UNDERSTANDING EVIDENCE
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Chapter 1

OVERVIEW OF EVIDENCE LAW

§ 1.01 Introduction

Lee Harvey Oswald either shot President Kennedy or he did not. This is an important question, but for trial lawyers, the question is whether a party — here, the prosecution — could have proved Oswald's guilt at a trial. This is where the rules of evidence come into play. They govern how we go about the task of attempting to determine what occurred in the past, often under circumstances of uncertainty. What if there were no eyewitnesses to a crime? What if there were two eyewitnesses, but they disagreed?

This chapter introduces the subject of “proof” at trial and then examines one way to classify the rules of evidence. Next, the Federal Rules of Evidence — their enactment and interpretation — are considered. Finally, some basic themes in evidence law are briefly explored.

§ 1.02 Proof at Trial

There are some basic issues that any system of proof would need to confront. We, of course, will focus on the adversarial system used in this country.1

Burdens of proof. A fundamental issue involves the allocation of burdens of proof: the burden of persuasion and the burden of production.2 What if the evidence adduced at trial is insufficiently persuasive under some defined standard? Who should lose the case? Moreover, in defining the burden of persuasion do we want to favor one party over another by placing a thumb on the scales of justice, so to speak? There are two types of errors that can be made in a criminal case: (1) false positives — convicting the innocent, and (2) false negatives — acquitting the guilty. As a policy matter, we want to avoid the former more than the latter, and thus, we use a higher standard in criminal cases, i.e., proof beyond a reasonable doubt. The same policy issue is absent in civil litigation. Thus, a preponderance of evidence standard is used because the system is expensive and we do not want a tie at the end of a one week, one month, or one year trial. Special procedural rules, called presumptions, assist parties in meeting their burdens of proof.3

1 Our system of proof is very different from the system used in civil law countries in Europe and elsewhere. See Damaska, Presentation of Evidence and Factfinding Precision, 123 U. Pa. L. Rev. 1083 (1975); Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823 (1985); Van Kessel, Adversary Excesses in the American Criminal Trial, 67 Notre Dame L. Rev. 403 (1992).

2 See infra chapter 4 (burdens of proof).

3 Fed. R. Evid. 301. See infra chapter 5 (presumptions & inferences).
“Housekeeping” rules. We also need some “housekeeping” rules. In offering evidence, who should go first? Who goes second and does the first party have a right to rebut? The order of trial is: (1) plaintiff (prosecution) case-in-chief, (2) defense case-in-chief, (3) plaintiff rebuttal, and (4) defense surrebuttal. The party with the burden of production goes first because if that party fails to meet that burden, the trial can end with a directed verdict right then. In examining witnesses, the same issues arise: who examines first, second, and should there be any further examination? The answer: (1) direct examination, (2) cross-examination, (3) redirect examination, and (4) recross examination.

Testimonial proof. In the common law system, proof typically comes in the form of witness testimony. The first issue is who should be considered a competent witness. Another issue is the credibility of witnesses, i.e., their worthiness of belief. Some witnesses lie, but more often witnesses are inaccurate for other reasons, such as poor eyesight, unconscious bias, or a poor opportunity to observe. Efforts to diminish a witness’s credibility fall under the rubric of “impeachment.”

Lay witnesses. Evidence law makes a distinction between ordinary witnesses (called “lay” or “fact” witnesses) and experts. As for lay witnesses, the primary rule is that they testify based on their personal observations — the “firsthand knowledge” rule. For example, persons who were not physically present at a bank robbery should not testify about how the bank was robbed based merely on their speculation. We want an eyewitness.

Hearsay. If the eyewitness from the bank robbery tells another person about the robbery, should that other person be allowed to testify about the robbery as a mere conduit? The hearsay rule says “no.” We need to be able to cross-examine the eyewitness about what that person saw. For present purposes, hearsay may be defined as an out-of-court statement offered for the truth of its assertion. Oh, yes, there really are 29 exceptions, but you need to know only about a dozen major exceptions.

