alfred H., *The Federal Influence on the Tennessee Hearsay Rule*, 57 *TENN. L. REV.* 117 (1989), 597

Kolata, Gina, *Judge Rules Breast Implant Evidence Invalid*, *NEW YORK TIMES*, Dec. 19, 1996, 822

Koningisor, Christina, *The De Facto Reporter's Privilege*, 127 *YALE L.J.* 1176 (2020), 972

Krattenmaker, Thomas G., *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 *GEO. L.J.* 61 (1973), 950

Kry, Robert, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 *BROOK. L. REV.* 493 (2007), 628

Ladd, *Expert Testimony*, 5 *VAND. L. REV.* 414 (1952), 768

LAFAVE, WAYNE R. & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* (2d ed. 1992), 1047, 1051

Langbein, John H., *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 *COLUM. L. REV.* 1168 (1996), 512

Langbein, John H., *The Criminal Trial Before the Lawyers*, 45 *U. CHI. L. REV.* 263 (1978), 27

Lau, Timothy T., *Reliability of Excited Utterance Hearsay Evidence*, 87 *MISS. L.J.* 599 (2018), 529

Lau, Timothy T., *Reliability of Present Sense Impression Hearsay Evidence*, 52 *GONZ. L. REV.* 175 (2016/2017), 529

LeDuc, Daniel, *A Case of Mistaken Identity Landed Him in Jail for 3 1/2 Years*, *PHILADELPHIA INQUIRER*, Oct. 25, 1992, 210

Ledwon, Lenora, *Diaries and Hearsay: Gender, Selfhood, and the Trustworthiness of Narrative Structure*, 73 *TEMP. L. REV.* 1185 (2000), 426, 1046

Letter from Michael A. Ramos to President Obama (Nov. 16, 2016), 898

Levenson, Michael, *Judge Overturns Murder Convictions. Citing Use of Rap Lyrics at Trial*, *N.Y. TIMES*, Oct. 4, 2022, 190

Levey, Noam N., *House Extends Law to Protect Reporters*, *LOS ANGELES TIMES*, Oct. 17, 2007, 975

Lewis, Neil A., *President's Accuser May Be Questioned on Her Sexual Past*, *NEW YORK TIMES*, June 2, 1997, 385

Liang, Bryan A., *Shortcuts to "Truth": The Legal Mythology of Dying Declarations*, 35 *AM. CRIM. L. REV.* 229 (1998), 518

Libby, Eileen, *The "Oops" Factor: Latest Model Rule Leaves Wiggle Room for Lawyers Receiving Misdirected Materials*, 92 *A.B.A. J.* 26 (February 2006), 1014

Liptak, Adam, *Reporter Jailed After Refusing to Name Source*, *NEW YORK TIMES*, July 7, 2005, 974

Livia Albeck-Ripka, *A Bill Limits Rap Lyrics as Evidence*, *NEW YORK TIMES*, Aug. 27, 2022, 190

Louisell, David W., *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 *TUL. L. REV.* 101 (1956), 991

MacKenzie, John P., *Confession Case Reverses Usual Roles*, *WASHINGTON POST*, Nov. 26, 1972, 729

Maguire, John MacArthur, *The Hillmon Case—Thirty-three Years After*, 38 *HARV. L. REV.* 709 (1925), 540

Man, Girl Sought in Street Fight Fatal to Youth: Victim Is Shot by Friend of Woman He Was Alleged to Have Insulted—Flee in Car, *BROOKLYN DAILY EAGLE*, Nov. 11, 1929, 165

Martin, Douglas & Jacques Steinberg, *Robert Novak, Washington Political Columnist and TV Pundit, Dies at 78*, *N.Y. TIMES*, Aug. 19, 2009, 963

McCord, David, *A Primer for the Nonmathematically Inclined on Mathematical Evidence in Criminal Cases: People v. Collins and Beyond*, 47 *WASH. & L. L. REV.* 741 (1990), 89

MCCORMICK, CHARLES T., *HANDBOOK OF THE LAW OF EVIDENCE* (1954), 598

McFarland, Douglas D., *Dead Men Tell Tales: Thirty Times Three Years of the Judicial Process After Hillmon*, 30 *VILL. L. REV.* 1 (1985), 540

McMichael, Benjamin J. et al., *"Sorry" Is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability Risk*, 71 *STAN. L. REV.* 341 (2019), 135

Méndez, Miguel A., *Character Evidence Reconsidered: "People Do Not Seem to be Predictable Characters"*, 49 *HASTINGS L.J.* 871 (1998), 182

Mnookin, Jennifer L., *Fingerprint Evidence in an Age of DNA Profiling*, 67 *BROOK. L. REV.* 13 (2001), 879

Mnookin, Jennifer L., *The Validity of Latent Fingerprint Identification: Confessions of a Fingerprinting Moderate*, 7 *LAW, PROBABILITY & RISK* 127 (2008), 886

Moore, Solomon, *Science Found Wanting in Nation's Crime Labs*, *N.Y. TIMES*, Feb. 5, 2009, 886

MORGAN, EDMUND M., *BASIC PROBLEMS OF EVIDENCE* (1962), 432

Morgan, Edmund M., *Hearsay Dangers and the Application of the Hearsay Concept*, 62 *HARV. L. REV.* 177 (1948), 455

Mosteller, Robert P., *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 *IND. L.J.* 917 (2007), 628

MUELLER, CHRISTOPHER ET AL., *EVIDENCE* (6th ed. 2018), 109, 314, 337, 449, 795, 906, 935, 950, 952, 1016, 1066, 1070

Nagareda, Richard A., *Reconceiving the Right to Present Witnesses*, 97 *MICH. L. REV.* 1063 (1990), 737

