For the first assignment for the first two classes on January 14, please read the attached first 19 pages of A Conversation on Evidence, and *Leake v. Haggert,* the first case in the Syllabus.

**A Conversation on Evidence**

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Welcome. I’m thrilled to be back in the classroom.

Serving The Syllogism Machine

Lawyers are servants of what I call “The Syllogism Machine.” Almost all legal questions are resolved by the creation of a legal syllogism where the rule of law provides the major premise; the facts of the case provide the minor premise; and the outcome follows as a logically compelled conclusion.

Diagram 1 (in class):

The Syllogism Machine

Suppose in my haste to get back into the classroom, I was clocked this morning on a radar gun at 80mph on the road from the airport. If I contest my speeding ticket, the administrative hearing officer will, first, look up the statutorily imposed speed limit on the road in question – assume it’s 65mph. She’ll use the statute to lock in a major premise stating that no one may exceed 65mph on that particular road. Then, she’ll check the radar gun readings – 80mph. We’ll look later at the use of machines to generate and transmit evidence. Assume for now that radar gun readouts are admissible. She’ll use the radar gun reading to lock in a minor premise – Neuborne was doing 80mph on that road. At that point, the conclusion of guilty follows as inevitable logic.

That’s “The Syllogism Machine” in action in its simplest form – an unambiguous, externally imposed major premise; a minor premise drawn from clearly observable reality; and a logically compelled conclusion requiring no discretionary calls. Of course, it can be (and usually is) a good deal more difficult to construct a legal syllogism. Often, the content of the major premise is deeply contested, and/or the minor premise requires complex investigation. Consider the current Supreme Court’s approach to abortion in the Mississippi case purporting to ban abortion after 15 weeks of pregnancy. The holding in *Roe v. Wade*, as modified in *Casey*, announced a constitutional rule of law drawn from the 14th Amendment due process clause assuring a woman the right to terminate a pregnancy until “viability,” which occurs between 23-24 weeks of gestation. The Mississippi statute clearly bans abortion after 15 weeks. So, assuming the existence of a valid case or controversy (standing etc.), the conclusion of unconstitutionality follows as a matter of logic.

Except, unlike my simple speeding case where the major premise is locked into place by an unambiguous statute and the facts are not really in dispute, the parties in the Mississippi case bitterly contest the content of both the major premise and minor premises in abortion-related litigation, seeking to overrule or modify the *Roe/Casey* reading of the constitutional text. Actually, the real fight in abortion-related litigation is over the minor premise. Almost everyone agrees that the major premise is “government may protect a fetus at the point during gestation when it achieves the status of a ‘life.’” Mississippi argues that life occurs at about 15 months when a fetus “quickens” and, allegedly, can, with massive medical support, exist outside the womb. Texas argues that “life” occurs at 6 weeks gestation when a fetal heartbeat can be discerned. *Roe* and *Casey* set it between 23-24 weeks, when the fetus can, without massive support, exist independently outside the womb.

How does one go about the process of filling in a minor premise that is essentially a value judgment about the meaning of “life”? Allow the political majority to make the determination? Disable the government from making the value judgment because it is too deeply bound up with religious values? Use error-deflection techniques, like the burden of proof, to limit anyone’s power to fill in the minor premise? Respect a woman’s autonomy-based right to make the judgment for herself? Respect a woman’s equality-based right to make the judgment for herself?

Fortunately, most minor premises can be generated without the complexity of abortion-related settings. This course is all about generating garden variety minor premises, like Neuborne’s speed, in the context of adversary dispute resolution. Most of your law school experience involves figuring out what the major premise is. You struggle with: (1) the techniques of reading complex text - constitutional, statutory, and administrative; (2) how to read, analyze, apply, and alter caselaw as precedent; and (3) how to use logic and policy to forge both textual and common law rules. With the exception of clinics or a trial practice course, though, you almost never worry about the facts that form the minor premise. They are almost always treated as a given because most law school readings are in the form of appellate opinions, where the facts have been found below. Be careful. Consuming such a steady diet of “uncontestable” facts risks trapping you in the illusion that facts in legal proceedings are like archeological artifacts lying under the surface, just waiting to be discovered by careful excavation. Law teachers and leaders of the bar sometimes foster that illusion by stressing that legal factfinding is a search for “truth.” I wish I had a dollar for every time the Supreme Court has mis-characterized trials as a search for the “truth.”

In my experience, given the difficulty of reconstructing past events in courtroom settings, it’s never possible to be certain about the “truth” of a contested fact in an adversary legal proceeding. The best that able lawyers and dedicated factfinders can do is assess the *probability* of an alleged fact’s existence (or non-existence); not its truth. There is, alas, no truth machine. I’m not sure that I’d want to live in a society that had one.

Moreover, the “gold standard” in evidence, eyewitness testimony, is surprisingly unreliable – affected by perceptional psychology, ingrained assumptions, physical limitations, emotion, interest, bias, and linguistic limitations.

Since we’re dealing with probability (not truth), the facts in most adversary legal proceedings are deeply contestable, meaning that a lawyer’s skill, a factfinder’s predisposition, the witnesses’ quirks, and the rules of Evidence often play inordinate roles in determining which version of a contested “fact” is ultimately stamped by the factfinder as “the established truth.” The real “truth” is that American lawyers, judges, and jurors do not merely “find” pre-existing factual “truths,” any more than judges “discover” pre-existing law in hard cases. To the contrary, the builders of a legal syllogism play significant roles in shaping both its major and minor premises. We call the search for the minor premise “fact-finding;” but it’s really “fact-shaping.” We’ll look later in the course at the question of burdens of proof, the level of probability required in varying legal contexts before treating a fact as “true” (warranting a directed verdict), or sufficiently contestable to go to the jury.

Since the law of evidence is the study of rules regulating proof of facts in a variety of legal contexts, this course flips the usual law school assumptions and treats the governing law (the major premise) as a given. Evidence zeroes in on how we determine the minor premise – the facts. The Anglo-American fact-finding process assumes that the (often) eyewitness accounts of (often) deeply interested witnesses and parties, usually delivered to the jury long after the events they purport to recount, plus any surviving artifacts of the event (like the murder weapon), can allow contested versions of the past to be reconstructed in the courtroom before twelve “neutral” jurors, who, then, decide which version of the “facts” to endorse.

Often, there isn’t much disagreement about what happened in the past; or there’s disagreement, but only one side can marshal enough probative evidence to justify sending the case to the jury. That’s when you get directed verdicts. Most of the time, though, each side presents enough contradictory evidence which, if believed, would justify a jury in finding for either. Stop for a moment and consider whether such a contested historical reconstruction process asks the impossible. Is the inherent risk of relying on the conflicting testimony of interested witnesses the reason why we care so much about cross-examination? Is our recognition of the role that a fact-finder’s predisposition plays in deciding which version of the facts to endorse the reason why we care so much about choosing a representative jury that reflects the community? Is our recognition of the “fact” that we will often get the historical reconstruction process wrong the reason we: (1) spend so much time and effort excluding potentially misleading relevant evidence, even when it appears highly probative; and (2) worrying about deflecting inevitable error by juggling the burdens of proof? Should we have different rules for criminal cases, where liberty is at stake, and civil cases which are almost always about money? How should we deal with resource imbalance in a system that rewards verbal sophistication and intensive investigation?

