

Final – probably allowed one sheet of notes for the final

Evidence disrupts the narrative of a case

- **Judge is gatekeeper to prevent use of evidence that should not be entered**
 - **Relevant?**
 - **Reliable?**
 - **Prejudicial?**
 - **Undermine policy?**
- **Want the fairest narrative to help achieve the right result**

State v. Peterson (NC. App. 2006), p.4

- **Facts**
 - D Michael stated wife K fell down stairs, unconscious but breathing, and called paramedics
 - Paramedics noticed blood on front door
- **What evidence would you want to exclude as a defense attorney?**
 - **Affidavit bio**
 - **Not Relevant – just bolsters his credibility**
 - **Prosecutor rebuttable – all factual claims, not puffery = reliable**
 - **Likely ruling? Probably admissible**
 - **Bank Accounts**
 - **Relevance? – doesn't go to the issue**
 - **Counter – motive**
 - **What about fact that D makes \$0? – prejudicial, relevant**
 - **Closing statements could try to limit prejudice, could ask judge to instruct jury**
 - **Emails with gay escort**
 - **Relevance – about their relationship**
 - **But relates to the level of happiness, motive perhaps**
 - **Prejudicial – might be homophobia in jury box**
 - **Ask judge for jury instruction – if too hard to think of what to ask, might actually be prejudicial**
 - **Emails to ex-wife asking for money**
 - **Death of friend**
 - **Emails from coworkers**
 - **Seems irrelevant. Unsure if she opened the email**
 - **Reliability if expert was "pretty confident"**
 - **If D attorney doesn't like it, he can cross-examine and undermine the testimony**
 - **Second and third warrants without change to probable cause**
 - **EMT account**

- **Relevancy deals with probative evidence – so if he’s pretty sure, then it loses some relevant force**
 - **911 call – reliability? Close in time, is it informative**
 - **Large estate home – characterization, better to be an address**
 - **Said blood “all over his person” – accurate or something that should be limited?**
 - **Unsure if she knew she had been laid off – if she knew, would she tell her husband – would lose insurance, etc.**
 - **Relevance vs. reliable**

IV. The Role of the Jury

Rule 606(b)

Limit what juries see, trust them, let judge be gatekeeper

Tanner v. US (1987 SCOTUS), p.17 (O’Connor)

- **Facts**
 - D convicted of conspiring to defraud US and mail fraud
 - D argue DC erred in refusing to admit juror testimony at a post-verdict hearing on juror intoxication during trial
 - Day before sentencing filed motion to seek continuance of sentencing date, permission to interview jurors, evidentiary hearing, and new trial
 - Atty received phone call from juror saying many other jurors drank alcohol at lunch and slept through afternoons
 - DC granted, but found testimony inadmissible
 - Then allowed other parties in the courtroom to testify
- **Issue**
 - **Seeking evidentiary hearing, including juror interviews to determine if 6th amendment right to competent jury was destroyed**
- **Holding**
 - FRE 606b does not allow for juror testimony regarding conduct deliberations, including intoxication
 - **Allowing the hearing would**
 - **Undermine finality of jury decisions**
 - **Permit harassment of jurors by losing parties**
 - **Remove privacy of deliberation**
 - **Want to preserve community trust – let them work their magic on their own without being disrupted**
- **Discussion**
 - D argue
 - Juror testimony on ingestion of drugs or alcohol during trial not barred by FRE 606(b)
 - Sixth Am right to trial by a competent jury
 - Exceptions to rule when “extraneous influence”