Nance, Dale A. & Scott B. Morris, *Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Small Random-Match Probability*, 34 *J. LEG. STUD.* 395 (2005), 93

Nance, Dale A., *Conditional Relevance Reinterpreted*, 70 *B.U. L. REV.* 447 (1990), 48

Nance, Dale A., *The Wisdom of Dallas County in EVIDENCE STORIES* 307 (Richard Lempert ed., 2006), 598

NATIONAL RESEARCH COUNCIL, *IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS TESTIMONY* (2014), 485

Nelson, Jack, *Supreme Court to Rule on Mississippi Shootout*, *LOS ANGELES TIMES*, Jan. 17, 1973, 728

Nesson, Charles, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 *HARV. L. REV.* 1357 (1985), 1

Nestler, Jeffrey S., *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 *U. PA. L. REV.* 201 (2005), 971

New Courthouse, Badly Damaged by Fire This Morning—Dome Burned Off: Incendiary Origin, *SELMA MORNING TIMES*, June 9, 1901, 592

Newman, Andy, *Judge Who Ruled Out Matching Fingerprints Changes His Mind*, *N.Y. TIMES*, Mar. 14, 2002, 882

Niehoff, Len, *A Parable on Race, Statistically Rendered*, *RANDOMVERDICTS.BLOGSPOT.COM* (Sept. 16, 2014), 93

Ovalle, David, *Miami-Dade Judge Rules Fingerprint Evidence Should be Restricted*, *MIAMI HERALD*, Oct. 28, 2012, 889

Park, Roger, *The Rationale of Personal Admissions*, 21 IND. L. REV. 509 (1988), 430, 432

Pet Wolf Bites Boy in U. City, ST. LOUIS POST-DISPATCH, March 23, 1973, 437

Peters, Justin, *Was George Zimmerman's 911 Call a Clever Piece of Propaganda?*, SLATE, Nov. 30, 2013, 531

Polenberg, Richard, *Law and Character: The "Saintly" Cardozo: Character and the Criminal Law*, 71 U. COLO. L. REV. 1311 (2000), 171

Prifogle, Emily, *Law and Local Activism: Uncovering the Civil Rights History of Chambers v. Mississippi*, 101 CAL. L. REV. 445 (2013), 729

Quinn, Sally, *Baggage Check: How Far Should We Go?*, WASHINGTON POST, Feb. 28, 1999, 246

Raeder, Myrna S., *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009 (2007), 609

Raeder, Myrna S., *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463 (1996), 241

Rand, Joseph W., *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 GEO. L.J. 873 (1992), 598

Raskin, Lieu, *Yarmuth Introduce Federal Press Shield Legislation* (Press Release, July 6, 2021), 978

Reporters Committee for Freedom of the Press, *Reporter's Privilege Compendium*, 971

Richey, Charles, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537 (1994), 889

Risinger, D. Michael, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99 (2000), 816, 827

Roberts, Anna, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977 (2016), 303

Rose, Jasmine B. Gonzales, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017), 77

Ross, Lee & Donna Shestowsky, *Two Social Psychologists' Reflections on Situationism and the Criminal Justice System in IDEOLOGY, PSYCHOLOGY, AND LAW* (Jon Hanson ed., 2012), 184

Rothstein, Paul, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259 (1995), 223

Saks, Michael J., *The Aftermath of Daubert: An Evolving Jurisprudence of Expert Evidence*, 40 JURIMETRICS J. 229 (2000), 880

Says He Can Produce Hillmon, N.Y. TIMES, Apr. 5, 1895, 546

Schmidt, Bob, *Justice by Computer*, [LONG BEACH] INDEPENDENT-PRESS-TELEGRAM, Nov. 20, 1964, 89

Scott, John Norman, *Michigan Catches Up to the "Catch-Alls": How Much Hearsay Will They Catch?*, 14 T.M. COOLEY L. REV. 1 (1997), 597

Shaviro, Daniel, *The Confrontation Clause Today in Light of Its Common Law Background*, 26 VAL. U. L. REV. 337 (1991), 626

Sheffield, Emily Crawford, *Rationalizing a Spousal Confidential Communications Privilege Fit for the Twenty-First Century*, 74 VAND. L. REV. EN BANC 187 (2021), 1070

Simmons' Testimony a Footless Fancy, LEAVENWORTH TIMES, Nov. 17, 1899, 544

Souvion, Richard & Leslie Haller, *Bite Mark Evidence: Bite Mark Analysis Is Not the Same as Bite Mark Comparison or Matching or Identification*, 4 J. L. & BIOSCIENCES 617 (2017), 900

Spector, Robert G. & Teree E. Foster, *Rule 412 and the Doe Case: The Fourth Circuit Turns Back the Clock*, 35 OKLA. L. REV. 87 (1982), 383

Steinbuch, Robert, *The "Unfairness" Proof: Exposing the Fatal Flaw Hidden in the Rule Governing the Use of Criminal Convictions to Impeach Character for Truthfulness*, 49 PEPP. L. REV. 63 (2022), 316

Stoller, Sarah E. & Paul Root Wolpe, *Emerging Neurotechnologies for Lie Detection and the Fifth Amendment*, 33 AM. J.L. & MED. 359 (2007), 1048

Stratagems Against Insurance Companies, S.F. BULL. Sept. 14, 1878, 545

Sunderland, Edson R., *Verdicts, General and Special*, 29 YALE L.J. 253 (1920), 26