The historical reconstruction process depends upon two principal sources of data: (1) *direct evidence* about a past event consisting of: (a) *testimony* (often, but not always, eyewitness) describing the relevant events to the fact-finder long after they occurred (b) *physical (or “real”)* evidence, consisting of surviving artifacts of the past event, like the car wreck or the gun allegedly used to kill the victim, or a computer reconstruction of the crash; and (c) *documentary* evidence, like an invoice, contract, or the will at issue; and (2) *indirect (or circumstantial) evidence* providing implied or inferential proof about a contested event. Statistical proof is the classic example of indirect or circumstantial inference.

As we’ll see later, statistics is often the only way to establish racial or other forms of bias, or causation in many product liability settings. We’ll look briefly at its use. A defendant’s (or a witnesses’) past behavior, offered to prove that he or she acted the same way this time around, is another example of circumstantial evidence. Should someone’s past be used to predict a person’s current or future behavior? We’ll explore the limits of such inferential proof, focusing on the use of past criminal convictions in current trials.

Much of the course will be devoted to exploring: (1) the rules governing the use of “testimonial proof,” especially the techniques of cross-examination and the related rule against using “hearsay;” and (2) the circumstantial evidence rules governing statistical proof (don’t worry – no math involved) and the use of past or similar behavior to prove present facts.

Let’s start with testimonial proof.

**Testimonial Proof of Facts**

Modern factfinding emerges from the early common law *ordeal*, where the accused was submitted to a physical test with divine connotations. The divine voice spoke through the ordeal’s outcome. Often, ordeals were nothing more than disguised applications of the death sentence. For example, ordeal by water required the accused to be immersed in holy water. If the accused floated to the top, the water was deemed to have rejected the defendant as guilty, and the accused was immediately put to death. If the defendant remained at the bottom, the water accepted the accused, proclaiming the defendant innocent. Unfortunately, the accused drowned. But, since the accused was deemed innocent, no lands were forfeited to the crown.

In fact, ordeal by water often provided an accused charged with treason an opportunity to commit suicide and save the family’s lands from confiscation. Given the cost and psychological discomfort associated with much litigation, I sometimes wonder if we’ve carried the ordeal forward into modern litigation. I’ve won too many cases, only to realize the enormous toll the litigation has taken on my clients.

Our modern conception of testimonial proof emerges from the early common law process of *compurgation*, pursuant to which an accused could clear himself (it was always men) by obtaining up to twelve “oath-helpers” who were expected to recite pre-set formulaic Latin phrases establishing innocence. If the requisite number of oath-helpers could not be found, or if one or more stumbled in reciting the formula, the accused was deemed guilty. If the requisite number recited the Latin phrases without stumbling, the accused was acquitted. Since only the nobility and clergy had any familiarity with Latin, compurgation was a virtual shield against conviction for harming a commoner. Be alert to how many of our “advanced” procedural rule also favor the powerful?

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Who should be allowed to testify? You can learn a good deal about a culture not only by studying its prisons, but by asking who is eligible to testify in its courts. Not surprisingly, cultures tend to exclude the testimony of oppressed groups. Throughout history, slaves were rarely permitted to bear witness, especially against members of the master class or race. Women were excluded from the witness stand until the 17th century. Nineteenth-century extra-territorial imperialist courts often barred subject people from testifying. British extra-territorial courts established in China after the Opium War are a well-studied example.

At early common law, parties to the litigation could not testify, ostensibly because the temptation to lie placed their immortal souls in jeopardy. I suspect that the exclusion was more closely connected to shielding powerful defendants from potential liability for mistreating social or economic inferiors.

Take a look at Rule 601 providing for universal competence to testify, subject to narrow state-based exceptions based on the ability to perceive reality and an understanding of the duty to testify accurately. As we’ll see, the universal competence of 601 is in occasional tension with the rules beginning with 607 governing cross-examination about past conduct, which often deter certain witnesses from taking the stand. More generally, I’ve come to believe that the enormous influence of live, oral testimony in our factfinding process systematically advantages those with the resources to acquire a high level of verbal skill

At what age should children be permitted to testify? How about persons suffering from mental illness? Atheists? Convicted perjurers? Parties to the litigation? Interested witnesses? The dead? Everyone? If someone is incapable of in-court testimony, can their out-of-court statements be admitted as hearsay exceptions?

What form should witness testimony take? Sworn/unsworn? Oral? Written? Videotape? Mime? Communicative conduct? Non-communicative conduct from which an implied communication is inferred? Should it matter whether the witness is intending to communicate something? (If I raise an umbrella, am I “testifying” that it is raining?).

Where can testimony take place? Must it be in a courtroom? What about out-of-court statements overheard by someone? Wiretaps? How about statements to a police officer? At home? In police stations? Jail cells? Wiretaps? How about a diary?

In thinking about using out-of-court statements, what if the potential witness dies before trial? What if the witness runs away, or can no longer remember? What if the witness takes the 5th and refuses to testify, even when directed to? What if the witness claims to no longer remember the events? (We’ll call the a “lapsed memory” witness.

Can sensitive testimony be offered confidentially, like voting? How about a child testifying about molestation? A student testifying about sexual harassment? Must the accused be present? Is cross examination always required?

What can a witness testify about? Is personal knowledge a requirement? Take a look at Rule 602, requiring personal knowledge. How about testifying to an opinion, as opposed to a fact. At common law, ordinary lay witnesses could not give opinions. Opinions were for expert witnesses. Rule 701 opens the door to some non-expert opinion testimony, but ordinary witnesses are generally expected to stick to facts. If there’s time, we’ll take a quick look at experts, whose job it is to give opinions about matters beyond the knowledge or competence of the usual juror.

What’s the purpose of the oath? Can (must?) it be waived on demand?

Are rehearsals permitted? Are they ethical? I once lost an appeal involving the destruction of the Amazon Basin in Ecuador by oil companies where my well-heeled opponents had rehearsed their star witness on videotape 53 times, while the crucial witness on my side flew in from Ecuador on the morning of the hearing and spoke only broken English. Who do you think the federal judge believed? Does our system’s reliance on sworn oral testimony in the presence of the factfinder create a structural bias in favor of well-educated witnesses? What are the ethical limits to prepping a witness?

**Leading Questions**

Despite that fact that no good lawyer allows a witness to testify who has not been carefully prepped, we operate on the fiction that the witness is spontaneously narrating to the jury, without being unduly influenced by counsel. So, the most invoked testimonial rule is the common law ban on “leading questions” that shift the burden of narration from the witness to examining counsel. Rule 611 codifies the common law practice banning leading questions, where the lawyer narrates, and the witness simply adopts the lawyer’s narration. Careful witness preparation usually makes leading questions unnecessary. In my experience, objections about leading questions are usually tactical, designed to interrupt the flow of testimony. The ban on leading questions does not apply to cross-examination.

**Hearsay**

Far and away, the most important testimonial rule is the ban on hearsay testimony. We’ll start the Evidence course this semester by plunging immediately into the hearsay swamp.

