Evidence: A Problem-Based and Comparative Approach

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Chapter 1: Relevance

Page 29, add the following case immediately after *Old Chief v. United States:*

United States v. Ray

803 F.3d 244 (6th Cir. 2015)

MARBLEY, District Judge.

Appellant Alvin Ray ("Ray") appeals his jury conviction for one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1)….

Ray first contends that the trial court abused its discretion by allowing his charge under § 922(g) to be referred to as a charge for "felon in possession," effectively calling him a "felon," in front of the jury, including during voir dire, and at trial. Ray insists that the use of the word "felon" in describing the charge is more prejudicial than probative under Federal Rule of Evidence 403. Labeling someone a "felon" is highly prejudicial, Ray contends, because of the societal stigma associated with being a felon. Ray maintains that "there is bias and prejudice against felon offenders in the general public," citing publications discussing felon disenfranchisement laws as an example of such bias. Ray insists that learning a defendant's criminal history, even generally, is likely to bias the jury against the defendant and, in general, creates a substantial risk that a jury will convict for crimes other than those charged or because they believe that the defendant is a bad person who deserves punishment. He also points out, accurately, that § 922(g) is not formally titled "felon in possession," nor does the statute use the word "felon" in its text, thus, it is not necessary that a charge under § 922(g) be labeled as such. At oral argument, Ray also pressed this Court to consider the implicit bias aroused by and associated with the term "felon."

Instead of referring to Ray as a "felon" or using the phrase "felon in possession," the Defense requested that alternative language be used, which he claims would have been "less unfairly prejudicial." Specifically, the Defense asked that the jury be told only that Ray was "ineligible" to possess a weapon. The Defense also offered to stipulate that Ray did not have a license to carry a weapon and that he was not eligible to carry one. And in fact, the parties ultimately did stipulate to the fact of Ray's status as a felon at trial.

For these reasons, Ray insists that the trial court abused its discretion by stating several times during voir dire "that Ray was being charged as a 'felon in possession' of a firearm," and by using the word "felon" to question the jurors about whether they believed that a defendant with a prior record had the propensity to commit the charged offense. In addition, Ray argues the trial court abused its discretion by allowing Ray to be referred to as a "felon" during trial—during the direct examination of Officer Robson, and when the Government read into the record a stipulation between the two parties that Ray was in fact a felon, an element of the Government's case under 18 U.S.C. § 922(g).

The Government insists that Ray's request at trial that the jury only be told that Ray was "ineligible" to possess a firearm was an improper attempt "to limit the jury's consideration to only one of the elements required for a felon-in-possession conviction—possession" and "would

have precluded the jury from making a finding of each element necessary to find him guilty of the statute he was charged with violating." Further, the Government argues that any unfair prejudice Ray claims as a result of the use of the term "felon" during voir dire and at trial is "entirely speculative" because the district court sufficiently probed the jury pool about biases against felons and instructed the jury to consider only the evidence before it during its deliberations.

In this case, the district court did not abuse its discretion by using, or allowing the use of the word "felon" or the phrase "felon in possession" to describe Ray's charge under § 922(g). As Ray points out, § 922(g) does not use the word "felon," either in the title or text of the statute: it refers only to a person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, which is an element the Government must prove during its case-in-chief. Although *Old Chief* requires the Government to accept a defendant's offer to stipulate to a prior felony conviction, it is still the Government's burden to prove each element of the offense and, likewise, generally the jury must make a finding as to each element, even where there is a stipulation to the elemental facts. And, in fact, the parties entered into such a stipulation here.

While it appears that this Circuit has not explicitly addressed the unfair prejudice that may arise solely as a result of the repeated use of the word "felon" in reference to a defendant, courts in this Circuit have recognized the potential unfair prejudice that may arise as a result of trying a charge under § 922(g) with other charges arising from the same underlying conduct. Further, we recognize the proven impact of implicit biases on individuals' behavior and decision-making. Social scientists have examined extensively the theory of implicit bias in recent decades, especially as it relates to racial bias.

In light of such concerns, and because the word "felon" is not used in the statute, there is no reason a court could not use alternative language—such as the language of the statute—instead of labeling the defendant a "felon" or referring to a charge under § 922(g) as "felon in possession." Indeed, if a court conducted a Rule 403 analysis and concluded that the use of the term "felon" or "felon in possession" was unfairly prejudicial, we see no reason such a ruling should not be upheld.

In this case, however, this Court cannot say that the trial court abused its discretion in allowing the term "felon" to be used in reference to Ray. Here, the word "felon" was used by the trial court during voir dire in an attempt to weed out those jurors who would be unable to make an unbiased decision about Defendant's guilt based on knowledge of his prior criminal history alone—the very concern Ray addresses here. Further, one of the references to Defendant as a "felon" during trial was through the reading of the parties' stipulation, entered into by Ray, so that the facts of his prior felony convictions did not have to be entered into evidence in order for the Government to prove a required element of its case under § 922(g). Moreover, the second reference to Ray as a felon during trial was by a Government witness, Officer Robson, reading Ray's affirmative answer to the question "were you aware that you were a convicted felon" from Officer Hill's notes taken during Ray's alleged statements at the police station. The Defense did not object to this portion of the direct examination.

In this context, the district court did not abuse its discretion in allowing the word "felon" to be used. Even if an abuse of discretion was shown, however, there is no evidence to indicate that the effect of the use of the word "felon" alone was so substantial that it affected the outcome of the trial. Thus any error that may have occurred was harmless….

Page 39, add the following note after note 2:

3. Although a limiting instruction is mandatory if requested by the party against whom the evidence is offered, such a party might prefer to forego such an instruction so as to avoid drawing undue attention to the evidence. For this reason, trial courts should not give such instructions *sua sponte*. *See, e.g.*, *United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014). *See also United States v. Jones*, 455 F.3d 800, 811 (7th Cir. 2006) (Easterbrook, J., concurring) ("[L]imiting instructions….may make things worse. Telling juries not to infer from the defendant's criminal record that someone who violated the law once is likely to do so again is like telling jurors to ignore the pink rhinoceros that just sauntered into the courtroom.").

Chapter 4: Witness Qualification, Competency, and Examination

Page 183, add the following case immediately after *United States v. Villar*:

Warger v. Shauers

135 S.Ct. 521 (2014)

JUSTICE SOTOMAYOR delivered the opinion of the Court….

I

Petitioner Gregory Warger was riding his motorcycle on a highway outside Rapid City, South Dakota, when a truck driven by respondent Randy Shauers struck him from behind…. Warger sustained serious injuries that ultimately required the amputation of his left leg.

Warger sued Shauers for negligence in Federal District Court. During jury selection, counsel for both parties conducted lengthy *voir dire* of the prospective jurors. Warger's counsel asked whether any jurors would be unable to award damages for pain and suffering or for future medical expenses, or whether there was any juror who thought, "I don't think I could be a fair and impartial juror on this kind of case." Prospective juror Regina Whipple, who was later selected as the jury foreperson, answered no to each of these questions.

Trial commenced, and the jury ultimately returned a verdict in favor of Shauers. Shortly thereafter, one of the jurors contacted Warger's counsel to express concern over juror Whipple's conduct. The complaining juror subsequently signed an affidavit claiming that Whipple had spoken during deliberations about "a motor vehicle collision in which her daughter was at fault for the collision and a man died," and had "related that if her daughter had been sued, it would have ruined her life."