Swift, Eleanor, *The Story of Mahlandt v. Wild Canid Survival & Research Center, Inc.: Encounters of Three Different Kinds in EVIDENCE STORIES 239* (Richard Lempert ed., 2006), 440

Tavernise, Sabrina, *Legal Precedent Doesn't Let Facts Stand in the Way*, N.Y. TIMES, Nov. 26, 2004, 632

Temkin, Barry R., *Errant E-Mail: Inadvertent Disclosure of Confidential Material Poses Dilemma*, NEW YORK LAW JOURNAL, Oct. 14, 2003, 1013

Tharp, Robert, *Domestic Violence Cases Face New Test: Ruling That Suspects Can Confront Accusers Scars Some Victims from Court*, THE DALLAS MORNING NEWS, July 6, 2004, 630

THAYER, JAMES BRADLEY, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* (Boston: Little, Brown & Co. 1898), 5

The Brides Case: Prisoner on Trial at the Old Bailey.: The Death of Miss Mundy., THE TIMES, June 23, 1915, at 5, 218

The Government Accuses Roger Stone of Being a Disorganized Figure Who Committed a Crime, EMPTYWHEEL.NET, Aug. 16, 2019, 60

The Proof of the Pudding: A Novel Proceeding in the United States District Court, SAN FRANCISCO CHRONICLE, Jan. 26, 1880, 763

THORP, EDWARD O., *BEAT THE DEALER: A WINNING STRATEGY FOR THE GAME OF TWENTY-ONE* (1962), 89

TRAIN, ARTHUR, *THE PRISONER AT THE BAR* (1906), 302

TREVELYAN, RALEIGH, *SIR WALTER RALEIGH* (2002), 709

Trial by Mathematics, TIME, Apr. 26, 1968, 80

TRIAL OF SIR WALTER RALEIGH, KNT. AT WINCHESTER, FOR HIGH TREASON (1603) reprinted in 2 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 1 (1816); 1 D. JARDINE, CRIMINAL TRIALS 400 (1832), 399

Trials: The Laws of Probability, TIME, Jan. 8, 1965, 90

Tribe, Laurence H., *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971), 92

Tribe, Laurence H., *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974), 403, 415

Tuerkheimer, Deborah, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1 (2006), 642

U.S. Immigration and Customs Enforcement, *NM Man Pleads Guilty to Federal Child Pornography Charge* (Aug. 26, 2013), 665

Uviller, H. Richard, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776 (1993), 290, 300

Van Derbeken, Jaxon, *Dog-Mauling Judge OKs Testimony*, SAN FRANCISCO CHRONICLE, Jan. 30, 2002, 526

Van Derbeken, Jaxon, *Witness Links Attorneys to Prison Gang Testimony in Dog-Mauling Trial*, SAN FRANCISCO CHRONICLE, Feb. 22, 2002, 718

Van Gerven, Dennis, *A Digital Photographic Solution to the Question of Who Lies Buried in Oak Hill Cemetery* (Feb. 13, 2007), 545

Verhovek, Sam Howe, *Athlete and Legal Issue on Trial*, NEW YORK TIMES, Feb. 19, 1996, 1067

Walker, Mark, *Supporters Seek Clemency for Native American Activist Convicted in Killings*, N.Y. TIMES, Feb. 26, 2022, 191

Wanderings of a Murderer, N.Y. TIMES, May 24, 1893, 548

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986 unabridged ed.), 317
 Weisberg, Robert, Note, Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges, 30 STAN. L. REV. 935 (1978), 990
 Weiss, Kenneth J. & Alisa R. Gutman, Testifying about Trauma: A Call for Science and Civility, 45 J. AM. ACAD. PSYCHIATRY & L. ONLINE 1 (2017), 863
 Wellborn III, Olin Guy, Demeanor, 76 CORNELL L. REV. 1075 (1991), 782
 Wesson, Marianne, "Remarkable Stratagems and Conspiracies": How Unscrupulous Lawyers and Credulous Judges Created an Exception to the Hearsay Rule, 76 FORDHAM L. REV. 1675 (2007), 542
 Westen, Peter, The Compulsory Process Clause, 73 MICH. L. REV. 71 (1974), 742, 991
 Wickes, Joseph A., Ancient Documents and Hearsay, 8 TEX. L. REV. 451 (1930), 598
 WIGMORE, EVIDENCE (3d ed. 1940), 571
 WIGMORE, JOHN HENRY, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940, Vol. 2), 389
 WIGMORE, JOHN HENRY, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940, Vol. 3), 347
 WIGMORE, JOHN HENRY, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940, Vol. 5), 512
 WIGMORE, JOHN HENRY, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (James H. Chadbourn ed., 1976, Vol. 6), 398
 WIGMORE, JOHN HENRY, THE PRINCIPLES OF JUDICIAL PROOF (1913), 541
 Wissler, Roselle L. & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 LAW & HUM. BEHAVIOR 37 (1985), 328
 Zackowitz Goes to Death Chair Week of May 5: Slayer, Before Sentence, Tells Judge Nova He Did Not Have a Fair Trial, BROOKLYN DAILY EAGLE, March 25, 1930, 166

UNIVERSITY CASEBOOK SERIES®

EVIDENCE

FOURTH EDITION

INTRODUCTION

Evidence law is about the limits we place on the information juries hear. The chapters ahead examine these limits, their boundaries, their ambiguities, and how they work in practice. Mastering the Federal Rules of Evidence will occupy much of our time. It is essential to know what the rules say and how judges enforce them. It's just as important to know when the meaning of a rule is unclear and on what grounds courts decide close calls. But behind these rule-bound and case-focused inquiries lies a more fundamental question: Why have evidence rules at all?