In past years, I’ve begun the course with a maddeningly theoretical effort to model the fact-finding process. I ask who the factfinder should be in various settings– criminal prosecutions; civil proceedings; administrative proceedings; bankruptcy courts; student disciplinary proceedings; and/or legislative enactments. The usual options are: (1) unanimous jury; (2) majority jury; (3) judge; (4) administrative official; or (5) legislator. Then, I ask how sure a factfinder in various settings – criminal, civil, administrative, legislative - must be about a given fact before treating it as established. It’s called the “burden of persuasion.” The usual options are: (1) absolutely certain (100%); (2) persuaded beyond a reasonable doubt (90%); (3) persuaded by clear and convincing evidence (75%); (4) persuaded by the more-likely-than-not weight of the evidence (51%); (5) persuaded that an alleged fact is likely, but not more likely than not (40%); (6) persuaded that an alleged fact is plausible but not likely (20%); and (7) persuaded that an alleged fact is possible, even if not plausible (1%).

Donald Trump, in talking about alleged massive election fraud in the 2020 Presidential election, almost always chooses (7). What should the burden of persuasion be to overturn an election for alleged fraud? Impose a death sentence? Expel you from school? Put you in jail? Take your money? Censor your newspaper? Fire you?

Finally, I ask whether a minimum level of probability must be established to enable you to get to the factfinder at all. That’s called the “burden of production.” What some judges call “burden of proof” is an either the “burden of production,” the “burden of persuasion,” or both. You should get yourself into the habit of being precise about whether the case shouldn’t go to the jury at all (burden of production), and how sure the jury must be (burden of persuasion). Don’t be sloppy and use “burden of proof” loosely.

Don’t think you can escape these difficult inquiries. We’ll get to them later in the course.

Your colleagues in past years have persuaded me, though, that moving immediately into such abstract areas of Evidence can be frustrating and confusing. They craved rules. So, let’s start with Rules 801-807 of the Federal Rules of Evidence (FRE) setting forward the basic contours of the hearsay doctrine.

I chose the FRE, which governs in federal courts, both because it was among the earliest codifications of common law of evidence (1980), and because it has been the most influential codification. Many states have adopted the FRE, some with minor modifications, for use in state courts. But there are holdouts. New York continues to refuse to codify its Evidence rules, relying on common law adjudication. Since the FRE applies in federal courts in New York, this sets up difficult issues under *Erie v. Tompkins* when the two sets of Evidence rules diverge. California has codified but does not always track the FRE, creating similar *Erie* issues.

Codification of the common law rules of evidence is thought to simplify the factfinding process by compiling a definitive set of rules in a single place. It also shifts the responsibility for making the rules from common law judges to legislators, democratizing the process. But codification has its costs. The flip side of democratization is politicization. Interest groups now lobby vigorously to generate rules that advantage their parochial interests. Moreover, the shift from common law case-by-case adjudication to legislative codification has severed evidence from its common law roots and rendered it a hostage to text. Often, the rules seek to codify the common law rule. But ambiguity is always present in a complex code. Judges vary dramatically in their approach to the codified rules. Some take refuge in literalism, risking an arbitrary outcome unconnected to the rules’ underlying purpose. Some use originalism, importing the difficulty of assessing original intent into the evidence process. The best judges seek to link evidence codification to its common law roots by construing the codified rules to advance the common law’s purpose. I’ll try to follow that track by looking at both the textual rule, and its common law case-driven root.

**An Analytic Introduction to Hearsay**

The Hearsay Rule can be summed up in a single sentence:

**"A witnesses’ out-of-court statement offered to prove the truth**

**of its contents is inadmissible in an Anglo/American court."**

It sounds so simple.

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Everyone agrees that the purpose of the hearsay rule is to assure that an observer/witnesses’ description of a relevant event is subjected to cross-examination before it can be considered by a factfinder. At common law, a party was not permitted to cross-examine his or her own witness. You were stuck with your witnesses’ testimony. It was like having a faulty oath-helper. Modern codes have universally abolished the common law rule, so you can assume that all witnesses are subject to cross-examination, even a witness that you have called.

What do we mean by cross examination? We’ll cover cross-examination techniques in more detail later, but it’s useful at this point to recall what required cross-examination looks like. Cross examination, usually carried out in the presence of the jury, seeks to attack (or impeach) the credibility of a witnesses’ testimony by: (1) questioning the witnesses’ ability to have *perceived* or *remembered* the event; (2) challenging the *accuracy* or *honesty* of the witnesses’ description of the event; (3) confronting the witness with his or her *earlier inconsistent versions* of the testimony, if any; (4) pointing out the witnesses’ possible *bias, interest, or corrupt behavior*; (5) pointing out a witnesses’ *prior criminal convictions*; (6) revealing a witnesses’ *prior bad acts not resulting in conviction*; and (7) pointing out the witnesses’ *bad reputation or character, especially for veracity*. As we’ll see, controversy surrounds many impeachment techniques, especially linking a witnesses’ past conduct or criminal convictions to credibility.

At common law, cross-examination was permitted only about topics that fell within the scope of the direct examination; leading question were permitted on cross; and you could not cross-examine your own witness. These days, if you want to go beyond the scope of the original cross, you can make the witness your own, but you can’t ask leading questions. By and large, you can ignore the common law technicalities.

The core of the hearsay rule is an assumption that unless an observer/witnesses’ narrative is subject to all or most of these seven impeachment techniques, the narrative is not trustworthy enough to be considered by a jury. Note that the only requirement is that the cross-examination techniques be “available.” There is no requirement that they be used, except in determining the adequacy of representation in subsequent *habeas corpus* proceedings, deciding malpractice claims, or imposing bar discipline. The counterargument, of course, is that lack of cross examination should affect the probative weight of the observer’s narrative, but not its admissibility. Most civil law countries follow such a path. So far, Anglo-American courts reject it in both civil and criminal trial settings.

For the antiquarians among you, the earliest mention of cross-examination that I've been able to find occurs in Aeschylus' *The Eumenides* (458 BCE), where Apollo cross examines The Furies during the trial of Orestes for murdering his mother, Clytemnestra, in revenge for her murder of her husband, Agamemnon, in revenge for his sacrifice of their daughter, Iphigenia, in order to gain fair winds to sail to Troy. When Athena, presiding over the trial on the Acropolis, breaks the cycle of violent revenge and consigns Orestes' fate to the people of Athens, and the Athenian jury acquits him by an equally divided vote, the idea that law should be based on reason, not emotion and revenge, is born in Western culture. I don’t know enough about other cultures to know whether similar cultural artifacts exist. I’d welcome information about additional cultures.

Fifty some-odd years later, Socrates wasn’t so lucky with an Athenian jury, being convicted by a vote of 280-220 of the charge of corrupting the youth of Athens by criticizing the government and destroying their faith in their leaders, setting up issues that we confront today under the aegis of the First Amendment. Socrates refuses to escape from the unjust death sentence, arguing that fidelity to law requires him to accept the verdict. Was he right? Are we doomed to accept unjust outcomes because they are formally correct? Would you have escaped? On the other hand, what limits exists as to how far you can go in resisting an unjust legal outcome?

How often does emotion trump reason in a modern courtroom. Can emotion ever be excluded from the deliberative process? Should we try?