- Distinction has been considered to be external vs internal influence
- Lower fed courts treated allegations of physical or mental incompetence of a juror as “internal”
- Strong policy against post-verdict inquiry into a juror’s state of mind
- Leg History does not support D’s arguments
- Sixth Amendment protected by other trial processes
 - Voir dire
 - Observable conduct by attorneys, judge, etc.
- **External/internal distinction**
 - **Want to avoid examining mental processes**
 - **But external influences can be investigated**
 - **Was there evidence that shouldn’t have been included that was introduced through another venue**
 - **Can’t google search witnesses, can’t read newspaper description, bribery**
- **Can’t testify about deliberation if internal**
- **Can testify about**
 - **Mistakes made on jury form**
 - **Extraneous prejudicial info improperly brought to attention**
 - **Outside influence improperly brought to bear on juror**
- **McDonald v. Pless – except in the gravest and most important cases**
- **Senate seems to have suggested they like the internal/external distinction**
- **Court says you can have non-juror evidence that could answer the same question. Don’t bother the jurors, but get the receipt from lunch**
- Dissent, Marshall
 - Due Process implies a tribunal both impartial and mentally competent to afford a hearing
 - FRE 606b only applies to juror testimony related to deliberations
 - **These issues deal with intake of information, so person should have been able to explore what jury understood**
 - Drugs and alcohol are outside influences
- **Other avenues that don’t require a violation of FRE 606b and bothering the jurors**

Relevance

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Lecture 2 – 8/20

Recap

- **Importance of framing a narrative**
 - **Why am I offering this evidence?**
 - **Motive...**
 - **Why am I disputing?**
 - **Prejudicial..., Irrelevant, Antipolicy, Unreliable**
- **Judge is gatekeeper – if jury can't handle, we should keep it out. Everything else they can handle and they can figure out how to use what they are told**
- **What rationales?**
 - **Want verdict to be final, to preserve community trust**
- **What exceptions?**
 - **In gravest and most important cases**
- **What safeguards?**
 - **Sometimes there are 2 tracks running parallel – 2 ways to prove narrative**
 - **Bring receipt, or some other form of evidence where you can get the same inference without having to put the jury members on the stand**
- **Tanner makes a tenable argument that a drunken jury member who is not clearly affecting trial is not affecting the confidence of trial**
- **What if he said outside the courtroom that he hates X people, and the defendant is X**
 - **Not an external influence**
 - **Doesn't seem to fit into FRE 606, but it could be a Constitutional violation because not receiving substantive DP – THIS would be a grave and important case**
 - **The constitutional guarantee of an impartial jury would be impossible from the outset**
 - **Jury should have been vetted, but this would be a grave and important case that should be brought to the judge's attention**
 - **Attorney would have an affirmative duty to report what he overheard the jury member say**

General Principles

II. The Anatomy of a Trial, p.7

- **Pretrial Motions**
 - **Motions in limine to exclude inadmissible evidence before trial begins, may insist on raising issue of relevance outside of jury's presence before attempting introduction, clarify scope**
- **Jury Selection and Instruction**

- Voir Dire – attorneys and judge ask questions of potential jurors to determine impartiality
- For cause and peremptory removal of potential jurors
 - Peremptory cannot be based on race or gender
- Opening Statements
 - Trial judge has a great deal of latitude in defining scope of an opening
- Prosecutor/Plaintiff's Case-in-Chief
 - Redirect limited to responding to new points raised on CrossX
- Motion for Acquittal or Directed Verdict
 - At close of P's case, D may say P has not met burden of producing sufficient evidence
 - Judge must determine if enough evidence exists that jury could reasonably find for P
- D's Case in Chief
 - Civil case, P may then move for directed verdict; criminal no – would violate 6th am
- Rebuttal and surrebuttal
 - Limited to evidence responding to other party's submitted evidence
- Directed Verdict Motions
- Closing Arguments
- Jury Instructions
- Jury Deliberations
- Post-Trial Motions and Entry of Judgment

Relevance, p. 35

- **Is it relevant first?**
 - **Then if it is relevant, are there reasons to not allow it?**
- **Relevance threshold**
 - **1. Probative**
 - **Makes a fact more or less probable than without the evidence**
 - **I need to prove X, this makes what I have to prove either more probable or less probable**
 - **Any tendency to do so**
 - **Low threshold**
 - **2. Material**
 - **Matters under the law that is the core component of the case**
 - **If murder case, matters under the law of homicide**
 - **Can't talk about negligence if a products liability case**
 - **Substantive law issue**
 - **HINT – if you are being told what the law is, might be testing materiality**
 - **Most common example – strict liability offenses**
 - **If she showed an ID that said 19, charged of statutory rape, doesn't matter because strict liability**
 - **Makes fact more or less probable, and Fact is of consequence to the dispute**