Why should we limit the information juries hear? Some reasons are clear enough. To begin with, trials have to *end*, so judges must restrict pointless, bloated, or repetitive evidence. Moreover the Supreme Court has barred use of some evidence obtained in violation of the Constitution. And we as a society have chosen to protect the privacy of certain communications—between wife and husband, lawyer and client, for example—even at the expense of good evidence. These are examples of evidence rules that serve discrete and identifiable goals. The great majority of evidence rules, however, serve a more elusive goal.

That goal has something to do with achieving, at trial, the *right* result. We want juries to return the right verdict, and by that we may mean the *truthful* verdict, the one that accords with *what happened*. Charles Nesson has argued we do not want truthful verdicts so much as verdicts that *seem* truthful and therefore gain legitimacy and stability. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985). But whether the goal is truth or virtual truth, we still can wonder why external limits on the flow of information help achieve that goal.

One reason, of course, is that in many cases only one lawyer is advocating the “right” result. So we can’t count on lawyers to present only sound and helpful evidence. Still, since juries surely know what lawyers are up to, can’t we count on juries to separate wheat evidence from chaff? Evidence rules presume otherwise. They presume certain evidence will distract juries from their search for truth and produce wrong results.

Yet our mistrust of juries’ factfinding powers is not uniform. Sometimes we place great and perhaps unjustified faith in the power of juries to see the truth. Once a witness has testified before a jury, for example, we grant the jury unreviewable power to say whether the witness was truthful. At other times our faith in jury factfinding falters. We worry autopsy photos may impassion juries to convict regardless of guilt. We fear juries may misuse evidence of a person’s past behavior, so we often forbid such evidence in court. We typically deem juries unable to judge the credibility of persons who aren’t in court. And when it comes to expert witnesses, we are so afraid juries will take charlatans as sages that we deem judges gatekeepers guarding against unsound evidence.

Much of our task ahead is to plot the crooked line that separates evidence we think the jury can evaluate reasonably (and therefore is admissible) from evidence we think will distract the jury from its search for truth (and therefore is not admissible). Examine this line critically. After all, the notion we can get more truth from less evidence must have strict limits. If *you* would find a particular piece of evidence useful, why keep it from the jury?

The inconstancy of our faith in juries’ power to judge the truth is one source of irregularity in our evidence rules, but there are others. Various public-policy goals have shaped the rules in ways not wholly predictable. Moreover the rules of evidence are largely the product of centuries of common-law contrivance and compromise. At times we will trace the common-law sources of the rules, if only to highlight the difficulty of finding consistent attitudes and uniform principles.

Hard as it may be to identify themes that unify the rules of evidence, it is not hard to organize the rules loosely according to function. The Contents Summary on page xi suggests the great bulk of the federal evidence scheme addresses either the relevance or the reliability of the information going before the jury. Rules of relevance seek to focus the parties and jury on the issues at hand. They guard against digression and distraction. Rules of reliability seek to ensure that the evidence the jury hears is as good as it purports to be—or at least that its defects are apparent to the jury. These broad bodies of rules occupy Units I and II and most of the book. Unit III addresses privileges, which exclude relevant and reliable evidence to serve specific societal interests. These three categories are rough and overlapping, but they help give shape to the material.

The book addresses only those evidence rules that limit the kind of information that reaches the jury and the uses the jury may make of that information. I will not deal with the mechanics of getting information to the jury—the proper form of a question, the way to offer an exhibit. These topics seem more suited to a course in trial practice. Nor will I address questions of the sufficiency of evidence, the effect of presumptions, or the allocation of burdens of proof. These topics fall on the cusp of evidence, procedure, and substantive

lawmaking. They are rich in theory and would reward your curiosity, but I think they would distract us from the study of the flow of information to the jury.

The Federal Rules of Evidence

This book centers around the Federal Rules of Evidence, which govern in the great majority of federal judicial proceedings. At last count forty-five states and Puerto Rico have adopted or mimicked the Federal Rules in whole or greater part, sometimes adding state rules that have no federal counterpart.³ Even the five states that have adopted distinct evidence codes

3

or have not codified their evidence law—California, Kansas, Massachusetts, Missouri, and New York—adhere to similar evidence principles. Hence I often use state cases to illustrate the operation of the Federal Rules. Underlying almost all American evidence law is the common-law tradition, and the Federal Rules borrow heavily from that tradition.

Enacted by Congress in 1975, the rules are fundamentally statutes and may be read in light of their history. In a formal sense that history began in 1965, when Chief Justice Earl Warren appointed an advisory committee of judges, practitioners, and academics who drafted the original slate of proposed rules. Guided principally by its reporter, Professor Edward W. Cleary, the advisory committee drew not only from the common law but also from earlier codification efforts, including the Model Code of Evidence of 1942 and the Uniform Rules of Evidence of 1953. The committee delivered its proposed rules to the Supreme Court in November 1972. The Court approved the rules essentially without change and sent them on to Congress.

Occasionally you'll see suggestions that the Supreme Court "promulgated" the rules. But as Justice Douglas wrote in dissent when the Court transmitted the rules to Congress, the Court's role was "merely perfunctory":

[T]his Court does not write the Rules, nor supervise their writing, nor appraise them on their merits, weighing the pros and cons. The Court concededly is a mere conduit. Those who write the Rules are members of a Committee. . . .

Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 185 (1972) (Douglas, J., dissenting). Years later the whole Court acknowledged it had served "in truth merely [as] a conduit." *United States v. Abel*, 469 U.S. 45, 49 (1984).

Congress proved in contrast to be a tough and discriminating audience. The House and Senate Judiciary Committees aggressively scrutinized the proposed rules and amended many of them. The full Congress amended a few more. Most strikingly, Congress scrapped thirteen proposed privilege rules and replaced them with a single rule, FRE 501, which abdicated the entire matter of privileges to the courts. Over the years Congress has amended the Federal Rules several times and has added new rules. The most significant additions have been Rule 412, adopted in 1978, which created a federal rape shield provision, and Rules 413 through 415, enacted in 1994, which generally admit evidence of a criminal or civil defendant's propensity to commit certain sexual offenses.

4

The Evidence Rules Restyling Project

Several years ago the advisory committee undertook a full-scale restyling of the whole slate of federal evidence rules. The restyling project, led mainly by Professor Joseph Kimble, was part of a larger venture to apply uniform conventions of style and usage across all of the federal rules. Earlier restyling efforts had targeted the rules of appellate, criminal, and civil procedure. The restyled evidence rules were released for public comment in 2009 and approved by the Supreme Court early in 2011. They became law by congressional inaction on December 1, 2011.

True to its name, the restyling project aimed to improve style, not alter substance. After each of the refashioned rules the advisory committee appended a standard note, varying only slightly from rule to rule:

Committee Note

The language of Rule [] has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to alter any result in any ruling on evidence admissibility.

In the rulebook I have omitted this standard note to avoid repetition, but you may wish to test its accuracy. The old and restyled rules appear side by side in the rulebook beginning at page 410. Consider whether the committee accurately captured the meaning of the old rules, printed on the left, in the restyled text, printed on the right in shaded boxes.

Some of the cases you will read in the pages ahead still incorporate the now-obsolete language of the unstyled rules. Where the old language differs substantially from the new, I've added a footnote to clarify the change.

In the rulebook at pages 405 to 408 you will find more details on the restyling project and on Professor Kimble's conventions of good English prose and sound rule writing.

Interpreting the Federal Rules

In his introduction to the Federal Rules, Professor Cleary wrote that though "[t]he language of [a] rule itself should be taken as the prime source of meaning," the rule should be read in the light of its "legislative history, which on occasion may even override an apparently plain and unmistakable meaning of the words of the rule." So it's important to read the legislative history that follows the text of each rule in your rulebooks. You'll see that if Congress amended a rule as submitted by the Supreme Court, the rule's legislative history generally includes a report from the House or Senate Judiciary Committee or excerpts from floor debate. Occasionally a conference committee report reflects a compromise struck between competing House and Senate versions of a rule. If Congress has amended a

5

rule since 1975, the legislative history of the amendment follows the original rule's history in the rulebook.

The significance of the Advisory Committee's Note that accompanies each rule is a matter of some dispute. Professor Cleary recommended that whenever Congress adopted a rule as written by the advisory committee and submitted by the Court, the committee's note "should be taken as the equivalent of a congressional committee report as representing the thinking of Congress." In 1995 Justice Scalia rejected Cleary's suggestion and declared that the Advisory Committee's Notes "bear no special authoritativeness as the work of the draftsmen." *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring). You will see, though, that the great majority of justices, judges, and courts follow Cleary's advice and often turn to the committee's notes for guidance.

When neither the rule's language nor its history makes its meaning clear, Cleary said to look to the common law for guidance. "No common law of evidence in principle remains under the rules," he wrote. Still, "the common law remains as a source of guidance in identifying problems and suggesting solutions, within the confines of the rules." See also Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978) (offering more detailed principles of construction for interpreting the rules). As you read *Tanner v. United States*, 483 U.S. 107 (1987) (page 10), note how the majority and dissent both employ (or manipulate?) the legislative history of Rule 606(b) to support their positions.

Two Notes on Using This Book

Now and then you will see a boldfaced notice of the sort that appears on page 10: "**Focus on FRE 606(b).**" I hope these notices prompt you to turn to the rulebook and read the cited rule along with any related legislative history. Page references to the rulebook appear with the abbreviation "RB."

The casebook presents many problems challenging you to apply rules or caselaw. Sometimes I have based these problems on published cases and included case cites. Though you may find it useful to refer to the cited cases, you should not assume they reach the "right" result or even address the same issue raised in the problem. If a problem has no case cite, its facts are fictional.

A Glance at the Trial Process

Though the rules of evidence govern both bench and jury trials, evidence law is classically "the child of the jury." JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 266 (Boston: Little, Brown & Co. 1898). Even if some evidence principles emerged before jury trials as we know them, modern evidence law evolved largely within a system of trials by lay factfinders. So before launching into our study of evidence law, let's pause to review trials by jury.

6

Trials often begin with pretrial motion hearings at which the judge and parties limit the scope of the charges, issues, and evidence. The most important pretrial hearings for our purposes address *motions in limine*, in which either party asks the court to rule on the admissibility of evidence the party hopes to offer or bar its opponent from offering at trial. After hearing arguments from counsel, the court may deem the contested evidence admissible or inadmissible or may reserve judgment till the evidence is offered at trial. Securing pretrial in limine rulings enables lawyers to plan trial strategy with less fear of surprise.