Documentary evidence. In addition to testimony, proof may consist of documentary evidence. The use of writings at trial produced several rules. The first deals with authentication, which requires the offering party to establish that a document is what that party says it is. Assume the accused has signed a written confession in a criminal case. Evidence law typically rejects self-authentication, i.e., letting the document speak for itself. Thus, the prosecution would need to put a witness on the stand to

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4 See infra chapter 3 (stages of trial).
5 See infra chapter 20 (examination of witnesses).
6 See infra chapter 18 (witness competency).
7 See infra chapter 22 (credibility of witnesses).
8 See infra chapter 23 (lay witnesses); chapter 24 (expert testimony).
10 See infra chapters 31–35 (hearsay rule & a bunch of exceptions).
11 Fed. R. Evid. 901. See infra chapter 28 (authentication of writings).
authenticate the confession — here, the detective who obtained the confession could testify that the accused signed the confession in the detective’s presence. In addition, a person sufficiently familiar with the accused’s signature could identify that signature. Other methods of authentication include the “ancient document” rule and the “reply rule.” We also permit an expert or the jury to compare a document with known exemplars. In contrast, certain types of documents such as public records are self-authenticating, and the Federal Rules has expanded this category to include newspapers, trademarks, commercial paper, and so forth.

A second rule, known as the rule of completeness, allows a party to introduce a part of writing (or recording) immediately in order to place the writing in context if the other side has introduced a different part of the writing. A third rule comes into play when a party tries to prove the contents of a writing, which might be important in a contract dispute or will contest. Although the phrase original document rule is the more apt description, this rule is typically called the “best evidence” rule. In short, sometimes we want the original produced.

Real evidence. Another type of proof is referred to as “real” evidence. An example would be a murder weapon, such as a gun, knife, or baseball bat. Perhaps the prosecution wants to trace the murder weapon back to the accused. If so, the prosecutor would have to show that the gun seized at the murder scene was the same weapon the prosecutor was attempting to admit at trial, at which time a witness could identify it as the defendant’s gun. One way to do this is to establish the chain of custody for the gun.

Photographs. Typically, photographs are taken at a murder scene, and courts have long admitted them into evidence, provided a witness to the crime scene can testify that the photographs are an “accurate and fair representation” of the scene. The witness, who has firsthand knowledge of the scene, in effect, adopts the photograph as her testimony. This is known as the pictorial communication theory of admissibility. If this method is not possible (e.g., surveillance camera in an empty store), the pictures can be admitted through the testimony of a person familiar with

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12 The prosecution could not call the accused to authenticate the confession because of the Fifth Amendment privilege against compulsory self-incrimination. See infra § 43.05 (accused’s privilege at trial).
14 For example, I send you a letter and you reply. That’s it. See infra § 28.5[A] (reply rule).
15 Fed. R. Evid. 902.
16 Fed. R. Evid. 106. See infra chapter 29.
18 See infra chapter 26.
19 Fed. R. Evid. 901 covers real evidence as well as documentary evidence. Moreover, a chain of custody is not the only way to identify real evidence. For example, if the police officer who recovered the gun at the crime scene placed her initials on the weapon, the gun would be “readily identifiable” and thus admissible under most circumstances.
20 See infra chapter 27 (photographs, videos, computer simulations).
the operation of the surveillance system (the “silent witness” theory). Comparable rules were developed for movies and later applied to videotapes.

Demonstrations, models, etc. Models, blackboards, and charts may be used to illustrate testimony. In some cases, a witness may exhibit a scar or amputated arm to show the jury the result of an accident (in-court exhibition), or, perhaps demonstrate how she can no longer walk without a limp (in-court demonstration). Computer animations are now used for such illustrative purposes, although they can also be used for other purposes.

Judge & jury functions. In this system, we also need to allocate responsibility between the judge and jury. The jury decides the “facts,” which includes the credibility of witnesses. The judge decides the admissibility of evidence (once an objection is raised) and generally runs the trial.

§ 1.03 Law of Evidence

When first approached, evidence law can appear to be just a “bunch of rules” — and it is that. But there are several ways to classify the rules of evidence that may be of assistance. One way is by type of proof — testimonial, documentary, real, and so forth, as was done in the preceding section. Another way is to divide the subject into three major categories: (1) rules governing the substantive content of evidence, (2) rules governing witnesses, and (3) substitutes for evidence.

[A] Rules Governing the Content of Evidence

There are two main categories of evidentiary rules concerning the substantive content of evidence: relevance rules and competence rules.