- **Fact X exists, and therefore ... ?**
 - **Need to have a vision of what you are proving with the fact**
- **Committee notes – judge’s life experience matters**
 - **What inference can we draw from suicide – effects some people and plays no role in other’s. Inherent sensitivity for some, so judge’s experience can matter when judging an evidentiary hypothesis**
- **As a threshold matter, judge SHOULD NOT**
 - **Weigh the evidence**
 - **Cannot ascribe persuasive force to the evidence**
 - **Prejudice issues he can consider weight, but initially should not be considering how persuasive the evidence is**
 - **Determine the sufficiency**
 - **Doesn’t matter if it could withstand a directed verdict; many pieces together, so each piece doesn’t have to be individually strong**
- **Two types of evidence**
 - **Direct**
 - **Asserts existence of fact to be proven**
 - **Murder weapon, an email seeking a rendezvous with a prostitute – not making inferences; it is what it is**
 - **Witness testimony, real evidence (tangible item), demonstrative (scale model of staircase)**
 - **Rarely found irrelevant**
 - **Circumstantial**
 - **Can infer an increased possibility that a fact will exist**
 - **Real evidence, testimony, demonstrative**
 - **Inference is what goes under the magnifying glass**
 - **Does the evidence have any tendency to suggest the fact**
 - **Does the evidential hypothesis provide a heightened probability of the fact to be proved**
 - **If no tendency to prove the ultimate fact you are trying to prove – irrelevant**
 - **Really depends on how judge views evidential hypothesis**
- FRE 401 – Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, AND the fact is of consequence in determining the action
- FRE 402 – Relevant evidence admissible unless US Constitution, fed statute, FRE, or other rules proscribed by the SCOTUS prohibit. Irrelevant evidence not admissible.

Overview Question – Attempted Suicide

Defining Relevance

- Must be probative – provide proof of proposition it is offered to prove

- Material – proposition to be proved must be one that is of consequence to the determination of the action

Judge's Role in Determining Relevance

- Judge not concerned with weight or sufficiency of evidence

The Evidential Hypothesis

- Is the evidence direct or circumstantial?
 - Inferences called evidential hypothesis
- Judge must analyze whether evidential hypothesis provides a heightened probability of the fact to be proved

Problem 2-1

- Probative? – tendency to prove she was afraid she would be convicted
- Material?
- Evidential Hypothesis? – if attempted to commit suicide, then knew higher probability of being convicted
- Additional Facts
 - Any history of attempted suicide; how clear was it that she knew the bodies were found because of the informant; would the notes be admissible; temporal relationship between learning of bodies' discovery and attempt
- How may jury use the evidence?
 - Must prove beyond a reasonable doubt; may not jump to conclusions if there is a reasonable explanation for an alternative
- **Tried to commit suicide ----- She is the killer**
 - **Evidential hypothesis – people who are conscious of their guilt do not want to go to jail**
 - **Argue the timing is not coincidental; suicide can come from many sources, but the timing is too perfect**
 - **She gave him notes in her handwriting that only the killers would know**
- **Defense counsel response**
 - **History of depression, emotional, vulnerable**
 - **Maybe she didn't know bf actually had killed people just said what he had said – not about guilt, but shock that boyfriend actually killed these people**
- **Judge wants lots of information before determining if it should be admitted**
 - **Lots of stigma around suicide; religious connotations, could have significant effects on the jury**
 - **Jury might apply it to many things beyond consciousness of guilt**
- **Is there any tendency to suggest consciousness of guilt?**
 - **Are there alternative explanations – history of mental illness**
 - **Prejudice if jury knows of suicide**
- **What if you knew she was a meth addict coming down**