Relying on this affidavit, Warger moved for a new trial. He contended that Whipple had deliberately lied during *voir dire* about her impartiality and ability to award damages….

The District Court refused to grant a new trial, holding that the only evidence that supported Warger's motion, the complaining juror's affidavit, was barred by Federal Rule of Evidence 606(b)…. The Eighth Circuit affirmed…. We granted certiorari, and now affirm.

II

We hold that Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during *voir dire*. In doing so, we simply accord Rule 606(b)'s terms their plain meaning. The Rule, after all, applies "[d]uring an inquiry into the validity of a verdict." Rule 606(b)(1). A postverdict motion for a new trial on the ground of *voir dire* dishonesty plainly entails "an inquiry into the validity of [the] verdict": If a juror was dishonest during *voir dire* and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated.

This understanding of the text of Rule 606(b) is consistent with the underlying common-law rule on which it was based. Although some common-law courts would have permitted evidence of jury deliberations to be introduced to demonstrate juror dishonesty during *voir dire,* the majority would not, and the language of Rule 606(b) reflects Congress' enactment of the more restrictive version of the common-law rule.

Rule 606(b) had its genesis in *Vaise v. Delaval,* 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785), in which Lord Mansfield held inadmissible an affidavit from two jurors claiming that the jury had decided the case through a game of chance. The rule soon took root in the United States, where it was viewed as both promoting the finality of verdicts and insulating the jury from outside influences, see *McDonald v. Pless,* 238 U.S. 264, 267–268 (1915).

Some versions of the rule were narrower than others. Under what was sometimes known as the "Iowa" approach, juror testimony regarding deliberations was excluded only to the extent that it related to matters that "'inhere[d] in the verdict,'" which generally consisted of evidence of the jurors' subjective intentions and thought processes in reaching a verdict. A number of courts adhering to the Iowa rule held that testimony regarding jury deliberations is admissible when used to challenge juror conduct during *voir dire*.

But other courts applied a broader version of the anti-impeachment rule. Under this version, sometimes called the "federal" approach, litigants were prohibited from using evidence of jury deliberations unless it was offered to show that an "extraneous matter" had influenced the jury. The "great majority" of appellate courts applying this version of the rule held jury deliberations evidence inadmissible even if used to demonstrate dishonesty during *voir dire*.

This Court occasionally employed language that might have suggested a preference for the Iowa rule. But to the extent that these decisions created any question as to which approach this Court followed, *McDonald v. Pless* largely settled matters. There, we held that juror affidavits were not admissible to show that jurors had entered a "quotient" verdict, precisely the opposite of the result reached by the Iowa Supreme Court in its decision establishing the Iowa approach. In doing so, we observed that although decisions in a few States made admissible a "juror's affidavit as to an overt act of misconduct, which was capable of being controverted by other jurors," the argument in favor of that approach (*i.e.,* the Iowa rule) had not been generally accepted, because permitting such evidence "would open the door to the most pernicious arts and tampering with jurors." 238 U.S., at 268….

In any event, these decisions predated Congress' enactment of Rule 606(b), and Congress was undoubtedly free to prescribe a broader version of the anti-impeachment rule than we had previously applied. The language of the Rule it adopted clearly reflects the federal approach: As enacted, Rule 606(b) prohibited the use of *any* evidence of juror deliberations, subject only to the express exceptions for extraneous information and outside influences.[2]

For those who consider legislative history relevant, here it confirms that this choice of language was no accident. Congress rejected a prior version of the Rule that, in accordance with the Iowa approach, would have prohibited juror testimony only as to the "effect of anything upon ... [any]

[2] The additional exception for mistakes made in entering the verdict on the verdict form was adopted in 2006.

juror's mind or emotions ... or concerning his mental processes." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 387 (1971); see *Tanner v. United States,* 483 U.S. 107, 123–125 (1987) (detailing the legislative history of the Rule). Thus Congress "specifically understood, considered, and rejected a version of Rule 606(b)" that would have likely permitted the introduction of evidence of deliberations to show dishonesty during *voir dire*. *Id.,* at 125.

III

….

C

Nor do we accept Warger's contention that we must adopt his interpretation of Rule 606(b) so as to avoid constitutional concerns. The Constitution guarantees both criminal and civil litigants a right to an impartial jury. And we have made clear that *voir dire* can be an essential means of protecting this right….

[A]ny claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*. In *Tanner,* we concluded that Rule 606(b) precluded a criminal defendant from introducing evidence that multiple jurors had been intoxicated during trial, rejecting the contention that this exclusion violated the defendant's Sixth Amendment right to "'a tribunal both impartial and mentally competent to afford a hearing.'" 483 U.S., at 126. We reasoned that the defendant's right to an unimpaired jury was sufficiently protected by *voir dire,* the observations of court and counsel during trial, and the potential use of "nonjuror evidence" of misconduct. 483 U.S., at 127. Similarly here, a party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased. Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered.[3] ….

Page 187, add the following note after note 5:

5A. In footnote 3 of its opinion, the *Warger* Court leaves open the possibility that evidence of "extreme" juror bias that is blocked by Rule 606(b) or its state law equivalent might be deemed to violate the Sixth Amendment. Would racial bias, of the sort at issue in *Villar*, qualify as the sort of "extreme" juror bias that the *Warger* Court had in mind? The Court has recently granted certiorari to consider the issue. *See Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513 (2016).

[3] There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process. We need not consider the question, however, for those facts are not presented here.

Chapter 5: Privileges

Page 323, replace Problem 5-7 with the following:

Problem 5-7: Love & Loyalty, Hawaii Style

Kai, a citizen of Hawaii, files a lawsuit against ABC Corporation (a New York corporation with its principal place of business in New York and a branch office in Hawaii) in federal court, alleging that the latter discriminated against him on the basis of his sex. His claims arise under a Hawaii statute as well as Title VII of the Civil Rights Act of 1964, a federal statute.

Under Hawaii law, although both same-sex and opposite-sex couples can legally marry, *see* Haw. Rev. Stat. Ann. § 572-1, both types of couples also have the option to instead enter into civil unions, which provide all of the same rights, responsibilities, and benefits of marriage under state law but without the use of the label "marriage." *See* Haw. Rev. Stat. Ann. §§ 572B-2, 572B-9.

Hawaii Rule of Evidence 505 provides in pertinent part as follows:

> (a) Criminal proceedings. In a criminal proceeding, the spouse of the accused has a privilege not to testify against the accused. This privilege may be claimed only by the spouse who is called to testify.
>
> (b) Confidential marital communications; all proceedings.
>
> > (1) Definition. A "confidential marital communication" is a private communication between spouses that is not intended for disclosure to any other person.
> >
> > (2) Either party to a confidential marital communication has a privilege to refuse to disclose and to prevent any other person from disclosing that communication.
>
> ….

Pursuant to Hawaii law, the term "spouse" as used in any law also refers to parties to a civil union. *See* Haw. Rev. Stat. Ann. § 572B-11.

At trial, ABC Corporation seeks to call as a witness Leilani, Kai's partner in a lawful Hawaii civil union. They would like to ask Leilani to testify about both confidential communications that Kai made to her as well as statements that she heard Kai make in the presence of third persons, but both Leilani and Kai object, claiming that the testimony is privileged under both federal and state law.

What are the best arguments in favor and against a finding that the testimony sought by ABC Corporation is privileged?