Trial jurors are chosen from a *venire*, or jury panel, assembled by a public officer and constitutionally required to represent "a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 528-30 (1975). From these prospective jurors, the judge and parties together choose the trial jury, sometimes called the *petit*

jury, that sits in judgment. Criminal trial juries usually have twelve members, while civil juries vary more widely in size. See FED. R. CRIM. P. 23(b); FED. R. CIV. P. 48(a) (permitting civil juries of between six and twelve members). During *voir dire*, the process of selecting those jurors, the judge and sometimes the lawyers question prospective jurors to ferret out sympathies for or prejudices against either party. The judge may exclude “for cause” biased jurors and those already familiar with the parties or issues. And the parties may exercise an allotment of “peremptory” challenges to remove jurors they perceive as unfavorable. See FED. R. CRIM. P. 24(a), (b); FED. R. CIV. P. 47(a), (b). Though typically unexplained, peremptory challenges may not be motivated by a juror’s race or gender, see *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994), or—in some jurisdictions—by an array of other factors, see, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014) (extending *Batson* to bar peremptory strikes based on sexual orientation).

Once the jurors are assembled and sworn to try the case impartially, the lawyers offer *opening statements*, setting out the issues in the case and the evidence they expect to present. The party bearing the burden of proof—the prosecution in criminal cases, the plaintiff in civil matters—then presents its *case-in-chief*, in which it must lay out enough evidence to meet its burden in the minds of reasonable jurors. Evidence most commonly takes the form of witness testimony, supported by an oath or affirmation to tell the truth, see FED. R. EVID. 603, often joined by such physical exhibits as photos, guns, stolen goods, or banking or medical records. Lawyers also may offer *stipulations*, oral or written agreements that certain facts are true or that certain absent witnesses, if present and sworn, would testify to specified facts. See FED. R. CIV. P. 16(c)(2)(C).

Parties question their own witnesses on *direct examination*, typically consisting of *nonleading*, open-ended questions—“What did you see next?” and not “Did you see the defendant had a gun?” After each witness’s direct examination, the opposing lawyer may *cross-examine*, seeking to undermine the witness’s testimony. Here the lawyer usually may—and does—pose

7

leading questions, but “should not go beyond the subject matter of the direct examination and matters affecting the witness’s credibility” unless the court permits wider inquiry. FED. R. EVID. 611(b), (c). The proponent then is allowed *redirect examination*, generally limited to matters addressed on cross, followed by *recross-examination*, limited to matters addressed on redirect. Non-party trial witnesses normally are *sequestered*, meaning they are excluded from the courtroom except when testifying to ensure they don’t tailor their testimony to what other witnesses or the lawyers have said. See FED. R. EVID. 615.

After the prosecution has presented its witnesses and physical exhibits and concludes its case-in-chief—or later, after the close of all the evidence—a criminal defendant may ask the court for a judgment of acquittal. The judge must grant the motion concerning “any offense for which the evidence is insufficient to sustain a conviction.” FED. R. CRIM. P. 29(a). Either party in a civil case may bring a similar motion for a finding on any issue on which its opponent “has been fully heard.” The judge may resolve the issue against either civil party if “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” If a finding on the issue was essential to sustain a claim or defense, the court may grant a motion for a judgment against the party on that claim or defense as a matter of law. FED. R. CIV. P. 50(a).

If no such motion is made or granted, the defense may offer its case-in-chief, calling witnesses and offering physical exhibits as in the prosecution’s or plaintiff’s case-in-chief. The prosecutor or civil plaintiff then may present witnesses and exhibits in *rebuttal*. Criminal defendants can foreclose these last two steps by exercising their Fifth Amendment right to sit silently, putting the prosecution to its proof.

Throughout the presentation of evidence, either lawyer may *object* to a question posed or evidence offered by opposing counsel. An objection may bear on the form of a question, as when a lawyer asks a leading question on direct examination or poses a compound question, seeking two answers at once. Or an objection may challenge the admissibility of the evidence sought. A trial advocacy course typically addresses objections as to form. Contests over admissibility are the stuff of this course. All objections pause the testimony till the judge either *sustains* the objection and deems the question improper or *overrules* the objection, permitting the witness to answer. Before ruling, the court may ask counsel to explain an objection or defend a question and may seek an *offer of proof*, in which a lawyer predicts (quietly, at sidebar) the likely answer to the challenged question.

After both parties have rested their cases and the evidence is closed, their lawyers may present *closing arguments*, concluding with the party carrying the burden of proof. Here the lawyers recap their evidence, confront their opponents’ arguments and evidence, and suggest inferences the jurors may draw from the evidence. Attention then turns to the judge, who instructs the jurors on the law they are to apply to the facts as they find them, including the proper *standard of proof*. The government in criminal

8

cases must persuade the jury of all the elements of the charged crimes *beyond a reasonable doubt*. The standard of proof in civil cases is lower—a *preponderance of the evidence*, defined as proof rendering the facts alleged

more likely than not.

The jurors finally retire and deliberate, privately and alone. Normally they may inspect any physical exhibits admitted during the trial. They may ask the judge questions, and they may alert the court to difficulties, as when deliberations are deadlocked. Otherwise they may not communicate with non-jurors about the case till they have delivered their verdict and are discharged. All criminal juries and many civil juries must reach unanimous verdicts. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (deeming nonunanimous criminal jury verdicts a violation of the Sixth and Fourteenth Amendments); Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U.L. REV. 201, 203 (2006) ("Federal [civil] juries must be unanimous, but only eighteen states require unanimity . . ."). Though jurors in civil cases sometimes answer specific questions posed by the court, see FED. R. CIV. P. 49(a), verdicts in criminal cases most often consist of one or two unexplained words: "guilty" or "not guilty."