[1] Relevance Rules

All evidence must be relevant. Irrelevant evidence is always inadmissible. Stated another way — relevancy is the threshold issue in deciding the admissibility of all evidence. There are an almost infinite variety of relevancy problems. Some situations have come before the courts so often that “rules of thumb” on admissibility have developed — e.g., “similar happenings,” “adverse inferences,” and “out-of-court experiments.” In other situations, categorical rules have resulted. For instance, character

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21 See infra chapter 26 (real & demonstrative evidence).
22 See infra chapter 2 (roles of judge & jury).
23 See infra chapter 6 (objections & offers of proof); chapter 7 (preliminary questions of admissibility).
24 The organization of the Federal Rules of Evidence is set forth infra § 1.04(D).
26 See infra chapter 9 (relevancy & its counterparts).
evidence is generally prohibited, although there are exceptions.\textsuperscript{27} Other relevance rules govern habit\textsuperscript{28} and insurance evidence.\textsuperscript{29}

\textbf{[2] Competence Rules}

Relevancy, however, is not enough. Relevant evidence may be excluded for various reasons. These reasons are found in competency rules, which can be divided into two subcategories.

\textbf{[a] Rules Based on Reliability Concerns}

Sometimes we exclude evidence because it is believed to be unreliable. The hearsay\textsuperscript{30} and “best evidence” rules are examples.\textsuperscript{31} Here, relevant evidence is inadmissible due to another evidentiary rule.

\textbf{[b] Rules Based on External Policies}

Competency rules may also be based on some policy extrinsic to the trial process—\textit{i.e.}, rules of privilege. We exclude communications between client and lawyer because we want to encourage such communications. Other common privileges include communications between spouses, doctors-patients, psychotherapists-patients, and clergy-communicants.\textsuperscript{32} Here, we exclude evidence that may be both relevant and reliable.

\textbf{[B] Rules Governing Witnesses}

Rules relating to witnesses can be divided into several categories: (1) competency of witnesses, (2) examination of witnesses, (3) types of witnesses (lay and expert), and (4) credibility of witnesses. These were briefly touched upon in the previous section.

\textbf{[1] Competency of Witnesses}

The competency of a witness (as opposed to the competence of the evidence discussed above) refers to the mental capacity of the witness to observe, recall, and relate what that witness has seen and the moral capacity to recognize the obligation to testify truthfully. At common law, competency rules excluded any person with an interest in the case (including the parties), children, the insane, and so forth. For the most part, these

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{27} Rules 404, 405, and 412–15 deal explicitly with character. See infra chapters 10–11.
\item\textsuperscript{28} Fed. R. Evid. 406. See infra chapter 12 (habit & routine practice).
\item\textsuperscript{29} Fed. R. Evid. 411. See infra chapter 17 (insurance). Another set of relevance rules are based on ancillary policies. Rules 407–410 all involve the exclusion of relevant evidence based on policy reasons external to the truth-seeking function of the trial. For example, subsequent remedial measures (Rule 407) are excluded in order to encourage people to make repairs after accidents. See infra chapters 13–16. The federal drafters placed these rules in Article IV, which is the relevancy article. However, these rules function as competence rules.
\item\textsuperscript{30} See infra chapters 31–35 (hearsay rule & exceptions).
\item\textsuperscript{31} See infra chapter 30 (best evidence rule).
\item\textsuperscript{32} See infra chapters 37–43 on privileges.
\end{itemize}
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rules have been transformed into credibility rules. Indeed, Federal Rule 601 states that everyone is competent to testify. Nevertheless, a few problems remain. Will a two-year old child be permitted to testify?

[2] Examination of Witnesses

As noted in the previous section, there are housekeeping rules governing the order of evidence presentation at trial and the order of witness examination (direct, cross, redirect, and recross). There, are additional rules. For example, “leading questions” are generally prohibited on direct examination but are allowed on cross-examination. Moreover, witnesses forget stuff, so we let them refresh their recollections with documents.

[3] Types of Witnesses

Evidence law divides witnesses into two categories — experts and lay witnesses; the latter are often called fact witnesses.

[a] Lay Witnesses

There are two principal rules relating to lay witnesses. First, lay witness testimony must be based on personal observations — i.e., “firsthand knowledge” rule. Second, we prefer witnesses to testify in terms of their primary sensory impressions rather than to opinions, inferences, or conclusions drawn from those perceptions. If possible, we prefer the witness to testify that the defendant drew a pistol, aimed it at the bank teller, and then fired the pistol, rather than: “The teller was killed in cold blood.” This is the much misunderstood “opinion rule.”