Chapter 6: The "Best Evidence" Rule

Page 410, add the following at the end of note 8:

But see Crawford v. Tribeca Lending Corp., 815 F.3d 121, 127 n.2 (2d Cir. 2016) ("It has been suggested in some quarters that if a duplicate is inadmissible under Rule 1003 because of a genuine question about the original's authenticity, it should not be admitted through the backdoor of Rule 1004. If this rule is sound (an issue on which we intimate no view), its corollary should prevent a party from evading the test of Rule 1003 by seeking in the first instance to admit a duplicate through Rule 1004.").

Chapter 7: The Rule against Hearsay

Page 440, insert the following case immediately after *United States v. Wright:*

United States v. Lizarraga-Tirado

789 F.3d 1107 (9th Cir. 2015)

KOZINSKI, Circuit Judge….

On January 17, 2003, defendant was arrested near the United States–Mexico border. He was charged with illegal reentry under 8 U.S.C. § 1326 as a previously removed alien who "entered and was found in the United States." At trial, defendant disputed that he had entered the United States before his arrest. He testified that he was still on the Mexico side of the border, waiting for instructions from a smuggler when he was arrested. Because he was arrested on a dark night in a remote location, he insisted that the arresting Border Patrol agents must have accidentally crossed the border before arresting him.

The arresting agents, Garcia and Nunez, testified that they were very familiar with the area where they arrested defendant and were certain they arrested him north of the border. Agent Garcia also testified that she contemporaneously recorded the coordinates of defendant's arrest using a handheld GPS device. To illustrate the location of those coordinates, the government introduced a Google Earth satellite image….

Google Earth is a computer program that allows users to pull up a bird's eye view of any place in the world. It displays satellite images taken from far above the earth's surface with high-resolution cameras. Google Earth superimposes certain markers and labels onto the images, such as names of towns and locations of borders. Relevant here, it also offers two ways for users to add markers of their own. A user can type GPS coordinates into Google Earth, which automatically produces a digital "tack" at the appropriate spot on the map, labeled with the coordinates. A user can also manually add a marker by clicking any spot on the map, which results in a tack that can be labeled by the user.

The satellite image introduced at trial depicts the region where defendant was arrested. It includes a few default labels, such as a nearby highway, a small town and the United States–Mexico border. It also includes a digital tack labeled with a set of GPS coordinates. Agent Garcia testified that the GPS coordinates next to the tack matched the coordinates she recorded the night she arrested defendant. On that basis, she surmised that the tack marked "approximately where [she was] responding to" on the night of defendant's arrest. Because the tack is clearly north of the border, the exhibit corroborated the agents' testimony that defendant was arrested in the United States. Defendant's lawyer cross-examined Agent Garcia about whether she had recorded the GPS coordinates accurately. But he couldn't cross-examine her about the generation of the satellite image or the tack because Agent Garcia hadn't generated them…. Defense counsel objected to the satellite image on hearsay grounds. The district court overruled that objection and admitted the image.

II

Defendant claims that both the satellite image on its own and the digitally added tack and coordinates were impermissible hearsay…. In defendant's view, the satellite image is hearsay because it asserts that it "accurately represented the desert area where the agents worked," and the tack and coordinates are hearsay because they assert "where the agents responded and its proximity to the border."

We first consider whether the satellite image, absent any labels or markers, is hearsay. While we've never faced that precise question, we've held that a photograph isn't hearsay because it makes no "assertion." Rather, a photograph merely depicts a scene as it existed at a particular time. The same is true of a Google Earth satellite image. Such images are produced by high-resolution imaging satellites, and though the cameras are more powerful, the result is the same: a snapshot of the world as it existed when the satellite passed overhead. Because a satellite image, like a photograph, makes no assertion, it isn't hearsay.

The tack and coordinates present a more difficult question. Unlike a satellite image itself, labeled markers added to a satellite image do make clear assertions. Indeed, this is what makes them useful. For example, a dot labeled with the name of a town asserts that there's a town where you see the dot. The label "Starbucks" next to a building asserts that you'll be able to get a Frappuccino there. In short, labeled markers on a satellite image assert that the labeled item exists at the location of the marker.

If the tack is placed manually and then labeled (with a name or GPS coordinates), it's classic hearsay, akin to *Aronson v. McDonald*, 248 F.2d 507, 508–09 (9th Cir.1957), where we held that hand-drawn additions to a map—there, topography lines—were hearsay. Google Earth allows for the functional equivalent of hand-drawn additions, as a user can place a tack manually and then label it however he chooses. This is like drawing an X on a paper map and labeling it "hidden treasure." That would be an assertion by the person drawing the X that treasure can be found at that location. Similarly, a user could place a tack, label it with incorrect GPS coordinates, and thereby misstate the true location of the tack.

Because there was no evidence at trial as to how the tack and its label were put on the satellite image, we must determine, if we can, whether the tack was computer-generated or placed manually. Fortunately, we can take judicial notice of the fact that the tack was automatically generated by the Google Earth program…. Specifically, we can access Google Earth and type in the GPS coordinates, and have done so, which results in an identical tack to the one shown on the satellite image admitted at trial.

A tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay. The hearsay rule applies only to out-of-court *statements*, and it defines a statement as "a *person's* oral assertion, written assertion, or nonverbal conduct." Fed.R.Evid. 801(a) (emphasis added). Here, the relevant assertion isn't made by a person; it's made by the Google Earth program. Though a person types in the GPS coordinates, he has no role in figuring out where the tack will be placed. The real work is done by the computer program itself. The program analyzes the GPS coordinates and, without any human intervention, places a labeled tack on the satellite

image. Because the program makes the relevant assertion—that the tack is accurately placed at the labeled GPS coordinates—there's no statement as defined by the hearsay rule. In reaching that conclusion, we join other circuits that have held that machine statements aren't hearsay.

That's not to say machine statements don't present evidentiary concerns. A machine might malfunction, produce inconsistent results or have been tampered with. But such concerns are addressed by the rules of authentication, not hearsay. Authentication requires the proponent of evidence to show that the evidence "is what the proponent claims it is." Fed.R.Evid. 901(a). A proponent must show that a machine is reliable and correctly calibrated, and that the data put into the machine (here, the GPS coordinates) is accurate. A specific subsection of the authentication rule allows for authentication of "a process or system" with evidence "describing [the] process or system and showing that it produces an accurate result." Fed.R.Evid. 901(b)(9). So when faced with an authentication objection, the proponent of Google-Earth-generated evidence would have to establish Google Earth's reliability and accuracy. That burden could be met, for example, with testimony from a Google Earth programmer or a witness who frequently works with and relies on the program. It could also be met through judicial notice of the program's reliability, as the Advisory Committee Notes specifically contemplate….

Page 440, insert the following note immediately after note 2:

3. Should the *Lizarraga-Tirado* decision be interpreted to mean that a photograph can *never* be deemed hearsay? *See* David F. Binder, Hearsay Handbook § 1:6 (4th ed. 2015) ("[I]t is possible for a photograph, particularly one that is posed for purposes of litigation, to be hearsay. This is so if the photograph is assertive in nature, and is offered to prove the truth of the assertion depicted. For example, a man with a broken leg might be photographed, on crutches, pointing to a broken rung on a stepladder, or pretending to trip over a defect in a sidewalk. If such photograph…is offered to show how the man broke his leg, it would be hearsay.").