The biblical roots of cross-examination can be traced to "Susannah and the Elders" in the Book of Daniel (Apocrypha), where the virtuous Susannah is spied upon in her bath by two Elders, who demand that she have sex with them or be accused of adultery. When Susannah refuses, the Elders charge her with adultery, punishable by death by stoning. As Susannah awaits death, Daniel appears and cross-examines the Elders by separating them and demanding that they repeat their stories. When significant disparities emerge, Susannah is exonerated, and the Elders put to death.

I suspect that the adoption of common law rules requiring a chance to cross-examine prosecution testimony in criminal cases, which begins in the mists of the early 14th century, was influenced by the ancient Greek and biblical origins of the technique. At common law, the opportunity for cross-examination of the prosecution's witnesses in the presence of the jury was quickly deemed crucial to a fair criminal trial. The history of English law is peppered with efforts by the Crown to establish prosecutorial institutions free from the requirement of cross-examination. The Privy Council's “Star Chamber” is the best known. To this day, a "Star Chamber" proceeding is an epithet for procedural unfairness. What institutions are used in the modern era to avoid or minimize cross examination – military tribunals? National security courts? Ordinary administrative proceedings? School disciplinary hearings?

Remember, that the importance of cross examination is directly related to the zeal with which hearsay is excluded. Hearsay is just another word for non-cross-examined testimony. In 1791, the common law hearsay rule morphed into the modern 6th Amendment right of Confrontation in criminal (but not civil) cases. As we'll see, the 6th Amendment Confrontation Clause often runs parallel to the hearsay rule in criminal cases, but, under current Supreme Court guidelines, the two are not always identical. We'll do a comparison at the end of the hearsay materials.

I've often wondered how the hearsay rule made the jump from criminal to common law civil proceedings; but, by the 17th century, hearsay testimony was clearly excludable from both civil and criminal cases. The engine that drove the hearsay rule at common law was mistrust of the probative value of any testimony that is not tested by adversary cross-examination in the presence of the factfinder, usually a jury. Lay jurors were simply not trusted to assess the probative value of testimony that had not been subjected to cross-examination in the presence of the jury. In civil law systems, where fact-finding is carried out by an inquisitorial judge, usually on the basis of documents and written witness statements, there is no need for live testimony before a jury. Not surprisingly, in civil law countries, cross-examination is not deemed an iconic engine for truth-finding and there is no categorical rule barring out-of-court statements. Nor is there a bar on appellate courts re-finding the facts because first-level civil law appeals judges have access to the identical written record used in the trial court. Common law, adversary-model appeals courts, can rarely disturb a trial court finding of fact because the appeals judges were unable to observe the demeanor of the witnesses.

Think for a moment about whether the hearsay rule should apply only when jurors are the factfinders. That would make hearsay inadmissible in virtually all criminal trials, where juries are required under the 6th Amendment; but not in judge-determined pre-trial exclusionary rule hearings on the admissibility of evidence, or confessions; bail hearings; Grand Jury proceedings; pre-trial motions; sentencing; and parole hearings. That’s the practice followed in most criminal courts. Hearsay governs the actual trial; but nothing else.

Should the hearsay rules apply in civil judge trials, even though there’s no jury to confuse? Remember, under the 7th Amendment, jury trials can be demanded in civil cases, but juries are often waived. Remember, also, that jury trials are not required by the 7th Amendment in injunctive proceedings. Finally, remember that since the 7th Amendment is one of the few provisions of the Bill of Rights that has not yet been incorporated against the states, many state trials occur in the absence of the jury. Virtually all jurisdictions apply the hearsay rule to civil judge trials; but not to civil pre-trial motions, or motions for preliminary injunctive relief.

My sense, though, is that more relaxed hearsay rules tend to be used in civil cases before a judge. After all, unlike a jury, where the evidence can be kept from the jurors’ knowledge, a judge must view the contested evidence in order to rule on its admissibility. Once it’s in the judge’s head, does it really matter what the formal hearsay ruling may be? We’ll come back to this point when we consider the burdens of proof and directed verdicts.

Should the hearsay rules apply in administrative proceedings? While no consensus has developed, the tendency has been to admit hearsay in administrative hearings, subject only to a due process check. Regardless of whether hearsay applies, procedural due process of law may require the ability to cross examine in certain non-jury settings like Presidential impeachment, deportation, parental termination proceedings, or student discipline. How about eviction, or mortgage foreclosure?

How about legislative hearings or Presidential impeachment trials? As things stand now, there are no rules of Evidence in legislative proceedings or impeachment trials.

**Triangulating Hearsay**

Once you determine that the hearsay rule applies in your factfinding proceeding, I find it extremely useful in analyzing hearsay issues to consider the psychological underpinnings of the rule. I call it "triangulating" hearsay. I wish I could claim that it is my idea, but triangulation was a staple of the way Evidence was taught by Wigmore, Thayer, and others in the early part of the 20th century. Larry Tribe usefully re-cycled the idea in the 1970's. It's fallen out of favor, though, since the codification of the hearsay rules in 1980’s. Many lawyers and judges look solely to the text, ignoring the common law rules. I continue to believe, though, that the often-ambiguous text of the codified hearsay rules can best be understood by going underneath the rules to the psychological model on which hearsay was based at common law.

I take no position on the accuracy of the psychological model of perception, the mind, and the process of communication that underlies the modern hearsay rule. The model was prevalent in Vienna at the end of the 19th century and may no longer be scientifically valid. Scientifically valid or not, though, the Vienna is the rock on which hearsay rests. Understanding the model doesn't substitute for careful reading of the rules, but I find that the model aids me in analyzing hearsay issues and makes it possible to read the often-ambiguous written hearsay rules more perceptively.

So, here's the model of hearsay as two linked triangles. Imagine a triangle diagramming how we perceive reality and communicate our perceptions to others.

An object, let's say a tree, emits light signals (photons) enabling us to perceive it. The photons are impact the eyes of an observer, and are translated into nerve signals sent to the observer’s brain, where they generate a mental picture of the tree which, ideally, should look just like the real tree. Then, at some point, the observer summons up the mental picture of the tree and uses it to send nerve signals to the observer’s communication organs (usually speech organs), which operate to convey the observer’s mental picture of the tree to a third person. If all goes well, the tree sends accurate signals (photons) to the eyes/mind of the observer permitting the creation of an accurate internal mental reproduction of the tree in the observer's brain. The accurate mental picture of the tree in the observer's mind enables the observer to use her speech organs to communicate an accurate verbal copy of the mental image of the tree to a third-person, who perceives the speech signals and decodes them into the same mental picture of the tree that is in the observer’s mind. If all goes well, the third-person now has a mental picture of the tree in his or her mind that is identical to the observer’s mental picture, which is identical to the tree itself.

Testimonial Diagram

Observer’s mind

Object Description juror’s mind

Assuming the existence of objective reality (itself a huge philosophical assumption – but let’s not go there), what can go wrong with the triangulation process as a method of conveying truth? First, the observer’s sensory apparatus and brain may inaccurately receive and assemble the signals from the perceived object - the tree. Let's call it a failure of perception. For example, it was too dark to see clearl; or "I misheard the words." A failure of perception results in a flawed mental picture of the tree in the observer's mind that does not match the reality of the perceived object. Once that happens, all following communications from the observer are worse than worthless. They are misleading.