[b] Expert Witnesses

Some topics are beyond the common understanding of most lay jurors, and in such situations, we use expert witnesses to educate the jurors. For example, had the victim already died from a heart attack before the defendant negligently ran over the victim who was lying in the middle of the street? Here, a physician could provide the jury with helpful information. The use of experts requires a standard for defining the proper subject matter of expert testimony and a rule on who qualifies as an expert in

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33 See infra chapter 18 (witness competency). There is still an oath requirement (Rule 603) and we don’t want the judge or jurors testifying in the case. Rules 605 and 606(a).
34 See infra chapter 3 (stages of trial) & chapter 20 (examination of witnesses).
35 Fed. R. Evid. 611(c).
36 Fed. R. Evid. 612. See infra chapter 21 (refreshing recollection).
37 Fed. R. Evid. 602. See infra § 23.02 (firsthand knowledge rule).
38 Fed. R. Evid. 701. See infra § 23.03 (opinion rule).
39 See infra chapter 24 (expert testimony).
40 The subject matter of expert testimony raises two issue. Some types of evidence, such as the polygraph, may be considered too unreliable for courtroom use. The second issue involves testimony that is so common that a lay juror can handle the issue without the assistance of
that subject matter. In order to take advantage of the witness's expertise, the common law permitted an expert to testify in the form of an opinion, *e.g.*, “In my opinion, the victim died of a heart attack.”

In addition, a rule on the *bases* of expert testimony is required. Clearly, an expert with firsthand knowledge should be allowed to testify, *i.e.*, the physician who performed the autopsy. But what about a physician who was not present at the autopsy? Here, the common law dispensed with the firsthand knowledge requirement and provided the expert with the facts through the use of a *hypothetical question*, provided all the facts were established by other witnesses (facts in the record). The federal drafters went beyond the common law, permitting an expert to testify based on facts provided outside of court (nonrecord facts) if these facts are the type reasonably relied upon by experts in the field.

### [4] Credibility

Credibility is simply a witness’s worthiness of belief. Credibility may be viewed in three stages: (1) bolstering, (2) impeachment, and (3) rehabilitation. Credibility issues most often involve *impeachment*, *i.e.*, attempts to diminish or attack a witness’s credibility.

There are five main lines of attack: bias, untruthful character, sensory or mental defect, prior inconsistent statements (self-contradiction), and specific contradiction. There are no specific Federal Rules on bias or sensory-mental defect impeachment, but they are recognized in the cases. In addition, the common law had a special impeachment rule for experts — the “learned treatise” rule.

Bolstering and rehabilitation refer to attempts to support a witness’s credibility; the difference is one of timing — bolstering comes before, impeachment and rehabilitation after.

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41 Fed. R. Evid. 702.
42 See infra chapter 25 (bases of expert testimony).
43 Fed. R. Evid. 703.
44 See infra chapter 22 (credibility).
45 There are several different ways to prove untruthful character: (1) reputation or opinion evidence, Rule 608(a), (2) prior conviction, Rule 609, and (3) specific instances reflecting untruthful character that have not resulted in a conviction, Rule 608(b).
46 Fed. R. Evid. 613.
47 A prior inconsistent statement involves self-contradiction by one witness — *i.e.*, the prior statement is inconsistent with the witness’s trial testimony. Specific contradiction involves two different witnesses, *e.g.*, Smith testifies that the accused shot the victim, while Jones testifies that somebody else shot the victim.
48 There are other rules on impeachment. Rule 610 prohibits the impeachment use of a witness’s religious beliefs.
49 Fed. R. Evid. 803(18). See infra § 33.16 (learned treatise hearsay exception).
[C] Substitutes for Evidence

The party with the burden of production is obligated to introduce evidence to satisfy that burden. This obligation is excused in two circumstances: (1) where the judge takes judicial notice of a fact and (2) where the parties stipulate (agree) to a fact.

§ 1.04 Federal Rules of Evidence

Before the Federal Rules were enacted in 1975, evidence law was basically a common law subject. There were, of course, a few exceptions; the law of privilege was mostly statutory, and most jurisdictions had codified hearsay exceptions for business and official records.

Several efforts at codification had been attempted. In 1942, the American Law Institute promulgated the Model Code of Evidence. The Model Code, however, was considered so radical by the practicing bar that it was never adopted by any state. In 1953, the Commissioners on Uniform State Laws threw their hat into the ring, promulgating the Uniform Rules of Evidence. Although not as radical as the Model Rules, the Uniform Rules were adopted by only a few jurisdictions. In 1967, California ventured out on its own and enacted an Evidence Code, which continues to this day.