Page 448, insert the following case immediately after *United States v. Reynolds*:

United States v. Torres

794 F.3d 1053 (9th Cir. 2015)

TALLMAN, Circuit Judge….

Alfonso Torres appeals his conviction for knowingly transporting seventy-three kilograms of cocaine across the United States–Mexico border concealed in a specially constructed compartment of his pickup truck. At his first trial, which ended in a hung jury, the district court permitted Torres to testify that his friend in Tijuana, Fernando Griese, borrowed his truck on several occasions. During this time, Torres alleged the modifications and concealment could have been made to his truck without his knowledge. On retrial, Torres attempted to testify about other requests made to him by Griese, who Torres claimed was manipulating him into unknowingly carrying drugs across the border by asking him for favors running errands in San Diego. The district court, however, precluded this line of questioning as hearsay and irrelevant….

As a general rule, a party is prohibited from introducing a statement made by an out-of-court

declarant when it is offered at trial to prove the truth of the matter asserted. Fed.R.Evid. 801(c), 802. For the purposes of hearsay, a "statement" is defined as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Fed.R.Evid. 801(a). The Advisory Committee Note clarifies that the effect of the "statement" definition is to "exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not *intended* as an assertion. The key to the definition [of a statement] is that nothing is an assertion unless intended to be one." Fed.R.Evid. 801 advisory committee's note to Subdivision (a) 1972 Proposed Rules (emphasis added).

Torres alleges that the district court erred in precluding his testimony about Fernando's inquiries because this evidence does not constitute hearsay. We hold that while some questions may constitute non-hearsay, where the declarant intends the question to communicate an implied assertion and the proponent offers it for this intended message, the question falls within the definition of hearsay.

Some of our sister circuits have held that questions or requests are admissible as non-hearsay because questions are not intended to assert anything….

[W]e think the issue is more nuanced and context specific. It is widely recognized that the grammatical form of a verbal utterance does not govern whether it fits within the definition of hearsay….

While we have not previously addressed whether questions constitute hearsay, we think "the term 'matter asserted' as employed in Rule 801(c) and at common law includes *both* matters directly expressed and matters the declarant *necessarily implicitly intended* to assert." 30B Kenneth W. Graham, Jr. & Michael H. Graham, Federal Practice & Procedure § 7001 (2014) (emphasis added). Because there may be instances where a party attempts to admit hearsay by cloaking statements under the guise of a question, the focus of the inquiry should be on what the declarant intended to say, whether implied or directly asserted. *See* Fed.R.Evid. 801 advisory committee's note to Subdivision (a) 1972 Proposed Rules….

Fernando asked: Can you take my friend to the D.M.V.? Torres said no. Fernando asked a second time: Can you take my friend to the D.M.V.? Torres said no. Fernando asked a third time: Can you take my friend to a tire shop? Torres said no. Fernando's intent in asking for Torres's truck on three separate occasions in the span of a week and a half is apparent: Fernando wanted control of Torres's truck on the U.S.-side of the border. In other words, Fernando intended the implied assertion rather than the express one, and Torres offered the questions for this intended implied message to show it was Fernando who was calling the shots and who unknowingly set him up on the drug importation scheme. Thus, Torres offered the statements for the truth of the defense asserted. We hold the district court did not abuse its discretion in finding that Torres offered Fernando's inquiries for the truth of the matter asserted to prove his third-party culpability defense. Thus, the objections were properly sustained on hearsay grounds….

Page 505, add the following case immediately after *Miller v. Crown Amusements, Inc.*:

United States v. Boyce

742 F.3d 792 (7th Cir. 2014)

[In this case, the majority opinion upholds the admission of the contents of a 911 call. What follows is the concurring opinion, which provides a stinging critique of the present sense impression and excited utterance exceptions to the hearsay rule, both of which were invoked by the majority to justify admission of the 911 call.]

POSNER, Circuit Judge, concurring.

I agree that the district court should be affirmed—and indeed I disagree with nothing in the court's opinion. I write separately only to express concern with Federal Rules of Evidence 803(1) and (2), which figure in this case. That concern is expressed in a paragraph of the majority opinion; I seek merely to amplify it.

Portis's conversation with the 911 operator was a major piece of evidence of the defendant's guilt. What she said in the conversation, though recorded, was hearsay, because it was an out-of-court statement offered "to prove the truth of the matter asserted," Fed.R.Evid. 801(c)(2)—namely that the defendant (Boyce) had a gun…. But the government argued and the district court agreed that Portis's recorded statement was admissible as a "present sense impression" and an "excited utterance." No doubt it was both those things, but there is profound doubt whether either should be an exception to the rule against the admission of hearsay evidence….

The rationale for the exception for a "present sense impression" is that if the event described and the statement describing it are near to each other in time, this "negate[s] the likelihood of deliberate or conscious misrepresentation." Advisory Committee Notes to 1972 Proposed Rules. I don't get it, especially when "immediacy" is interpreted to encompass periods as long as 23 minutes…. Even real immediacy is not a guarantor of truthfulness. It's not true that people can't make up a lie in a short period of time. Most lies in fact are spontaneous…. Suppose I run into an acquaintance on the street and he has a new dog with him—a little yappy thing—and he asks me, "Isn't he beautiful"? I answer yes, though I'm a cat person and consider his dog hideous.

I am not alone in deriding the "present sense impression" exception to the hearsay rule. To the majority opinion's quotation from *Lust v. Sealy, Inc.,* 383 F.3d 580, 588 (7th Cir.2004)—"as with much of the folk psychology of evidence, it is difficult to take this rationale [that immediacy negates the likelihood of fabrication] entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances"—I would add the further statement that "'old and new studies agree that less than one second is required to fabricate a lie.'" *Id*. Wigmore made the point emphatically 110 years ago. 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 1757, p. 2268 (1904) ("to admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle").

It is time the law awakened from its dogmatic slumber. The "present sense impression"

exception never had any grounding in psychology. It entered American law in the nineteenth century, long before there was a field of cognitive psychology; it has neither a theoretical nor an empirical basis; and it's not even common sense—it's not even good folk psychology.

The Advisory Committee Notes provide an even less convincing justification for the second hearsay exception at issue in this case, the "excited utterance" rule. The proffered justification is "simply that circumstances *may* produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of *conscious* fabrication." The two words I've italicized drain the attempted justification of any content. And even if a person is so excited by something that he loses the capacity for reflection (which doubtless does happen), how can there be any confidence that his unreflective utterance, provoked by excitement, is reliable? "One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation." Robert M. Hutchins & Donald Slesinger, "Some Observations on the Law of Evidence: Spontaneous Exclamations," 28 *Colum. L.Rev.* 432, 437 (1928). (This is more evidence that these exceptions to the hearsay rule don't even have support in folk psychology.)

As pointed out in the passage that the majority opinion quotes from the McCormick treatise, "The entire basis for the [excited utterance] exception may ... be questioned. While psychologists would probably concede that excitement minimizes the possibility of reflective self-interest influencing the declarant's statements, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant's observation and judgement." 2 *McCormick on Evidence* § 272, p. 366 (7th ed.2013).

The Advisory Committee Notes go on to say that while the excited utterance exception has been criticized, "it finds support in cases without number." I find that less than reassuring. Like the exception for present sense impressions, the exception for excited utterances rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas.