Second, perception can be fine, resulting in an initially accurate mental picture that degrades over time. Let's call it a failure of memory. 81year-old law professors know all about this.

Third, your mental picture may be perfectly accurate, but your verbal skill or communicative capacity may fail to convey the precise picture in a fully accurate or understandable manner. Let's call it a communications failure unintentionally caused by inaccuracy or ambiguity. As you will no doubt learn, I'm very good at unintentionally generating ambiguity. So is Congress. So are most witnesses.

Finally, assume a perfect mental picture and excellent communicative skill, but the presence in the observer of a desire to paint a false picture. Let's call it a failure of veracity. This is the Perry Mason scenario.

So, a failure of *perception, memory, ambiguity, or veracity* can result in a breakdown in the accurate description of reality to third-persons, like jurors. The role of cross examination is to allow adversary counsel to probe the four possible points at which a purportedly true depiction of reality can break down. Note how each of the seven cross examination techniques described above corresponds to a possible breakdown in the communications triangle. Our legal culture firmly believes that unless it is possible to use cross examination to test perception, memory, ambiguity, and veracity, the chance of a breakdown in one or more of the legs of the triangle is too great to trust the process to produce a communication that accurately replicates the perceived reality.

**Input Leg/Output/Leg**

Get used to thinking about possible breakdowns as "input leg" breakdowns affecting *perception* and *memory*; and/or "output leg" breakdowns affecting *ambiguity* and *veracity*. It will help you analyze potential hearsay exceptions later based on the inherent strength or weakness of the input or output legs. By and large, hearsay exceptions based on the strength of the input leg do not require the unavailability of the declarant, while exceptions based on the strength of the output leg require unavailability. We’ll look more at this when we go over the exceptions.

Now, imagine hearsay testimony, which consists of two triangles - one representing the declarant-observer; the second representing the testifying witness:

Diagram

                    (Declarant-Observer’s mind)                                       (Testifying-Witnesses’ Mind)

      (Objective reality) (Description-Statement) Testimony

If all goes well, signals from the tree (reality) to the declarant/observer's mind will generate an accurate mental picture of the tree in the declarant's mind, which she will use to generate an accurate verbal description of the tree (the description-statement) that is accurately perceived by the testifying/witness who uses the signals sent by the description/statement to create a mental picture in her mind that accurately replicates the tree/reality that had been accurately perceived, remembered, and described by the declarant. The witness then accurately communicates her mental picture to the jury, all of whom accurately perceive the witness's description and form mental pictures in their heads that accurately replicate the tree/reality that started the communicative chain. Ideally, the picture in each juror’s head should look just like the objective reality.

This is the testimonial process in a hearsay setting. Five elements: *proponent; observer/declarant; testifying/witness; description/statement; purpose for which offered*. What can possibly go wrong? The perception, memory, ambiguity and veracity legs of the testifying/witnesses' triangle could all break down. Maybe the witness misheard the declarant's statement. Maybe she forgot it? Maybe she's inadequately describing it. Maybe she's lying about it.  The Anglo-American system believes that such a possible breakdown can be dealt with by cross examining each leg of the witnesses’ testimonial triangle in front of the jury, enabling the jury to assess whether the witness triangle is actually delivering accuracy.

Remember, by definition, the *witness* is always present in the courtroom in a hearsay case. The probative value of the witnesses’ cross-examined testimony interacts with the burden of persuasion in allowing the jury to decide factual issues. Remember, there is never a hearsay problem with the witness's triangle because the witness is always in court. As we’ll see, sometimes we’ll excuse the witness from in-court testimony because a written record exists that we deem an adequate substitute for the personal appearance of the witness. That’s where exceptions for business entries and government records comes from. We’ll see when we reach business records that excusing the recordkeeper/witness is not the same as waiving the hearsay rule as to layers of hearsay embedded in the record.

The hearsay problem is always with the observer/declarant's triangle, where the same four breakdowns can occur - failures of *perception, memory, ambiguity* and *veracity*. Unlike the witness triangle, though, the declarant triangle cannot be probed by cross examination because the out-of-court declarant’s statement cannot be cross examined in front of the jury. Unless there is a hearsay exception (and there will be many), the hearsay rules prevent the introduction of any statement by an out-of-court declarant that cannot be subjected to cross examination before the jury/factfinder.

**I’m Not Offering it for the Truth; Only to Show that it Was Made**

Remember, the problem is not with the witness's triangle; it is with the declarant's triangle. So, in settings where we don't care about a breakdown in the declarant triangle because we don't care about the truth of the statement - only that it was made - we don't need a hearsay rule because cross examining the witness is all we need. In such cases, the possible breakdown of the declarant’s input or output leg can be ignored because as long as the witnesses’ input and output legs can be probed by cross examination, we don't care whether the declarant's triangle broke down, as long as he actually made the statement that is being testified to by the witness.

That’s why common law hearsay excludes only statements offered to prove the truth of their contents. The common law rule is codified without change in Rule 801(c)(1) and (2). There is, however, a very important limit to arguing that something isn’t hearsay because it isn’t being offered to prove the truth of the statement. You must be able to persuade the judge that the mere making of the statement is relevant to the case, even if it isn’t true. There is a reflex temptation to attempt to get around the hearsay rule by offering a statement merely to show that it was made. You must be prepared to back it up by a theory of why it’s relevant.

A prior inconsistent description by the witness offered solely to impeach the witness’ credibility by showing that he is inconsistent in his description is clearly ok. You are offering the earlier out-of-court statement just to show it was made. At common law you could not offer the out of-court statement for the truth; only to impeach. We’ll look a little later at how the Rule 801(d) modifies the common law by allowing prior inconsistent statements for the truth in certain circumstance on the theory that deferred cross of the prior out-of-court statement is adequate. Remember, the maker of a prior inconsistent statement must be present in court as a witness, so cross examination of both versions can take place in front of the jury.

As we’ll see, in addition to prior inconsistent statements, three types of out-of-court statements provide raw material for relevance merely because they were made: (1) verbal impact statements that are relevant because they put the hearer on notice of something; (2) statements of independent legal significance that generate legal consequences merely because they are uttered; and (3) statements offered to prove the state of mind of the declarant regardless of the truth of the contents. We’ll look more closely at each soon.

**Party-Admissions**

What about a *party’s* out-of-court statement that harms his trial position – like a confession. As we’ll see, party admissions were never barred at common law. Why not? Is it because there is always the potential for self-cross at trial? Is that persuasive? What happens when we move to vicarious admissions by agents, employees, or co-conspirators, where self-cross is impossible? What if the party dies before trial? Or takes the 5th? The common law rule is codified in Rule 801(d)(2).

**Prior Inconsistent Statements for the Truth**

What about offering a witnesses’ prior inconsistent statement for the truth; not merely to impeach? At common law, you couldn’t do it. The modern Evidence codes vary widely. When a declarant’s earlier out-of-court statement conflicts with his in-court testimony, the question arises whether the opportunity for deferred cross of the earlier statement before the jury can operate as an adequate test of accuracy. Remember, the witness must be present in court. As we’ll see, jurisdictions vary widely in answering the question. California trusts deferred cross of an earlier inconsistent statement. New York does not. The Federal Rules go down the middle, trusting deferred cross of prior inconsistent statements, but only if the earlier statement was made under oath in a formal setting. See Rule 801(d)(1)(A).