[A] Drafting the Rules

In 1961, a committee appointed by Chief Justice Earl Warren recommended the adoption of uniform Federal Rules of Evidence. Following the recommendation of this committee, the Chief Justice appointed an Advisory Committee to draft the Federal Rules in 1965. The Advisory Committee published a preliminary draft in 1969 and a revised draft in 1971. The

50 See infra chapter 44 (judicial notice).
51 See infra chapter 45 (stipulations).
52 Model Code of Evidence (1942). When the ALI undertook the task of clarifying the common law through its Restatement of Law project, the law of evidence was considered. The ALI abandoned this project because “however much that law needs clarification in order to produce reasonable certainty in its application, the Rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it.” Id. at viii.
53 See Uniform Rules of Evidence (1953). After the Federal Rules of Evidence were drafted, a new version, promulgated in 1974, was adopted; this version was patterned on the Federal Rules. The present version, which continues to follow the Federal Rules, was promulgated in 1999.
Federal Rules were promulgated by the Supreme Court in November 1972 and transmitted to Congress in February 1973.\(^58\)

[B] Congressional Intervention

Congress reacted by enacting legislation that deferred the effective date of the Federal Rules,\(^59\) and extensive hearings on the rules were held by both the House and Senate Judiciary Committees.\(^60\) In 1975, the Federal Rules emerged from Congress in statutory form.\(^61\) Congress had amended the Court-promulgated rules in a number of significant respects.\(^62\) The legislative history of these amendments is found in the various committee reports\(^63\) and in the Congressional Record.\(^64\)

[C] Amendment of the Rules

The Federal Rules have been amended numerous times since their adoption. There are two ways in which the Rules may be amended: (1) an act of Congress, and (2) promulgation by the Supreme Court through its statutory rulemaking authority, which is subject to congressional supervision. Both vehicles have been used to make amendments.\(^65\)

[D] Structure of Federal Rules

The Federal Rules are organized by Article:

- Article I: General Provisions (objections, offers of proof, etc.)
- Article II: Judicial Notice
- Article III: Presumptions
- Article IV: Relevancy (character, habit, remedial measures, etc.)
- Article V: Privileges
- Article VI: Witnesses (competency, impeachment, examination)
- Article VII: Opinions (lay opinions, expert testimony)
- Article VIII: Hearsay


\(^{62}\) The single most important example was the rejection of Article V, which contained thirteen rules of privilege. See infra § 37.02 (Federal Rule 501).


\(^{64}\) For a detailed history of the adoption of the Federal Rules, see 21 Wright & Graham, Federal Practice and Procedure § 5006 (1977).

Article IX  Authentication (documents, real evidence, etc.)
Article X  Original Document Rule (“best evidence rule”)
Article XI  Miscellaneous Rules (excepting certain proceedings such as grand juries from the Rules of Evidence) 66

§ 1.05  State Adoptions of the Federal Rules

Even before the Federal Rules of Evidence were adopted, some states enacted or promulgated evidence rules based on the preliminary and revised drafts of the Federal Rules. After the Federal Rules were proposed, a new version of the Uniform Rules of Evidence was promulgated (1974); this version was patterned on the Federal Rules and has been revised (1999). As of today, over forty jurisdictions, including the military, have rules patterned after the Federal Rules. Most states have made changes in the Federal Rules when adopting them; sometimes the changes have been extensive.

Even jurisdictions that have not adopted the Federal Rules in toto have sometimes accepted a single rule as part of that state’s common law. 67 For example, in Daye v. Commonwealth, 68 the Massachusetts Supreme Judicial Court adopted Federal Rule 801(d)(1)(A) on prior inconsistent statements as a matter of state common law.

As a federal statute not intended to preempt state law, the Federal Rules are not binding on the states. Thus, a state court is not required to interpret a state evidence rule, even one identical to its federal counterpart, in the same way that the federal rule is construed. For example, the Arizona Supreme Court declined to follow the Supreme Court’s decision in Daubert v. Merrell Dow Pharm., Inc. 69 That case involved an interpretation of Rule 702, which governs the admissibility of expert testimony. The state court noted that it was “not bound by the United States Supreme Court’s non-constitutional construction of the Federal Rules of Evidence when we construe the Arizona Rules of Evidence.” 70 The court also remarked: “Our rules . . . are court-adopted. While the United States Supreme Court considers congressional purpose, this court when construing a rule we have adopted must rely on text and our own intent in adopting or amending the rule in the first instance.” 71

66 The numbering of each rule corresponds to this framework. Because Article VIII governs hearsay, all the hearsay rules begin with the number 8 — for example, Rule 801 defines hearsay and Rules 803, 804, and 807 contain the hearsay exceptions.
67 The following states have not adopted the Federal Rules: Connecticut, Georgia, Illinois, Kansas, Massachusetts, Missouri, New York, and Virginia. California has its own code.
71 Id.
§ 1.06 INTERPRETING THE FEDERAL RULES: “PLAIN MEANING”

Federal Rule 102, the “purpose and construction” provision, provides: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” The goals set out in this rule (there are 5 or 6) often serve cross-purposes. Consequently, the rule is not particularly helpful.72

The principal problem concerns the relationship between the Rules and the common law. This raises two distinct issues. The first concerns “gaps” in the Rules, i.e., evidence issues not addressed by any rule. The second issue concerns the use of the common law in interpreting specific rules.