I don't want to leave the impression that in questioning the present sense and excited utterance exceptions to the hearsay rule I want to reduce the amount of hearsay evidence admissible in federal trials. What I would like to see is Rule 807 ("Residual Exception") swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee. The "hearsay rule" is too complex, as well as being archaic. Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.

Page 539, add the following note after note 4:

4A. If the records of one entity contain records produced by another, are the latter necessarily considered "outsider" statements not encompassed by Rule 803(6)? According to the "so-called 'adoptive business records' doctrine," *United States v. Powers*, 578 Fed.Appx. 763, 778 (10th Cir. 2014), "a record created by a third party and integrated into another entity's records is

admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record and the other requirements of Rule 803(6) are satisfied." *Brawner v. Allstate Indem. Co.*, 591 F.3d 984, 987 (8th Cir. 2010). Is this, in fact, an exception to the normal interpretation of Rule 803(6), or is it treating the inner layer of hearsay (the records created by the third party) as an adoptive admission under Rule 801(d)(2)(B)? If the latter, however, the records would be admissible only when offered *against* the business entity that incorporated the records, yet the cases have not imposed such a limitation.

Page 550, add the following note after note 6:

6A. Note that the "legal duty to report" requirement of Rule 803(8)(A)(ii) need not be an *express* one, but instead can be implied from the nature of the public official's position. *See, e.g.*, *United States v. Lopez*, 762 F.3d 852, 862 (9th Cir. 2014) ("We have not interpreted the 'duty imposed by law' requirement to mean that a statute or regulation expressly imposes duties to observe, report, and keep records. Rather, it suffices if the nature of the responsibilities assigned to the public agency are such that the record is appropriate to the function of the agency.").

Page 561, add the following case immediately after *Moore v. Goode*:

Porter v. Quarantillo

722 F.3d 94 (2d Cir. 2013)

BARRINGTON D. PARKER, Circuit Judge….

BACKGROUND

[Randolph] Porter's brother died on Pan Am Flight 103, which was destroyed over Lockerbie, Scotland by Libyan terrorists on December 21, 1988. Under a settlement reached between the United States and Libya, Porter may have been entitled to compensation for his brother's death if he could show that he, Porter, was a U.S. citizen at the time of the Lockerbie bombing.

Porter was born in St. Vincent in 1955 and became a naturalized U.S. citizen in 1995. He argued…that he was entitled to derivative U.S. citizenship as of the time of his birth because his mother Mary Diamond was a U.S. citizen (as a consequence of having been born in this country) and had been present here for at least one continuous year before relocating to St. Vincent. *See* 8 U.S.C. § 1409(c) (1952) (establishing requirements for derivative citizenship)….

Porter relied on several affidavits to support his claim. One of these affidavits, submitted by his mother, Mary Diamond, stated that she was born in Brooklyn in 1929 and moved to St. Vincent in 1930 when she was "between one year old and two years old." Diamond's childhood friend in St. Vincent, Thomas Brown, also submitted an affidavit stating that when they were children, Mary Diamond told him that she moved from New York to St. Vincent "when she was about one and a half years old." According to Brown, it was "common knowledge" among people who knew Diamond during her childhood that she left the United States "when she was about one and a half years old." Finally, affidavits from Diamond's third cousin, Porter's siblings, and from Porter himself all stated, in substance, that it was Diamond's "reputation" among her family

members that she arrived in St. Vincent from the United States when she was approximately one and a half years old….

The district court ruled that the affidavits submitted by Porter were inadmissible hearsay assertions, not subject to the personal or family history exceptions in Rules 803(19) and 804(b)(4)…. The court then held that Porter had failed to prove that his mother had been present in the United States for at least one year before his birth, as required by § 1409(c), and that, consequently, he was not entitled to derivative citizenship….

DISCUSSION

….

Porter contends that his mother's declaration satisfies the hearsay exception permitting admission of certain statements "of personal or family history" when the declarant is unavailable.[2] *See* Fed.R.Evid. 804(b)(4). This provision exempts from the rule against hearsay statements about "(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, *or similar facts of personal or family history,* even though the declarant had no way of acquiring personal knowledge about that fact...." *Id.* (emphasis added).

Diamond's sworn statement—"[w]hen I was between one year old and two years old, I moved to St. Vincent and the Grenadines"—does not relate to her "birth, adoption, legitimacy, ancestry, marriage, divorce, [or] relationship by blood, adoption, or marriage." Instead, Porter argues that his mother's age at the time of her relocation from the United States is a "similar fact[ ] of personal or family history," within the meaning of Rule 804(b)(4)(A). We disagree.

The exception for statements of family history, like the other exceptions to the hearsay rule, is premised on the view that certain categories of statements are "'free enough from the risk of inaccuracy and untrustworthiness'" such that "the test of cross-examination would be of marginal utility." *Idaho v. Wright,* 497 U.S. 805, 819–20 (1990) (quoting 5 Wigmore on Evidence § 1420, p. 251 (J. Chadbourn rev. 1974)). Rule 804(b)(4) assumes that statements of family history "are likely to be informed by knowledge shared in common among family members on the basis of customs and understandings that are likely to be true." 5 Mueller & Kirkpatrick, Federal Evidence § 8:133, p. 224 (3d ed.2007).

Neither the Rules nor the Advisory Committee Notes define the scope of "similar facts of personal or family history," but the Supreme Court has instructed that "absent express provisions to the contrary," we may presume that the drafters of the Rules intended to "adhere to the common law in the application of evidentiary principles." *Tome v. United States*, 513 U.S. 150, 160-61 (1995). At common law, the scope of the exception for "declarations of family history" was defined by the following question: "Were the circumstances named in the statement such a marked item in the ordinary family history and so interesting to the family in common that statements about them in the family would be likely to be based on fairly accurate knowledge

[2] The parties agree that, because Mary Diamond passed away after this litigation began, she is "unavailable" for purposes of Rule 804. *See* Fed.R.Evid. 804(a)(4).

and to be sincerely uttered?" 5 Wigmore on Evidence § 1502, p. 400 (J. Chadbourn rev. 1974).

The Diamond affidavit does not meet this test. The affidavit fails satisfactorily to explain how the precise date of relocation was sufficiently significant or interesting or unusual such that it ever became—much less remained for more than eighty years—a subject of presumptively accurate family lore. The affidavit was offered not simply to prove that Diamond left the United States at an early age. The affidavit was offered to prove many years after the event a very narrow range of dates for her travel—a range about which she, because of her age, lacked personal knowledge. We do not believe that family members would ordinarily be so interested in Mary's exact age at relocation as to afford Diamond's imprecisely described but definitely bounded statement the level of inherent reliability required by Rule 804. In other words, although a change in one's country of residence or in one's citizenship might, like the date of one's birth, death, or marriage, be a matter of interest within a family, the district court was properly skeptical that generalized discussions of family history would include statements of age so precise as to foreclose the possibility that Mary was eleven months old but allow the possibility that she was thirteen months old at the time of her relocation, especially when, insofar as the record reflects, nothing appears to have turned on that precise date for the intervening several decades prior to Porter's pursuit of derivative citizenship status. Accordingly, we find no abuse of discretion in the district court's decision to exclude Diamond's affidavit.

Porter asserts that the other affidavits satisfy the parallel exception for statements about "reputation concerning personal or family history," a hearsay exception for which the declarant's availability is immaterial. Fed.R.Evid. 803(19). This provision exempts from the hearsay rule statements concerning a "reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, *or similar facts of personal or family history." Id.* (emphasis added). Statements are sufficiently trustworthy, and thus satisfy this exception, "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community." Fed.R.Evid. 803(19)-(21) advisory committee's note.