A few jurisdictions require that the prior statement have been subject to cross when made. We’ll look at alleged prior inconsistent statements to cops, prior testimony in a preliminary hearing, prior Grand Jury testimony, and prior testimony in depositions, as well as earlier civil and criminal trials. If the prior proceeding is formal enough to have included cross examination, another option may be Prior Reported testimony. We’ll look more closely at the interplay between prior inconsistent statements and prior reported testimony.

Remember, prior inconsistent testimony is always admissible just to show it was made in order to impeach a witnesses’ credibility. The hard question is when it can be admitted for the truth as non-hearsay, or an exception to the hearsay rules. Curiously, Rule 801(d) treats it as non-hearsay, although it was treated as an exception at common law. Does anything turn on the difference between treating a prior inconsistent statement as non-hearsay or as an exception?

Should we ever admit a witnesses’ prior *consistent* statement, either to buttress credibility or for the truth? See Rule 801(d)(1)(B)(i) and (ii). The FRE codifies the common law approach which excluded prior consistent statements except when offered to rebut an allegation of recent fabrication, or to buttress an in-court identification.

**Input Leg Exceptions**

The common law recognized a series of exceptions to the hearsay rule based upon the strength (reliability) of the input leg of the declarant/observer’s testimonial triangle. Usually, the statement was made simultaneously with the event it is offered to prove, so memory never comes into play. Often, indicia of reliability exist that make it unlikely that there is a problem with the output leg’s concern with veracity. Rule 803 lays out the input leg exceptions as they existed at common law. The availability or unavailability of the declarant is irrelevant because we treat an 803 exception as potentially more probative than in-court testimony would be.

The earliest common law “input leg” exception was for “excited utterances,” where a declarant observes something shocking and reacts to it reflexively with no time to make up a story. (I call them “Oh my god” exceptions, since they are often introduced by “Oh my god. Did you see…….” What counts as “exciting” and how long can elapse between perceiving the event and the declarants’ statement describing it vary from court to court. Remember, you’re asking whether the statement qualifies as a verbal reflex.

Excited utterances eventually morphed into the modern “present sense impression” exception, which admits out-of-court statements made contemporaneously as the event unfolds. It scraps the need for the event to be so dramatic as to force a reflexive statement from the declarant. Calm and cool recitations of events as the unfold is all that’s required. The move to present sense impression from excited utterance is controversial, especially in criminal cases. Think of the Confrontation Cause issues.

A third common law input leg exception is for statements describing a declarant’s then-existing physical, mental, or emotional conditions. Ordinarily, the statement must be coterminous with the physical, mental, or emotional state which it describes. At common law, the modern exception grew out of a narrow exception for what I call “moans and groans,” the expression of pain. It now covers the contemporaneous description of all forms of a declarant’s then existing physical, mental, and emotional conditions. Sometimes, as in a pain and suffering case, the physical sensations are all we care about. Sometimes, though, lawyers use the proof of what is going on in the declarant’s head as a springboard to infer future behavior consistent with the mental or physical condition.

At common law, the exception was rooted solely in the present – expression of present mental or physical conditions, with an occasional jump into the future in the cases allowing an inference that the declarant acted consistently with his mental state. You were not permitted to look backwards, using proof of a declarant’s memory or fear or pain, for example, to infer that something happened in the past that created the present mental state. We’ll look at the cases, but the only reason to block inferences about the past is that, ultimately, it would eliminate the hearsay rule. Almost every hearsay statement can be reverse engineered into a state of mind exception – the declarant said it because she believed it to be true; she believed it to be true because it is true. Hearsay can’t survive such a reverse engineering. Maybe that’s the way hearsay will die.

You can go backwards only twice – declarations of past physical conditions to a treating physician; and proof of fear in will contests to prove undue influence.

Finally, input leg exceptions exist for “business records,” the content of records regularly made in the routine course of a business enterprise; and “public records” kept by government in the ordinary course of the performance of its duties. Two issues will arise later when we look closely at the records exceptions – what qualifies as a business record – a cop’s memo book? – and what about business/public records that are the culmination of layers of communication that finally reach the record-keeper. You will wind up deconstructing records into layers of triangles and asking whether each layer satisfies the hearsay rules, either because it isn’t hearsay, or because it falls into an exception.

Remember, what links the input leg exceptions is the closeness in time between the declarant’s statement and the event being described. Since the contemporaneous statement is probably more accurate than in-court testimony long after the event, we treat input legal exceptions as “first-best” testimony and admit it whether or not the declarant is available to testify in court.

**Output Leg Exceptions**

A second set of exceptions rests on the reliability of the output leg of the declarant’s triangle. Unlike input leg exceptions, an output leg statement is almost always made long after the event it describes, bringing memory into play. So, output leg exceptions are treated as “second best” testimony. If the declarant is available to testify in court, you can’t rely on an output leg exception. Rule 804 codifies the common law output leg exceptions.

The first output leg exception is for prior reported testimony. When a declarant’s testimony has already been subjected to cross examination in an earlier proceeding, but he becomes unavailable to repeat the testimony (death; 5th Amendment) in a new trial, can the earlier cross be an adequate substitute for in-court cross? At common law, it depended on how closely the earlier proceeding resembled the current proceeding. I hate to dredge up bad memories, but the test is similar to non-mutual collateral estoppel. It also turns on how you define “unavailable.” Is a “lapsed memory” witness unavailable so that her earlier testimony can come in? We’ll explore the cases.

The second principal output leg exception was for declarations against proprietary interest. If a declarant says (or does) something that exposes her to financial loss, the assumption at common law was that she must believe it to be true, buttressing the strength of the output leg – no motive to lie. Interestingly, at common law, declarations against interest were confined to civil settings and statements of financial consequence. The exception did not apply to declarations against penal interest, or in criminal proceedings. As we’ll see, in the modern era, prosecutors have strained to expand the declaration against interest exception to penal interest, and criminal cases, posing both policy and Confrontation Clause issues. We’ll explore the cases. I confess that I never understood the psychological underpinning of the rule. Has no one ever heard of Freud?

Be careful not to confuse declarations against interest with party admissions. Party admissions are only admissible against the party who makes them (plus vicarious admissions); while DAI’s are admissible against the world. Party admissions are tested for harmfulness at the point they are introduced at trial; DAI’s are tested at the moment they are uttered. Party admissions don’t require unavailability; DAI’s can be used only if the declarant is unavailable.

The last output leg exception at common law was a narrow exception in a homicide prosecution for a victim-declarant’s dying declaration identifying his or her killer. It must be made with knowledge of impending death because the common law justification turned on an assumption that no one facing death would dare lie because it risked their immortal soul.

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**The Structure of the Federal Rules of Evidence**

Before applying the rules to cases, let’s take an overview of the 801-807 of Federal Rules of Evidence governing hearsay. Rule 801 is the crucial definitional provision that codifies the common law testimonial triangles; and sets out major exceptions for party admissions, and prior inconsistent statements.

*Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay*

*The following definitions apply under this article:*

***(a) Statement.****“Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.*

***(b) Declarant.****“Declarant” means the person who made the statement.*

***(c) Hearsay.****“Hearsay” means a statement that:*

***(1)****the declarant does not make while testifying at the current trial or hearing; and*

***(2)****a party offers in evidence to prove the truth of the matter asserted in the statement.*

***(d) Statements That Are Not Hearsay.****A statement that meets the following conditions is not hearsay:*

***(1) A Declarant-Witness’s Prior Statement.****The declarant testifies and is subject to cross-examination about a prior statement, and the statement:*

***(A)****is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;*

***(B)****is consistent with the declarant’s testimony and is offered:*

*(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or*

*(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or*

***(C)****identifies a person as someone the declarant perceived earlier.*

***(2) An Opposing Party’s Statement.****The statement is offered against an opposing party and:*

***(A)****was made by the party in an individual or representative capacity;*

***(B)****is one the party manifested that it adopted or believed to be true;*

***(C)****was made by a person whom the party authorized to make a statement on the subject;*

***(D)****was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or*

***(E)****was made by the party’s coconspirator during and in furtherance of the conspiracy.*

*The statement must be considered but does not by itself establish the declarant’s authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).*

Note, that in addition to codifying the triangles, the definition of “statement” in 801(a) makes an important policy choice that alters the common law rules. Under 801(a), a hearsay “statement” must be an *intentional* assertion. So, if you raise your umbrella and someone perceives it as an assertion that it’s raining, it’s not a hearsay statement unless you intended by the gesture to assert that it was raining. As we’ll see, that excludes “non-assertive conduct hearsay” and “non-assertive verbal hearsay” but includes “assertive conduct hearsay” and “assertive verbal hearsay.” We’ll explore the issue when we reach the cases. Does defining non-assertive statements as outside hearsay raise Confrontation Clause issues?

On the other hand, 802(c)(2) codifies the common law rule confining hearsay to assertions of the contents of an out of court statement. Statements offered just to show they were made continue to be non-hearsay. See also 801(d)(1)(B)(i) and (ii) (allowing prior consistent statements just to show they were made).

801(d)(1)(A) changes the common law rule on the use of prior inconsistent statements for the truth by permitting PIS for the truth as long as the declarant is present in court and the earlier statement was given under conditions of formality that make it impossible to fabricate. Does it cover GJ proceedings? Note the distinction between party admissions and prior inconsistent statements.

801(d)(1)(C) codifies the common law rule allowing out of court id testimony in as a prior consistent statement, as long as the declarant is present in court. The exception is necessary since in court id is not very persuasive because the identified person is sitting in the defendant’s chair. I once got into trouble by having someone else sit in the defendant’s chair and putting the defendant in the audience. When the cop identified the wrong person, I sought to exclude his testimony. The judge was furious. Was I wrong?

801(d)(A-E) codifies the common law rules admitting out of court party admissions when they harm the party’s trial position. In a party admission setting, the out-of-court declarant is always a party to the litigation. The out-of-court admissions must be proved, usually by someone who heard them, like an informant planted in the defendant’s cell. What if a cop is alleged to have fabricated an alleged out-of-court confession? Unlike prior inconsistent statements, there is no formality check on admissions.

1. and (B) deal with admissions by the party herself. Self-cross is possible in those settings. It gets more

complicated when we move to (C) and (D), which introduce the idea of vicarious admissions by a party’s agent. Self-cross explains party admission in (A) and (B), but it doesn’t really explain vicarious admissions in (C) and (D), especially when it becomes impossible to cross examine the agent. Finally, (E) codifies the co-conspirator exception, treating each member of a criminal conspiracy as a vicarious, reciprocal agent of the other members, rendering every statement by one co-conspirator admissible against all members of the conspiracy as vicarious admissions. Note, the modern co-conspirator exception applies only to statements made in furtherance of the conspiracy. Statements to the police while in custody are very rarely in furtherance of the conspiracy. Very often, undercover agents posing as conspiracy members are the witnesses who testify to statements by members of the conspiracy.

Once we get through 801’s definitional minefield, 802 is easy.

# Rule 802. The Rule Against Hearsay

*Hearsay is not admissible unless any of the following provides otherwise:*

* *a federal statute;*
* *these rules; or*
* *other rules prescribed by the Supreme Court.*

Things get complicated again in Rule 803 and 804, which set out the principal exceptions to 802, as defined by 801. The 803/804 exceptions reflect judgments that the inherent strength of one or both legs of the declarant’s hearsay triangle is so strong that we can forego cross examination. 803 exceptions deal with settings where the declarant’s original out of court statement is thought to be more reliable than any in-court testimony would be. Often, the 803 statement occurs very close in time to the event it describes. Thus, 803 exceptions apply whether or not the declarant is unavailable. 804 exceptions deal with settings where in court testimony would be preferable, but the declarant is unavailable. Rather than lose the testimony altogether, 804 renders it admissible.

**Rule 803. Exceptions to the Rule Against Hearsay**

*The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:*

***(1)*Present Sense Impression*.****A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.*

***(2)*Excited Utterance*.****A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.*

***(3)*Then-Existing Mental, Emotional, or Physical Condition.***A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will.*

***(4)*Statement Made for Medical Diagnosis or Treatment*.****A statement that:*

***(A)****is made for — and is reasonably pertinent to — medical diagnosis or treatment; and*

***(B)****describes medical history; past or present symptoms or sensations; their inception; or their general cause.*

***(5)*Recorded Recollection.***A record that:*

***(A)****is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;*

***(B)****was made or adopted by the witness when the matter was fresh in the witness’s memory; and*

***(C)****accurately reflects the witness’s knowledge.*

*If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.*

***(6)*Records of a Regularly Conducted Activity*.****A record of an act, event, condition, opinion, or diagnosis if:*

***(A)****the record was made at or near the time by — or from information transmitted by — someone with knowledge;*

***(B)****the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;*

***(C)****making the record was a regular practice of that activity;*

***(D)****all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with*[*Rule 902(11)*](https://www.law.cornell.edu/rules/fre/rule_902#rule_902_11)*or (12) or with a statute permitting certification; and*

***(E)****the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.*

**\*\*\*\*\*\*\*\*\*\***

**8)*Public Records.****A record or statement of a public office if:*

***(A)****it sets out:*

***(i)****the office’s activities;*

***(ii)****a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or*

***(iii)****in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and*

***(B)****the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.*

**\*\*\*\*\*\*\*\*\*\*\***

**(21) *Reputation Concerning Character*.** A reputation among a person’s associates or in the community concerning the person’s character.