- **Maybe if she left a note, it wouldn't apply to consciousness of guilt – no longer relevant**
- **If they know the real reason, it carries its own prejudice**

"Gazelle Theory"

- **Let cross-X handle it**
- **Let it in, prosecutor can go crazy with the fact; defense counsel has cross-X and can ask her why she tried to commit suicide, let her psych testify**
- **Make the prosecutor prove it and let the defense strike it down**
- **Let adversarial process take care of what should be given weight and what should not be given weight**
 - **Vs. some things jurors can't handle, and gatekeeper judge should not let anything that will overly burden the jury**

Prob 2-2

- **Net outflow, debt, assets – bring it in**
- **\$ ----> Killer**
 - **Conjecture**
- **Cross-X seems like gazelle theory works well here**
 - **The couple is taking care of the money problems, not so desperate**
- **\$ ----- motive ---- guilty**
 - **Jury could say there wasn't that much motive, they were taking responsible course of lowering debt risk**
 - **Gazelle theory – I get what they are doing, but I will limit the force of the idea of motive**
- **McDowell case – witness comes in to testify, D counsel could implicate witness following testimony, court says you can't do that**
 - **Becomes a fishing expedition – at some point the probative value approaches 0; lots of people might inherent something when someone dies**
 - **Here not trying to prove another might have committed a crime**
 - **Zero income might not be the same for everyone – law student would be different than Peterson**

Lecture 3 – 8/21

Recap

- **Initial threshold**
- **Proponent of evidence must have a theory of what she is trying to prove**
- **Only way you can prove it is probative and material**
- **Evidentiary hypothesis to judge can only be proved if you can establish the link for the judge so he/she can respect your logic**
- **Starting to see counterbalances to evidentiary objections**

- **Counterarguments to objections**
 - **Alternative avenue of proof**
 - **Gazelle theory – let advocacy solve the issue**
 - **Jury instruction will curb any prejudice**

Relevance, cont.

Jones v. Pak-Mor Manufacturing Co. (Ariz. 1985), p.45

- Facts
 - Product Liability Action
 - P injured while working on machine manufactured by D
 - P alleged improper design
 - Negligence
 - Strict Liability
 - P moved to exclude all evidence of the absence of prior, similar accidents
 - DC excluded evidence, verdict for P, App. Affirmed
 - P riding on side of dump truck, pinned between fence and truck and seriously injured
 - No material change in design of truck – model had been used for 26 years
- Holding
 - Inadmissibility of evidence of the absence of prior accidents previously **was** a per se rule in AZ
 - But can admit evidence of (affirmative) prior accidents
 - New interpretation – TC has discretion under FRE 403 to admit evidence of safety-history concerning both existence and nonexistence of prior accidents, provided the proponent establishes the necessary predicate for the evidence
 - Issues pertaining to:
 - Whether design caused product to be defective
 - Unreasonably dangerous
 - Cause of accident
 - Whether D should have foreseen the design was not reasonably safe for contemplated use
 - Not overturned because no reversible error
- Discussion
 - *Fox Tucson Theaters v. Lindsay* (1936) – could introduce **collateral issues with little bearing, protract trial, distract jury, surprise factor (hard to disprove negative)**
 - Safety-history evidence not closely confined in time or space and could be too difficult for opposing counsel to address
 - Could prejudice jurors
 - Products Liability
 - Negligence