The “gap” problem. The Federal Rules were not intended to be a complete codification of all evidentiary rules. Professor Cleary, the Reporter for the Rules, wrote that Rule 102 indicates “one thing of importance: the answers to all questions that may arise under the Rules may not be found in specific terms in the Rules.”73 For example, no provision in the Rules governs the use of bias as a method of impeachment. Nevertheless, when the issue came before the Supreme Court in United States v. Abel,74 the Court held that impeachment of a witness for bias was proper. According to the Court, “the lesson to be drawn is that it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption.”75

The second issue concerns interpreting specific rules. There are numerous examples of the need to resort to the common law when interpreting the Rules of Evidence. For example, Rule 301 governs presumptions but does not define that term; the common law must be consulted.76 Rule 406 governs habit evidence but does not define what habit is; again the common law must be consulted.77 Rule 613 governs impeachment by prior inconsistent statements but provides no elaboration of the “inconsistency” requirement; there is a substantial body of evidence case law on this point.78 As Judge Becker and Professor Orenstein have commented: “Unquestionably, the Federal Rules coexist with unstated common law assumptions that were

72 (Nevertheless, it is good to have a Rule 102 to fill the gap between Rules 101 and 103.)
75 Id. at 51. As one court noted, “It is clear that in enacting the Federal Rules of Evidence Congress did not intend to wipe out the years of common-law development in the field of evidence, indeed the contrary is true. The new rules contain many gaps or omissions and in order to answer these unresolved questions, courts certainly should rely on common-law precedent.” Werner v. Upjohn Co., 628 F.2d 848, 856 (4th Cir. 1980).
76 See infra § 5.02 (presumptions defined).
77 See infra § 12.02 (habit defined).
78 See infra § 22.10[B] (inconsistency requirement).
never formally incorporated into the corpus of the Rules. The special relationship of the Federal Rules to the common law and the special expertise of the bench in evidentiary matters affect how the Rules should be interpreted.\footnote{Becker & Orenstein, The Federal Rules of Evidence After Sixteen Years — The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 Geo. Wash. L. Rev. 857, 868 (1992).}

The Supreme Court, however, has not seen it that way. It has often, but not always, espoused an almost mechanical “plain meaning” approach in construing the Rules of Evidence, treating the Federal Rules as any other statute. In one case, the Court wrote: “We interpret the legislatively enacted Federal Rules of Evidence as we would any statute.”\footnote{Daubert v. Merrell Dow Pharm., 509 U.S. 579, 587 (1993). To support its position, the Supreme Court has cited an article by Professor Cleary, the principal drafter. Cleary wrote: “In principle, under the Federal Rules of Evidence no common law of evidence remains. ‘All relevant evidence is admissible, except as otherwise provided.’ In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.” Cleary, supra note 72, at 915. However, other parts of Cleary’s article point in a different direction: “If what is meant is that meaning is to be ascertained by reading the statute with the aid only of a dictionary and such aphorisms of construction as noscitur a sociis and ejusdem generis as may be suitable, then it must be discarded as unrealistic.” Id. at 911.}

This approach has proved controversial. In a different case, Justice Blackmun criticized the Court for “espous[ing] an overly rigid interpretive approach; a more complete analysis casts significant and substantial doubt on the Court’s ‘plain meaning’ easy solution.”\footnote{Bourjaily v. United States, 483 U.S. 171, 187–88 (1987) (Blackmun, J., dissenting).} Commentators’ critiques are far stronger.\footnote{See Jonakait, Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence, 71 Ind. L.J. 551, 571 (1996) (“Sometimes we must look beyond the words of the Rules to understand evidentiary doctrine. We must do so when the Rules are not definitive or are ambiguous . . . but sometimes even when the text is clear.”); Jonakait, The Supreme Court, Plain Meaning, and the Changed Rules of Evidence, 68 Tex. L. Rev. 745, 786 (1990) (“Inevitably, the plain-meaning standard will produce worse evidence law by freezing evidence into a literalistic mold, by eliminating its dynamism, and by mandating results without any attempt to satisfy the policy goals of evidence law.”); Weissenberger, The Supreme Court and the Interpretation of the Federal Rules of Evidence, 53 Ohio St. L. J. 1307, 1338 (1992) (The Court’s approach “has recast the method of interpreting evidentiary principles in a manner that ignores the wisdom of the common-law history of the Federal Rules of Evidence and the capability of enlightened growth.”). But see Imwinkelried, A Brief Defense of the Supreme Court’s Approach to the Interpretation of the Federal Rules of Evidence, 27 Ind. L. Rev. 267 (1993).}