TANNER V. UNITED STATES: *Historical Prelude*

Before we proceed to the heart of the book—the rules of relevance, reliability, and privilege—let us take one last digression. As I said at the outset, evidence rules aim to limit the information juries hear. The tangled rules that make up this course betray deep and long-held suspicions about the talents and limits of jurors. Yet this systemic mistrust all but vanishes at the moment the jury renders its verdict. At that moment the system proclaims a blind faith in the judgment of the jury. After all, the jury deliberates in secret and renders its verdict inarticulately, in one or two naked words. *Tanner* stands for the system's unwillingness to look past the jury's verdict to expose whatever flaws in reasoning or understanding might lie behind the curtain of the deliberation room.

Our reluctance to examine what juries do with the evidence they hear perhaps highlights the importance of monitoring what they hear in the first place. If we are to exercise virtually no review of the jurors' skill and fairness in evaluating evidence, perhaps we need to be especially vigilant to ensure the evidence they hear is useful and fair. So instead of beginning with the many ways in which we mistrust juries, it may be revealing to start with that final moment of blind trust. That blind trust is the theme of *Tanner* and of Federal Rule 606(b). A glance backward at the jury's early history may help set the stage.

The Criminal Jury Trial: A Brief History of the Early Days

Though the jury's origins lie hidden in Dark Ages rituals, we can trace the beginning of one sort of jury—the criminal trial jury—with something like pinpoint accuracy: The first true criminal jury trial seems to have taken place at Westminster in 1220.*

The cause of the sudden birth of trial by jury was the sudden death of trial by ordeal. Before 1215 criminal trials had proceeded by ordeal or by battle. In the ordeal of cold water the accused was tossed into a pool with a rope around his hips. If he sank, he was hauled out an innocent person, for the purity of the water had accepted him. But if the water repelled him and he floated, he was condemned. In the ordeal of hot iron the accused walked barehanded with a hot iron bar. Three days later, when her bandages were removed, her healing hands revealed her fate: If the wounds were healing cleanly, she was absolved; if corruptly, condemned.** In all events the judgment was God's.

In 1215 the Church forbade priests to officiate at ordeals and suddenly stripped these rituals of their divine imprimatur. When the Church decertified ordeals, it wrecked them, for the system no longer could claim God—and not some mere human agency—had decreed the accused's guilt and authorized punishment. English and other European justice systems soon abandoned the ordeal in criminal cases. The countries of Continental Europe embraced forms of proof that exalted the power of sworn eyewitness testimony and the accused's confession, often coerced through torture. The English turned to trial by jury.

Lacking any claim to divine agency, the jury eventually found a remarkable source of systemic legitimacy in the secrecy of its deliberation room. The jury's private and usually unexplained decisionmaking generally has protected it from embarrassing public failures. At least within the system's formal bounds the jury's verdict has been almost immune from contradiction. There never has been a mechanism by which the defendant or prosecutor or anyone outside the system could command the jury to reveal its decisionmaking processes. The jury's secrecy is arguably an aid to legitimacy, for the privacy of the jury box shrouds the shortcomings of the jury's methods.

In modern times the law has gone to great lengths to shield the mystery of the deliberation process. In 1954 several law professors working with the Chicago Jury Project won permission from the judges of the Tenth Circuit to make secret recordings of jury deliberations in the district court in Wichita. The next year a Senate Subcommittee on Internal Security summoned Chicago Dean (and future Attorney General) Edward Levi and Professor

Harry Kalven to Washington. Lumping the “bugging” of jury rooms with the Communist bugaboos of the day, senators cast the law professors as a threat to national security. Of Levi the subcommittee’s chairman asked, “Now, do you not realize that to snoop on a jury, and to record what they say, does violence to every reason for which we have secret deliberations of a jury?” Of Kalven the committee counsel asked, “Did you write a letter to President Truman, asking clemency for the atomic spies, Rosenbergs?” See JAY KATZ, *EXPERIMENTATION WITH HUMAN BEINGS* 67, 84–91 (1972). A year later Congress made it a crime to record, listen to, or observe any federal jury deliberation. See Act of Aug. 2, 1956, ch. 879, § 1, 70 Stat. 935 (codified as amended at 18 U.S.C. § 1508).

Efforts to shield jury deliberations from scrutiny are not a dim memory of a McCarthyite past. As the Supreme Court’s ruling in *Tanner* shows, secret deliberations are an established feature of the common-law tradition and remain a central element of our trial system.

Focus on FRE 606(b)

TANNER V. UNITED STATES

483 U.S. 107 (1987).

■ O’CONNOR, J., delivered the opinion for a unanimous Court with respect to Parts III and IV and the opinion of the Court with respect to Parts I and II, in which REHNQUIST, C. J., and WHITE, POWELL, and SCALIA, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined.

■ JUSTICE O’CONNOR delivered the opinion of the Court. Petitioners William Conover and Anthony Tanner were convicted of conspiring to defraud the United States and of committing mail fraud. . . . Petitioners argue that the District Court erred in refusing to admit juror testimony at a post-verdict hearing on juror intoxication during the trial. . . .

I

. . . The day before petitioners were scheduled to be sentenced, Tanner filed a motion . . . seeking continuance of the sentencing date, permission to interview jurors, an evidentiary hearing, and a new trial. According to an affidavit accompanying the motion, Tanner’s attorney had received an unsolicited telephone call from one of the trial jurors, Vera Asbul. Juror Asbul informed Tanner’s attorney that several of the jurors consumed alcohol during the lunch breaks at various times throughout the trial, causing them to sleep through the afternoons. The District Court continued the sentencing date, ordered the parties to file memoranda, and heard

11

argument on the motion to interview jurors. The District Court concluded that juror testimony on intoxication was inadmissible under Federal Rule of Evidence 606(b) to impeach the jury’s verdict. The District Court invited petitioners to call any nonjuror witnesses, such as courtroom personnel, in support of the motion for new trial. Tanner’s counsel took the stand and testified that he had observed one of the jurors “in a sort of giggly mood” at one point during the trial but did not bring this to anyone’s attention at the time.