- D distributed a product when it was reasonably foreseeable that its design presented an unreasonable risk of harm
 - Strict Liability
 - Product was defective and unreasonably dangerous
 - One factor that bears on determination is likelihood that product will cause serious injury
 - So it is probative and material – the evidence will make more probable or less probable that the fact might be proved
- FRE 403 – exclusion when probative value is substantially outweighed by:
 - Danger of unfair prejudice
 - Confusion of issues
 - Misleading jury
 - Considerations of undue delay
 - Waste of time, or
 - Needless presentation of cumulative evidence
- Problems of prejudice, inability of opposing party to meet evidence, danger of misleading jury substantial
- Most courts hold that testimony that a witness did not see an event alone has no probative force sufficient to prove the event did not occur
 - Unless coupled with evidence that witness was in a position to know if it had occurred, or would have known about it
- **Notes**
 - **Could argue 26 years of positive performance**
 - **Argue negligence of truck driver and injured – driver and injured party had little training, trying to get through small alleyway**
 - **Theory at trial was that they were negligent**
 - **Nothing wrong with the product**
 - **Evidential hypothesis – If P has burden of proof by preponderance of evidence to prove it was defective, unreasonably dangerous, or D had notice of danger, this refutes all 3**
 - **If so defective, then there would have been other accidents**
 - **If so unreasonably dangerous, there would have been other accidents**
 - **Could not have known about danger if there were no other accidents**
 - **Ariz has a per se rule that the evidence should not come in because it would be unfair to P**
 - **Nature of evidence – negative evidence**
 - **Factors to allow it in**
 - **D SHOULD know**

- P's boyfriend boasted of violent crimes, including killing a man
 - V Previously raped P
 - Daughter had beaten up V 3 times, V would never fight back
- V punched Tiatano with an object that broke his nose and knocked him unconscious
 - Daughter asked mom for gun and later killed V
- P and daughter could testify about prior violent misconduct they had known about when P handed the gun, but not extrinsic evidence of which they had no knowledge at the time
 - **Extrinsic Evidence – outside information**
- Jury requested clarification as to whether V actually made violent acts he had boasted about, judge declined to supplement evidence
 - Only what D knew could explain her state of mind at that moment
 - **No tendency to prove anything if she didn't know it at the time**
- **Testimony – knew that it was going to be violent and she knows that he is dangerous, so she wanted her daughter to be protected**
- Issue
 - Whether evidence showing V actually committed crimes he boasted to P about should be admitted
- Holding
 - Should be admissible – goes to issue of her credibility and exclusion was prejudicial, even though she was not aware that his boasts were verifiable
- Discussion
 - Admission would have 2 functions:
 - Corroborate the testimony that she heard V tell her these things
 - Corroborate her statement that she had reason to be afraid when V was drunk and vicious
 - Necessary to the defense for jury to believe she wasn't making up stories and she had heard them from V
 - Crux of defense rested on credibility
- Dissent
 - Because mother had not known of the papers and had never seen them, could not have affected her state of mind – no abuse of discretion in denying admission
 - Because it goes to state of mind, could have been admissible – but not to the level of abuse of discretion
 - Large risk of unfair prejudice to prosecution
- **Notes**
 - **Committed previous crimes ----- not guilty**
 - **Missing evidential hypothesis: therefore she had reasonable fear**
 - **9th Cir says no**
 - **Committed previous crimes ----- credible telling the truth**

- **Missing evidential hypothesis: corroborates her version**
- **9th Cir says yes**
- **Limits of Holding**
 - **Stories of such remarkable character of atrocity one might doubt he had told them or doubt they had really occurred**
 - **Remarkable nature of the story that makes us doubt her and that gives it corroborative weight**
 - **Credibility must be central**
 - **Also matters that he didn't tell other people but only her**
 - **Essential to corroborate her story**

Problem 2-3

- **Embezzlement wobbler – misdemeanor or felony**
 - **Offered deal**
 - **Concede to guilt for lesser sentence – 90 days in jail (not prison), but would not be able to stay in union**
 - **Turns it down and goes to trial**
 - **Wants to tell jury that he turned down the deal**
 - **Evidentiary hypothesis**
 - **Turned down deal ----- Conscious of innocence --- Is not guilty**
 - **Should court let the evidence in?**
 - **Any tendency?**
 - **Court said this is not highly probative**
 - **Will this prove something?**
 - **Probably lacked a full grasp of what was happening**
 - **First time in this situation**
 - **Didn't appreciate significance**
 - **Keeping his job added a counterbalance, which weakened tendency**