The Supreme Court in 1995 indicated an intent to place greater reliance on the common law as a source of guidance in interpreting the Federal Rules. In \textit{Tome v. United States},\footnote{513 U.S. 150 (1995).} a case involving the admissibility of a prior consistent statement under Rule 801(d)(1)(B), the Court concluded that the Rule preserved the common-law requirement that the statement had to predate the motive to fabricate. In reaching its conclusion, the Court relied upon the intent of the Advisory Committee: “The [Advisory Committee’s] Notes disclose a purpose to adhere to the common law in the...
application of evidentiary principles, absent express provisions to the contrary. Where the Rules did depart from their common-law antecedents, in general the Committee said so.”

The Court also acknowledged that the “common law of evidence was the background against which the Federal Rules were drafted.”

§ 1.07 Themes in the Federal Rules

One of the purposes listed in Federal Rule 102, the “purpose and construction” provision, is the ascertainment of truth. Although the truth-seeking function of the trial can be considered its main goal, it is not the only one. The law of privileges, for example, precludes the admissibility of evidence that may be both relevant and reliable. Practical considerations such as the consumption of time is also a counterweight.

Admissibility favored. Even when the ascertainment of truth is the goal, how to achieve that goal is often a matter about which reasonable people may disagree. Here, the federal drafters adopted several guiding principles. First, the Federal Rules are biased in favor of admissibility. When the drafters came to a split in the common law cases, they typically adopted the approach that was more permissive, even if it was the minority view. At other times, the drafters adopted both a majority and minority position. This theme is most pronounced in the rules on hearsay and expert testimony. This position is based on a view that juries are capable of dealing

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84 Id. at 160-61.
85 Id. at 157.
86 See also Portuondo v. Agard, 529 U.S. 61, 80 (2000) (dissenting opinion) (“truth-finding function of trials”); Tennessee v. Street, 471 U.S. 409, 415 (1985) (“there were no alternatives that would have ... assured the integrity of the trial’s truth-seeking function”); Funk v. United States, 290 U.S. 371, 381 (1933) (“And, since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.”).
87 See infra § 37.03 (rationale for privileges).
88 See Fed. R. Evid. 403 (relevant evidence may be excluded if its probative value is substantially outweighed by waste of time, undue delay, needless presentation of cumulative evidence); Fed. R. Evid. 611(a). Even Rule 102 recognizes other values: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”
89 See Fed. R. Evid. 803(4) (hearsay exception for statements made for medical treatment or diagnosis); Fed. R. Evid. 804(b)(3) (declarations against penal interests).
90 Several hearsay exceptions are illustrative. The drafters adopted both a present sense impression exception and excited utterance exception. Fed. R. Evid. 803(1) & (2). The Rules also contain a hearsay exemption for authorized admission and agent-servant admissions. Fed. R. Evid. 801(d)(2)(C) & (D).
with most types of evidence and would reach better decisions with more, rather than less, information.\textsuperscript{91}  

\textit{Trial judge discretion.} Another theme is judicial discretion. Although many trial lawyers want fixed rules, which they argue make evidence law more predictable, the drafters believed that too many unforeseen contingencies can arise at trial, and therefore the judge must be given leeway to shape the rules of evidence to deal with them. Rule 807, which recognizes a residual hearsay exception, is perhaps the best example.