**(22) *Judgment of a Previous Conviction*.** Evidence of a final judgment of conviction if:

***(A)****the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;*

***(B)****the conviction was for a crime punishable by death or by imprisonment for more than a year;*

***(C)****the evidence is admitted to prove any fact essential to the judgment; and*

***(D)****when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.*

*The pendency of an appeal may be shown but does not affect admissibility.*

# Rule 804. Hearsay Exceptions; Declarant Unavailable

***(a) Criteria for Being Unavailable.****A declarant is considered to be unavailable as a witness if the declarant:*

***(1)****is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies;*

***(2)****refuses to testify about the subject matter despite a court order to do so;*

***(3)****testifies to not remembering the subject matter;*

***(4)****cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or*

***(5)****is absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure:*

***(A)****the declarant’s attendance, in the case of a hearsay exception under*[*Rule 804(b)(1)*](https://www.law.cornell.edu/rules/fre/rule_804#rule_804_b_1)*or*[*(6)*](https://www.law.cornell.edu/rules/fre/rule_804#rule_804_b_6)*; or*

***(B)****the declarant’s attendance or testimony, in the case of a hearsay exception under*[*Rule 804(b)(2)*](https://www.law.cornell.edu/rules/fre/rule_804#rule_804_b_2)*,*[*(3)*](https://www.law.cornell.edu/rules/fre/rule_804#rule_804_b_3)*, or*[*(4)*](https://www.law.cornell.edu/rules/fre/rule_804#rule_804_b_4)*.*

*But this subdivision (a) does not apply if the statement’s proponent procured or wrongfully caused the declarant’s unavailability as a witness in order to prevent the declarant from attending or testifying.*

***(b) The Exceptions.****The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:*

***(1)*Former Testimony*.****Testimony that:*

***(A)****was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and*

***(B)****is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.*

***(2)*Statement Under the Belief of Imminent Death*.****In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant’s death to be imminent, made about its cause or circumstances.*

***(3)*Statement Against Interest*.****A statement that:*

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

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

**Rules 805, 806, and 807 are relatively uncomplicated. 805 deals with complex communications involving layers of communication. Each layer must be tested for hearsay. 806 makes it clear that the credibility of out-of-court statements that are admitted may be subjected to cross examination techniques other than direct cross. 807 creates a catch-all hearsay exception for statements that so not qualify for admission but are deemed trustworthy enough to admit. Residual exceptions are rarely upheld.**

**The Hearsay Cases**

**We’ll use the 10th edition of the Weinstein Evidence casebook. It’s a classic book. I’m sorry about the cost. I have found the extensive case notes useful as a research tool, but they could use an editing. I fear that they can overwhelm you when approaching the area for the first time. Check the syllabus for my suggestions about using the notes.**

Remember, every hearsay problem has the same cast of five characters - spotting them should become second-nature to you. The *proponent*is the litigant who offers the testimony; the *declarant* is the out-of-court person who observed and described the event in question; the *witness* is the in-court person who observed the declarant's description of the event and repeats it to the factfinder; the *statement* is the declarant's description of the event. The statement is then repeated by the *witness* before the factfinder; and the *purpose* is the reason the proponent is offering the statement to the factfinder/jury.

Remember, a statement is hearsay only if it's being offered to prove the truth of its contents. If the statement is offered for some other purpose, it escapes the hearsay rule. By far, the leading example of an out-of-court statement offered for something other than the truth is a declarant's or a witnesses' prior inconsistent statements offered, not for the truth, but just to show they were made, thus casting doubt on the declarant's credibility. If such a statement is admitted on credibility, it's truth cannot be used to satisfy the proponent's production or persuasion burden - although it's hard to believe that a jury really puts truth out of its mind in considering a prior inconsistent statement. As we'll see, many jurisdictions now admit a witness's prior inconsistent statement for the truth because the witness can be cross-examined about it in court. We'll look at some examples later.

Absent a hearsay exception, which we'll look at later, at common law a declarant's prior inconsistent statement could never be admitted for the truth because it cannot be subjected to contemporaneous cross in the presence of the factfinder. The issue raised by modern Evidence codes is whether a deferred cross of the earlier prior inconsistent statement is an adequate substitute for contemporaneous cross. As we’ll see, jurisdictions are all over the place, depending on the circumstances surrounding the prior inconsistent statement.

In addition to prior inconsistent statements, a statement can be relevant, not for its truth, but merely to show it was made. Such a statement is not hearsay. If a declarant's statement is offered to prove merely that it was made, regardless of whether it was true, it's not hearsay. But to get the statement in, you must have a theory of why the mere existence of the statement is relevant, even if it isn't true. Common settings where the truth of the statement doesn't matter include *verbal impact statements* offered to prove that someone heard the statement - a warning, for example; *statements of independent legal significance*the mere utterance of which generate legal consequences whether or not the statement is true - the utterance of slanderous words, or contract acceptances are examples; and *statements probative of the declarant's mental state* - a statement that "I am Napoleon" offered, not for the truth, but to prove the mental incompetence of the declarant. We'll look at examples of all three.

Let's apply my triangles (and 801) to Leake v. Hagert and a few simple hypos.

Triangulate *Leake v. Haggert*,

175 N.W.2d 675 (1970)

Diagram

In Leake, a car that may have been speeding crashes into the rear of a tractor at dusk. Put aside the driver’s speeding issue which may establish contributory negligence. Focus on whether the tractor was negligent in failing to display a warning light near dusk. An insurance investigator working for the driver's company appears at the farm to investigate the accident. He testifies at trial and claims to have had a conversation with the farmer's son, who tells him that the tractor light was off several days before the accident.

By the time the case comes to trial, the farmer's son is unavailable, overseas in Korea. The insurance investigator takes the stand and testifies to his conversation with the farmer's son and is cross examined. He offers written notes of the conversation. Suppose he had offered an affidavit signed by the farmer's son. Should the evidence be admitted?  Are you concerned that he’s making it up to save his company money?

Who is the proponent; who is the declarant; who is the witness; what is the statement; and for what purpose is it offered? What if it's the only evidence the plaintiff has? Can the court be right in holding that the testimony is hearsay, but that admission was harmless error? Why should we lose the only probative evidence we have about whether the light was out? The driver is the *proponent*; the farmer’s son is the *declarant*; the *statement* is “the light was out;” the *witness* is the insurance adjustor; the *purpose* is to prove that the light was out. Is the statement hearsay at common law? Under 801?

What if the son's statement to the investigator had been made in the presence of his father, who didn’t contest it? What if the farmer had made the statement but denies it at trial? Dies before trial? Look at 801(d)(2)(A) and (B). What if the statement had been made by the farmer’s insurance agent? 801(d)(2)(C)?

What if the statement were made by the local pastor, after talking to the farmer? Does it matter if the farmer takes the stand? See 801(d)(1) (A). If the farmer takes the stand, swears the light was on, and denies making the statement, can it come in to impeach his credibility? See 801(c)(1) and (2). Would it be admissible for the truth in California? New York? State or federal court?

Are you comfortable with a rule that excludes the son’s evidence? Is your concern that the insurance adjuster made it up? That it’s not under oath? That the son may be wrong because he never saw the light, or confused it with another tractor? That the son may hate his father enough to lie?

Come up with a variant of the facts that would render the statement admissible.

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In the Boston Marathon bombing case, the jury recommended the death penalty for the surviving bomber. His effort to avoid the death penalty turned on seeking to prove that he had acted under the influence of his older brother, who had allegedly master-minded the bombing, and who had been killed in a shoot-out with police. At the sentencing hearing before the jury, the younger brother offers an out-of-court written statement by X accusing the older brother of a gruesome triple homicide. After making the statement, X attacked the FBI agents who were interrogating him and was shot dead. Is X’s written statement hearsay? Should it have been admitted? The issue is pending before the Supreme Court.