For the same reasons as those discussed above, we conclude that the district court did not abuse its discretion by ruling that statements of Diamond's family members and friend, concerning Diamond's precise age at relocation, were inadmissible hearsay. We see no reason for concluding that, without more, a statement about a child's age—precise to a range of months as to a time of relocation more than eighty years ago—is as inherently reliable as the types of statements that Rule 803 permits. *See* 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.21[1], p. 803–140 (J. McLaughlin ed., 2013) ("[A] false reputation as to birth, death, or marriage is not likely to arise at any time. However, there is a greater possibility of inaccuracy concerning other aspects of family history, such as an ancestor's travels."). Because Porter submitted no sufficient admissible evidence establishing his mother's age at relocation, we conclude that the district court correctly determined that Porter was not entitled to derivative citizenship….

Page 579, add the following note after note 2:

2A. For Rule 804(a)(3) to apply, it is irrelevant whether or not the declarant remembers making the very hearsay statement whose admissibility is at issue; what matters is that they lack a memory of the underlying events themselves. *See, e.g.*, *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1317 (11th Cir. 2013) ("Rule 804(a)(3) applies only if the declarant is unable to remember the 'subject matter,' i.e., if 'he has no memory of the events to which his hearsay statements relate.' The fact that the witness does not remember making the statements themselves is irrelevant.").

Page 607, add the following at the end of note 4:

What if there is evidence that the declarant had actual knowledge of the against-interest nature of her statement? *See United States v. Lozado*, 776 F.3d 1119, 1127 (10th Cir. 2015) ("Crediting the declarant's actual knowledge of the statement's self-inculpatory nature is compatible with the Rule's text. Rule 804(b)(3)(A) calls on courts to assess whether a statement is against interest from the standpoint of 'a reasonable person in the declarant's position.' Fed.R.Evid. 804(b)(3)(A). If there is proof of the declarant's actual knowledge, 'a reasonable person in the declarant's position' would have the declarant's actual knowledge.").

Page 615, add the following note after note 7:

8. Is it relevant that the statement at issue in *Williamson* was made in a custodial setting? In other words, does *Williamson*'s holding excluding non-self-inculpatory statements apply in non-custodial factual contexts? *See United States v. Ebron*, 683 F.3d 105, 133 (5th Cir. 2012) (so holding, reasoning that "[u]nlike the situation where a declarant implicates himself and the defendant in a statement made to officials, a statement made outside a custodial context does not provide the same set of incentives that create the risk of an unreliable statement.").

Page 644, replace note 1 with the following:

1. To admit prior out-of-court testimonial statements without having the declarant appear as a witness and be subject to cross-examination, the *Crawford* opinion— unlike *Roberts*— pretty clearly requires *both* a prior opportunity for cross-examination *and* unavailability. Only one hearsay exception, that for former testimony (804(b)(1)) requires both of those, and so statements that satisfy that exception should also satisfy *Crawford*. *See United States v. Avants*, 367 F.3d 433, 445 (5th Cir. 2004). That means, does it not, that testimonial statements that satisfy the *minimum* requirements of any other hearsay exception (save for those that *require* the declarant to appear as a witness and be subject to cross-examination) will *not* satisfy *Crawford*?

On the flip side, Rule 804(b)(1) also requires that there was a "similar motive" to cross examine the declarant in the earlier proceeding, a requirement not found in *Crawford*. *See United States v. Paling*, 580 Fed. Appx. 144, 148 (3d Cir. 2014); *United States v. Hargrove*, 382 Fed. Appx. 765, 778 (10th Cir. 2010)). That means, does it not, that this requirement could be eliminated from Rule 804(b)(1) and the rule invoked against the accused in a criminal case without offending the

Confrontation Clause?

Page 674, add the following case immediately after *Michigan v. Bryant*:

Ohio v. Clark

2015 WL 2473372 (2015)

JUSTICE ALITO delivered the opinion of the Court.

Darius Clark sent his girlfriend hundreds of miles away to engage in prostitution and agreed to care for her two young children while she was out of town. A day later, teachers discovered red marks on her 3–year–old son [L.P.], and the boy identified Clark as his abuser. The question in this case is whether the Sixth Amendment's Confrontation Clause prohibited prosecutors from introducing those statements when the child was not available to be cross-examined. Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial….

I

….

At trial, the State introduced L.P.'s statements to his teachers as evidence of Clark's guilt, but L.P. did not testify. Under Ohio law, children younger than 10 years old are incompetent to testify if they "appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Ohio Rule Evid. 601(A) (Lexis 2010). After conducting a hearing, the trial court concluded that L.P. was not competent to testify. But under Ohio Rule of Evidence 807, which allows the admission of reliable hearsay by child abuse victims, the court ruled that L.P.'s statements to his teachers bore sufficient guarantees of trustworthiness to be admitted as evidence.

Clark moved to exclude testimony about L.P.'s out-of-court statements under the Confrontation Clause. The trial court denied the motion, ruling that L.P.'s responses were not testimonial statements covered by the Sixth Amendment….

II

A

….

Our more recent cases have labored to flesh out what it means for a statement to be "testimonial." In *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006), which we decided together, we dealt with statements given to law enforcement officers by the victims of domestic abuse….

Announcing what has come to be known as the "primary purpose" test, we explained:

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.,* at 822. Because the cases involved statements to law enforcement officers, we reserved the question whether similar statements to individuals other than law enforcement officers would raise similar issues under the Confrontation Clause. See *id.,* at 823, n. 2.

In *Michigan v. Bryant,* 562 U.S. 344 (2011), we further expounded on the primary purpose test. The inquiry, we emphasized, must consider "all of the relevant circumstances." *Id.,* at 369. And we reiterated our view in *Davis* that, when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." 562 U.S., at 358. At the same time, we noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Ibid.* "[T]he existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry." *Id.,* at 374. Instead, "whether an ongoing emergency exists is simply one factor ... that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.,* at 366.

One additional factor is "the informality of the situation and the interrogation." *Id.,* at 377. A "formal station-house interrogation," like the questioning in *Crawford,* is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. *Id.,* at 366, 377. And in determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.,* at 358–359. In the end, the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Id.,* at 358. Applying these principles in *Bryant,* we held that the statements made by a dying victim about his assailant were not testimonial because the circumstances objectively indicated that the conversation was primarily aimed at quelling an ongoing emergency, not establishing evidence for the prosecution. Because the relevant statements were made to law enforcement officers, we again declined to decide whether the same analysis applies to statements made to individuals other than the police. See *id.,* at 357, n. 3.

Thus, under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.,* at 359. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. We have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. See *Giles v. California,* 554 U.S. 353, 358–359 (2008); *Crawford,* 541 U.S., at 56, n. 6, 62. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.