Another issue worth considering is the conventional wisdom that much of the law of evidence is designed to keep information from the jury. This position can be traced to Professor Thayer, who wrote his classic text at the turn of the 20th Century.\textsuperscript{92} Professor Nance has challenged this view, arguing that many evidence rules are designed to force attorneys to introduce the “best evidence.” In short, attorney-control, not jury-control, is the underlying principle.\textsuperscript{93}

\section*{1.08 Criminal & Civil Trials}

Although the Rules of Evidence apply to both criminal and civil cases, a number of rules recognize a distinction between civil and criminal trials — explicitly or by implication. Several rules apply only to criminal proceedings. For example, Rule 104(c) requires an out-of-court hearing to determine the admissibility of a confession. Rule 404(a) recognizes three exceptions to the rule prohibiting the use of character evidence; two of the three exceptions apply only in criminal cases.\textsuperscript{94} Similarly, Rule 609(a) requires a special balancing test when a prior felony conviction is offered to impeach a criminal defendant; in all civil cases and for witnesses other than an accused in criminal cases, a prior felony conviction is admissible subject to a different balancing analysis (Rule 403). In effect, there is a higher threshold requirement when evidence of prior convictions is offered to impeach the accused. Another example is found in Rule 803(8), which contains a special limitation on the use of public records in criminal prosecutions.

On the other hand, a number of rules, due to their subject matter, apply only in civil cases — for example, Rule 407 (subsequent remedial measures) and Rule 411 (liability insurance).

\textit{Constitutional issues.} In criminal prosecutions, application of the Rules must be consistent with constitutional provisions that bear on evidentiary

\begin{footnotesize}
\begin{enumerate}
\item See Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended, 138 F.R.D. 631, 631 (1991) (“The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts.”). Judge Weinstein was on the drafting committee of the Federal Rules.
\item Thayer, A Preliminary Treatise on Evidence at the Common Law (1898).
\item Fed. R. Evid. P. 404(a)(1) (an accused may offer evidence of her own character); Fed. R. Evid. P. 404(a)(2) (an accused may offer evidence of the victim’s character in some circumstances).
\end{enumerate}
\end{footnotesize}
matters. For example, the Confrontation Clause may require the exclusion of hearsay statements even if a statement falls within a recognized hearsay exception.95

§ 1.09 Key Points

The Federal Rules of Evidence were enacted in 1975, and over forty jurisdictions, including the military, have rules patterned after the Federal Rules. As a federal statute not intended to preempt state law, the Federal Rules are not binding on the states. Thus, a state court is not required to interpret a state evidence rule, even one identical to its federal counterpart, in the same way that the federal rule is construed.

The paramount goal of a trial is truth-seeking, but that is not the only goal. The law of privileges, for example, precludes the admissibility of evidence that may be both relevant and reliable. Even when the ascertainment of truth is the goal, how to achieve that goal is often a matter about which reasonable people may disagree. Here, the federal drafters adopted several guiding principles. First, the Federal Rules are *biased in favor of admissibility*. Another theme is *judicial discretion*. Although many trial lawyers want fixed rules, which they argue are predictable, the drafters believed that too many contingencies can arise, and therefore the trial judge must be given leeway to shape the rules of evidence to deal with them.

*Civil & criminal cases.* Although the Rules of Evidence apply to both criminal and civil cases, a number of rules recognize a distinction between civil and criminal trials — explicitly or by implication. A number of rules, due to their subject matter, apply only in civil cases — for example, Rule 407 (subsequent remedial measures), and Rule 411 (liability insurance). Further differences in applicability in criminal and civil proceedings arise due to constitutional principles — *e.g.*, right of confrontation.

*Classification of Evidence Law*

Evidence law may be divided into three major categories: (1) rules governing the substantive content of evidence, (2) rules governing witnesses, and (3) substitutes for evidence.

1. **Rules Governing the Content of Evidence**
   A. **Relevance Rules**
      1. Character evidence
      2. Other acts evidence
      3. Habit evidence

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4. Insurance evidence

B. Competence Rules
1. Rules Based on Reliability Concerns
   a. Hearsay rule
   b. “Best evidence” rule
2. Rules Based on External Policies
   a. Privileges (e.g., attorney-client)
   b. Quasi privileges
      (1) Subsequent remedial measures
      (2) Offers of compromise
      (3) Payment of medical expenses

II. Rules Governing Witnesses
A. Competency of Witnesses
B. Examination of Witnesses
   1. Order of examination (direct, cross, redirect, recross)
   2. Leading questions
   3. Refreshing recollections
C. Types of Witnesses
   1. Lay witnesses
      a. Firsthand knowledge rule
      b. Opinion rule
   2. Expert witnesses
      a. Subject matter requirement
      b. Qualifications requirement
      c. Bases of expert opinions
D. Credibility of witnesses
   1. Bolstering
   2. Impeachment
      a. Bias
      b. Untruthful character
      c. Sensory or mental defect
      d. Prior inconsistent statements
      e. Specific contradiction
   3. Rehabilitation

III. Substitutes for evidence
A. Judicial notice of fact
§ 1.09 KEY POINTS

B. Stipulations