Recap

- **Jones case**
 - **How to balance factors**
 - **Always know theory of the case**
 - **What would defense be if you were defendant**
 - **Helps with evidentiary hypothesis**
 - **Court errs in favor of judicial discretion**
 - **Per se rules are rare in Evidence law**
 - **Let the judge make the call**
 - **Reliable, substantially similar (makes it relevant)**

- **If you want to bring in that nothing like this has ever happened before, you need**
 - **Nature of danger**
 - **Factual similarity**
 - **Length of exposure**
 - **Have you been monitoring the product**
 - **Can you properly swear no other accidents exist**
 - **Insurance tracking, no other suits**
 - **Hard standard to meet**
- **James**
 - **May go naturally to one evidentiary hypothesis**
 - **Lack of motive, vicious propensities**
 - **Doesn't go to her knowledge of danger because she didn't know of it**
 - **But you can argue a different evidentiary hypothesis**
 - **Goes to corroboration**
 - **He said/she said situation where credibility is central to resolution, story is pretty remarkable and jury didn't seem to believe**
 - **Extrinsic proof does a good job of corroborating her wild story**
 - **If other avenues of proving, stories are believable, don't need the extrinsic evidence**
 - **Judge should give jury instruction – don't use the extrinsic evidence as proof that she had knowledge, but use it for corroboration**
 - **Would this really work?**

Lecture 4 – 8/26

General Principles of Relevance, cont.

II. Is There a Conditional Relevance Objection?, p.57

- Rule: 104(b) – when relevancy depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist; may admit on condition that proof be introduced later
- SCOTUS interp – whether jury could reasonably find the fact by a preponderance of the evidence based on all evidence of record
- Doesn't have to be offered up in order – could say suicide first, then that she heard the bodies were found later
- **Missing factual link in evidentiary chain**
 - **Without proof, the whole chain falls apart and all evidence is irrelevant**
- **What happens when someone stands up and objects on conditional relevance grounds?**
 - **Assuming missing evidence is true, would this be relevant?**

- **If yes, then judge asks is there sufficient evidence to prove the conditional fact**
- **Test for "sufficient"**
 - **Could a reasonable jury find the fact by a preponderance of the evidence?**
 - **About 33% standard – could a jury find this by about 51%**
 - **Jury always free to reject evidence**
- **In Peterson case – V on optimization list**
 - **Prosecution wanted to work the fact**
 - **She was about to be laid off → Motive**
 - **Defense says this is a lot of factual leaps**
 - **On list --- She knew she was on list --- She told D she was on list --- Motive --- Guilt**
 - **If we could confirm she knew**
 - **Would it be reasonable that a wife would tell her husband she was going to be laid off?**
 - **Maybe, judge would think about it**
 - **Seems like confirmation that she was on the list is a conditional fact**
- **Higher than "any tendency" standard – a little bit harder to overcome**
 - **Sometimes called "Huddleston" test**

III. Even if it is Relevant, is it Too Prejudicial?

- **Rules: 403 – may exclude if probative value substantially outweighed by a danger of one or more of: unfair prejudice, confusing the issues, misleading the jury, wasting time, undue delay, or needlessly presenting cumulative evidence**
 - **Key words – substantially, unfair**
 - **Favors admissibility**
 - **Recognizes that all evidence is inherently prejudicial**
 - **Favors admissibility**
 - **Unfair prejudice & must substantially outweigh probative value**
 - **Unfair – excessive emotional or irrational effects**
 - **Substantially outweigh**
 - **Courts can try to limit by only allowing a little bit, can say to jury the purpose of the evidence while presenting it and try to limit**
 - **Factors**
 - **How central is the point – more central for proponent of evidence, more probative value**
 - **How high of a need**
 - **Other avenues of proving**
 - **Would jury properly use limiting instruction**
 - **Different judges will typically weigh differently**