B

In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L.P.'s statements clearly were not made with the primary purpose of creating evidence for Clark's prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

L.P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. When L.P.'s teachers noticed his injuries, they rightly became worried that the 3–year–old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L.P. to his guardian at the end of the day, they needed to determine who might be abusing the child. Thus, the immediate concern was to protect a vulnerable child who needed help. Our holding in *Bryant* is instructive. As in *Bryant,* the emergency in this case was ongoing, and the circumstances were not entirely clear. L.P.'s teachers were not sure who had abused him or how best to secure his safety. Nor were they sure whether any other children might be at risk. As a result, their questions and L.P.'s answers were primarily aimed at identifying and ending the threat. Though not as harried, the conversation here was also similar to the 911 call in *Davis*. The teachers' questions were meant to identify the abuser in order to protect the victim from future attacks. Whether the teachers thought that this would be done by apprehending the abuser or by some other means is irrelevant. And the circumstances in this case were unlike the interrogation in *Hammon,* where the police knew the identity of the assailant and questioned the victim after shielding her from potential harm.

There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect L.P. At no point did the teachers inform L.P. that his answers would be used to arrest or punish his abuser. L.P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation between L.P. and his teachers was informal and spontaneous. The teachers asked L.P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized station-house questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon*.

L.P.'s age fortifies our conclusion that the statements in question were not testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system….Thus, it is extremely unlikely that a 3–year–old child in L.P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.

As a historical matter, moreover, there is strong evidence that statements made in circumstances

similar to those facing L.P. and his teachers were admissible at common law. And when 18th-century courts excluded statements of this sort, see, *e.g., King v. Brasier,* 1 Leach 199, 168 Eng. Rep. 202 (K.B.1779), they appeared to do so because the child should have been ruled competent to testify, not because the statements were otherwise inadmissible. It is thus highly doubtful that statements like L.P.'s ever would have been understood to raise Confrontation Clause concerns. Neither *Crawford* nor any of the cases that it has produced has mounted evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding. Certainly, the statements in this case are nothing like the notorious use of *ex parte* examination in Sir Walter Raleigh's trial for treason, which we have frequently identified as "the principal evil at which the Confrontation Clause was directed." *Crawford,* 541 U.S., at 50; see also *Bryant,* 562 U.S., at 358.

Finally, although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. See *id.,* at 369. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. See, *e.g., Giles,* 554 U.S., at 376. It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality. In light of these circumstances, the Sixth Amendment did not prohibit the State from introducing L.P.'s statements at trial.

III

Clark's efforts to avoid this conclusion are all off-base. He emphasizes Ohio's mandatory reporting obligations, in an attempt to equate L.P.'s teachers with the police and their caring questions with official interrogations. But the comparison is inapt. The teachers' pressing concern was to protect L.P. and remove him from harm's way. Like all good teachers, they undoubtedly would have acted with the same purpose whether or not they had a state-law duty to report abuse. And mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.

It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. The statements at issue in *Davis* and *Bryant* supported the defendants' convictions, and the police always have an obligation to ask questions to resolve ongoing emergencies. Yet, we held in those cases that the Confrontation Clause did not prohibit introduction of the statements because they were not primarily intended to be testimonial. Thus, Clark is also wrong to suggest that admitting L.P.'s statements would be fundamentally unfair given that Ohio law does not allow incompetent children to testify. In any Confrontation Clause case, the individual who provided the out-of-court statement is not available as an in-court witness, but the testimony is admissible under an exception to the hearsay rules and is probative of the defendant's guilt. The fact that the witness is unavailable because of a different rule of evidence does not change our analysis….

[The concurring opinions of Justices Scalia and Thomas are omitted.]

Chapter 10: Impeachment and Rehabilitation of Witnesses

Page 800, add the following case immediately after *Firemen's Fund Ins. Co. v. Thien:*

United States v. Davis

779 F.3d 1305 (11th Cir. 2015)

HINKLE, District Judge….

I

A jury convicted the defendant Jerry Thomas Davis of possessing an unregistered short-barreled shotgun in violation of 26 U.S.C. § 5861(d). He now appeals.

The background is this. Hanceville is a small city in Alabama. Its police department received a 911 report that Mr. Davis pointed a sawed-off shotgun at another person. The report gave a residential address.

Officers Anthony Childress and Jady Pipes separately traveled to the address. They were on the lookout for a red Pontiac Grand Am. Mr. Pipes saw a red Grand Am drive down the street but turn around in a driveway just before reaching the address at issue. Mr. Pipes saw the driver of the Grand Am throw something out the driver's window, over the car, into a yard. The Grand Am sped away, running stop signs. Mr. Pipes gave chase with lights and sirens activated. He eventually succeeded in stopping the Grand Am about a mile away. Mr. Davis was the Grand Am's driver and sole occupant.

When Mr. Childress arrived and went forward with the arrest, Mr. Pipes returned to the yard to look for the object thrown from the Grand Am. He eventually found the short-barreled shotgun that led to Mr. Davis's conviction.

II

Mr. Pipes was a sworn officer who routinely performed some of the same duties as other Hanceville officers. But Mr. Pipes held the position of "chaplain," not only with the police department but also with the city itself. Before trial, Mr. Davis moved to exclude testimony that Mr. Pipes was the "chaplain," to bar the government from referring to Mr. Pipes as "chaplain," and to prevent Mr. Pipes from appearing with these parts of his official uniform: a large, plainly visible cross on his hat and much smaller crosses on his badge and lapel….

The court ruled that Mr. Pipes could testify to his title and that the government could refer to him that way. The court ruled that Mr. Pipes could not wear the large cross but could wear the other crosses, which were too small to be seen or recognized from the jury box.

The trial proceeded accordingly. Mr. Pipes was the government's first and most important witness. He was the only person who saw an object thrown from the car, so the case turned largely on his credibility.

On appeal, Mr. Davis asserts that allowing evidence that Mr. Pipes was a "chaplain"—and allowing the government to refer to him that way—violated Rule 610. Mr. Davis has abandoned any complaint about the crosses….

Rule 610 is entitled "Religious Beliefs or Opinions." The rule provides in full: "Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility."

By its terms, the rule excludes evidence only when two conditions are both satisfied. First, the evidence must be evidence of a witness's "religious beliefs or opinions." Second, the evidence must be offered "to attack or support the witness's credibility." Evidence of religious beliefs or opinions may be admitted for another purpose.

Mr. Davis falls short in both respects.

The government offered no evidence of Mr. Pipes's "religious beliefs or opinions." In his argument to this court, Mr. Davis does not say—because on this record he cannot know—what religion Mr. Pipes adheres to. Mr. Davis does not discuss—because on this record he cannot know—Mr. Pipes's religious beliefs. Nobody said a word to the jury, in testimony or in argument, about Mr. Pipes's "religious beliefs or opinions."

All that was proved was that Mr. Pipes held the position of chaplain. Most chaplains, though not necessarily all, believe in a deity and adhere to an organized religion. But Mr. Pipes did not say whether this was true for him. And if he does adhere to an organized religion, Mr. Pipes did not say which one, or what he believes. (To be sure, while on duty Mr. Pipes wore a cross, a symbol associated with some religions but not others. The jury did not, however, learn of the cross.)

In trials across the country every day, countless witness examinations begin by having the witness tell the jury where the witness works. If the witness has a title, it almost always comes out. This background information is provided not "to attack or support the witness's credibility," but simply to introduce the witness….

Rule 610 does not codify a bias against those who hold jobs that may be related to religion. So just as a witness who is a builder or grocer or pharmacist can testify to the job the witness holds, so can a chaplain. Or even a priest.

Mr. Davis asserts—probably correctly—that the government wished for the jury to consider Mr. Pipes's position in assessing his credibility. But the government never said that. And in any event, juries every day undoubtedly consider a witness's job in assessing the witness's testimony. Considering a witness's job is not the same thing as considering the witness's "religious beliefs or opinions." ….