Earlier in the hearing the judge referred to a conversation between defense counsel and the judge during the trial on the possibility that jurors were sometimes falling asleep . . . :

“MR. MILBRATH [defense counsel]: But, in any event, I’ve noticed over a period of several days that a couple of jurors in particular have been taking long naps during the trial.

“THE COURT: Is that right. Maybe I didn’t notice because I was—

“MR. MILBRATH: I imagine the Prosecutors have noticed that a time or two.

“THE COURT: What’s your solution?

“MR. MILBRATH: Well, I just think a respectful comment from the Court that if any of them are getting drowsy, they just ask for a break or something might be helpful.

“THE COURT: Well, here’s what I have done in the past—and, you have to do it very diplomatically, of course: I once said, I remember, ‘I think we’ll just let everybody stand up and stretch, it’s getting a little sleepy in here,’ I said, but that doesn’t sound good in the record.

“I’m going to—not going to take on that responsibility. If any of you think you see that happening, ask for a bench conference and come up and tell me about it and I’ll figure out what to do

about it, and I won't mention who suggested it.

"MR. MILBRATH: All right.

"THE COURT: But, I'm not going to sit here and watch. . . . [C]ome up and let me know and I'll figure how—either have a recess or—which is more than likely what I would do."

As the judge observed during the hearing, despite the above admonitions counsel did not bring the matter to the court again.

The judge also observed that in the past courtroom employees had alerted him to problems with the jury. "Nothing was brought to my attention in this case about anyone appearing to be intoxicated," the judge stated, adding, "I saw nothing that suggested they were."

Following the hearing the District Court filed an order stating that "on the basis of the admissible evidence offered I specifically find that the

12

motions for leave to interview jurors or for an evidentiary hearing at which jurors would be witnesses is not required or appropriate." The District Court also denied the motion for new trial.

While the appeal of this case was pending before the Eleventh Circuit, petitioners filed another new trial motion based on additional evidence of jury misconduct. In another affidavit, Tanner's attorney stated that he received an unsolicited visit at his residence from a second juror, Daniel Hardy. Despite the fact that the District Court had denied petitioners' motion for leave to interview jurors, two days after Hardy's visit Tanner's attorney arranged for Hardy to be interviewed by two private investigators. The interview was transcribed, sworn to by the juror, and attached to the new trial motion. In the interview Hardy stated that he "felt like . . . the jury was on one big party." Hardy indicated that seven of the jurors drank alcohol during the noon recess. Four jurors, including Hardy, consumed between them "a pitcher to three pitchers" of beer during various recesses. Of the three other jurors who were alleged to have consumed alcohol, Hardy stated that on several occasions he observed two jurors having one or two mixed drinks during the lunch recess, and one other juror, who was also the foreperson, having a liter of wine on each of three occasions. Juror Hardy also stated that he and three other jurors smoked marijuana quite regularly during the trial. Moreover, Hardy stated that during the trial he observed one juror ingest cocaine five times and another juror ingest cocaine two or three times. One juror sold a quarter pound of marijuana to another juror during the trial, and took marijuana, cocaine, and drug paraphernalia into the courthouse. Hardy noted that some of the jurors were falling asleep during the trial, and that one of the jurors described himself to Hardy as "flying." Hardy stated that before he visited Tanner's attorney at his residence, no one had contacted him concerning the jury's conduct, and Hardy had not been offered anything in return for his statement. Hardy said that he came forward "to clear my conscience" and "because I felt . . . that the people on the jury didn't have no business being on the jury. I felt . . . that Mr. Tanner should have a better opportunity to get somebody that would review the facts right."

The District Court . . . denied petitioners' motion for a new trial.

The Court of Appeals for the Eleventh Circuit affirmed. 772 F.2d 765 (1985). We granted certiorari to consider whether the District Court was required to hold an evidentiary hearing, including juror testimony, on juror alcohol and drug use during the trial. . . .

II

Petitioners . . . assert that, contrary to the holdings of the District Court and the Court of Appeals, juror testimony on ingestion of drugs or alcohol during the trial is not barred by Federal Rule of Evidence 606(b). Moreover, petitioners argue that whether or not authorized by Rule 606(b), an evidentiary hearing including juror testimony on drug and alcohol use is compelled by their Sixth Amendment right to trial by a competent jury.

13

By the beginning of this century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict.

Exceptions to the common-law rule were recognized only in situations in which an "extraneous influence," *Mattox v. United States*, 146 U.S. 140, 149 (1892), was alleged to have affected the jury. In *Mattox*, this Court held admissible the testimony of jurors describing how they heard and read prejudicial information not admitted into evidence. The Court allowed juror testimony on influence by outsiders in *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (bailiff's comments on defendant), and *Remmer v. United States*, 347 U.S. 227, 228–30 (1954) (bribe offered to juror). See also *Smith v. Phillips*, 455 U.S. 209 (1982) (juror in criminal trial had submitted an application for employment at the District Attorney's office). . . .

Lower courts used this external/internal distinction to identify those instances in which juror testimony impeaching a verdict would be admissible. The distinction was not based on whether the juror was literally