In analyzing this issue, it bears noting that Rule 610 applies to defendants as well as the government. If, instead of a police chaplain called by the government, the witness was an alibi witness called by the defendant, and the alibi witness was a priest, would we say the defendant

could not ask the priest what he does for a living?

Similarly, Rule 610 applies in civil as well as criminal cases. In an ordinary car-wreck case, if a witness was a priest, or a secretary at the church, would we keep this from the jury? What would it tell the jury if every witness but these two—the priest and the secretary—disclosed their jobs? Or would we say that, in a case with a priest and church secretary on the witness list, *no* witness's job could be proved?

Mr. Davis has cited no case, and we are aware of none, suggesting that just asking a witness's job violates Rule 610. We also can find no case explicitly holding that asking a witness's job does *not* violate Rule 610. We suspect the reason is that witnesses who hold jobs related to religion routinely disclose their jobs, just as other witnesses do, without objection and without controversy….

That Rule 610 does not preclude disclosure of a witness's job does not mean that a district court is without tools to control improper use of this kind of evidence. Federal Rule of Evidence 403 allows a court to exclude evidence "if its probative value is substantially outweighed by a danger of ... unfair prejudice." This is a far better tool for dealing with issues of this kind.

Thus, for example, Rule 403 would have allowed exclusion of this witness's title—on the ground that the limited probative value of identifying the witness as a chaplain rather than only as an officer was substantially outweighed by the danger of unfair prejudice—while allowing disclosure of a witness's job in other circumstances. If Rule 610 is held to apply to a witness's job, in contrast, exclusion of the job will be mandatory; the rule does not allow the more nuanced analysis contemplated by Rule 403.

Here the district court easily could have concluded that Mr. Pipes's position as chaplain should be excluded under Rule 403. And under that rule or the court's inherent authority, the district court could have directed the government not to use "chaplain" in addressing Mr. Pipes. It would have been easy to substitute "officer."

But the district court addressed this at the outset of the trial. What seems clear in hindsight is rarely so clear from the beginning. In any event, a district court has broad discretion under Rule 403 and on matters of this kind. Mr. Davis did not cite Rule 403 as a basis for his "chaplain" objection and has not invoked Rule 403 on appeal. The district court did not abuse its broad discretion under that rule….

Page 804, add the following case immediately before *United States v. Beauchamp*:

United States v. Boswell

772 F.3d 469 (7th Cir. 2014)

BAUER, Circuit Judge….

On June 20, 2012, a federal grand jury returned a single-count indictment charging Boswell with being a felon in possession of two firearms (two revolvers) on January 26, 2011….

Boswell chose to take the stand. On direct examination, he admitted to having a number of felony convictions…. Boswell denied ever possessing any guns subsequent to his first felony conviction and, in doing so, stated, "I don't mess with weapons." …. The government then sought permission from the district court to ask Boswell about a tattoo of a firearm (a revolver) that he had on his neck. After the district court overruled defense counsel's objection to the proposed inquiry, the cross-examination of Boswell proceeded as follows:

> Government: I believe you testified on your direct that you don't even like guns, correct?
>
> Boswell: Yes, sir.
>
> Government: Not since your grandfather committed suicide, correct?
>
> Boswell: Yeah.
>
> Government: Well, if you don't like guns so much, why do you have a tattoo of one up there on your neck?
>
> Boswell: Because it's back in the westerns. I like to gamble; and it's part of a western thing with cards, poker and dice.
>
> Government: But you do have a tattoo of a revolver, correct?
>
> Boswell: I have a tattoo of a 4–barrel Dillinger, yes, sir.
>
> Government: On your neck?
>
> Boswell: Yes.
>
> Government: A person who doesn't like guns?
>
> Boswell: I got it before my grandfather passed away, yes, sir.

In its closing argument….the government highlighted his…firearm tattoo to demonstrate that his testimony had been dishonest….

As discussed above, Boswell chose to waive his Fifth Amendment right and testify in his own defense. On direct examination, Boswell was asked, "Have you possessed any firearms since you obtained your first felony conviction?" To which he responded, "No, sir. I don't mess with weapons." Boswell further stated on direct, "I'm a fighter. I don't use weapons." On cross-examination, the government sought to elicit testimony from Boswell regarding a tattoo of a revolver that he had inked to his neck. In a bench conference, the following exchange took place:

> Government: I'll ask this. I believe the defendant indicated on his direct testimony that he doesn't like guns, that ever since his grandfather committed suicide he doesn't like them. I'm

> going to inquire as to his tattoo.... I think that goes to his credibility, which he's made an issue by taking the stand.
>
> Defense Counsel: It's too much of a stretch between a picture of a gun and a gun.... [j]ust because he owns a picture of a gun and it happens to be on his skin I don't think is enough of a connection to impeach it as that.
>
> The Court: I don't think it's otherwise objectionable. I think it's fair game.

On appeal, Boswell insists that the district court committed reversible error in permitting the government's proposed line of inquiry regarding his firearm tattoo….

Given the "low threshold" that Rule 401 comprehends for establishing that evidence is relevant, Boswell faces a significant obstacle in contending that the firearm tattoo testimony should have been barred as irrelevant.

The government maintains, as it did before the district court, that the firearm tattoo inquiry was relevant to impeach Boswell's credibility, which he put in issue when he elected to testify. The district court accepted the government's position….

The rule is well established that when a criminal defendant elects to testify in his own defense, he puts his credibility in issue and exposes himself to cross-examination, including the possibility that his testimony will be impeached. Boswell chose to testify and, by doing so, he thrust his credibility in issue. The government, in turn, was entitled to impeach Boswell's testimony, i.e., cast doubt upon his credibility as a witness. Impeachment can be effected in a number of ways, including contradiction, which involves presenting evidence that the substance of a witness's testimony is not to be believed. Therefore, the question for us to resolve is whether the government's firearm tattoo-related inquiry had any tendency to impeach, or cast doubt upon, the truthfulness of Boswell's trial testimony. *See* Fed.R.Evid. 401. As we view the matter, it did.

Boswell, in defending himself on direct examination, sought to cast himself as someone who steers clear of guns, asserting "I don't mess with" and "I don't use" weapons—guns, in this case. Such a strategy was not without risk, however. By portraying himself as someone who generally does not associate with guns, Boswell "opened the door" for the government to cross-examine and impeach him on that testimony. And, that's what the government did on cross-examination. After Boswell affirmed the government's characterization of his direct testimony as stating he did not "like guns," the government asked him about his firearm tattoo. Although it may well be impossible to ascertain an individual's subjective motive or reasons for getting any particular image memorialized on his or her skin, this does not render the firearm tattoo testimony without impeachment value, as Boswell seems to claim. Rather, a jury may draw a number of reasonable inferences from the tattoo evidence. Prominent among such inferences is that Boswell maintained some degree of association with, or affinity for, guns—an inference which casts doubt upon his testimony that he does not "mess with" or "like" guns. Given the "low threshold" that Rule 401 comprehends, we cannot say that the district court abused its discretion when it allowed the government to ask Boswell about his firearm tattoo….

Page 807, add the following note after note 6:

7. In *Boswell*, the parties do not raise and the court does not address the applicability of the collateral matter rule. Had the defendant raised the issue, how would the court likely have disposed of it?