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Supreme Court, Plain Meaning, and the Changed Rules of Evidence

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I. Introduction

The Supreme Court has imposed the plain-meaning standard of statutory interpretation on the Federal Rules of Evidence. The Court has indicated that the plain language of the Rules now controls outcomes without regard to policy, history, practical operation of the law of evidence, or new conditions. The plain-meaning standard has the potential to create a new evidence law.

The Supreme Court, of course, did not invent the plain-meaning standard specifically for the Federal Rules of Evidence. More than fifty

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years before these Rules existed, for example, the Court, interpreting a criminal statute, stated:

> If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.
>
> . . . [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.[1]

Although the earliest formulations of the plain-meaning standard of statutory construction rigidly forbade all use of extrinsic interpretive aids when the meaning of a statute's words was plain,[2] this position has softened slightly.[3] Today, the standard requires courts to enforce a statute's literal language unless the legislative history of a provision explicitly indicates that the legislators intended another meaning.[4] Outside this nar-

1. Caminetti v. United States, 242 U.S. 470, 490 (1917). *Contra* United States v. Monia, 317 U.S. 424, 431 (1943) ("The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.").

2. *See* Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2, 5 (1939) ("The main effect of the rule in modern statutory interpretation . . . is that it bars resort to otherwise admissible extrinsic aids, evidencing the meaning or purpose of the enacting legislators, in cases which, in the judgment of the deciding court, fall within the scope of its operation.").

3. "The plain meaning rule has many formulations, but its essential aspect is a denial of the need to 'interpret' unambiguous language. . . . In the federal courts the most common effect of the rule has been to preclude resort to bits of legislative history such as reports, hearings, and debates." Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299-300 (1975) (footnote omitted); *cf.* Kelso & Kelso, *Appeals in Federal Courts by Prosecuting Entities Other Than the United States: The Plain Meaning Rule Revisited*, 33 HASTINGS L.J. 187, 208 (1981) ("[M]odern debate over the rule centers on the permissible use of extrinsic materials to determine legislative intent.").

4. "[S]tatutory construction 'must begin with the language of the statute itself,' " Bread Political Action Comm. v. FEC, 455 U.S. 577, 580 (1982) (quoting Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 187 (1980)), and " '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' " *Id.* (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); *see also* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 902 (1982) (concluding that "absent explicit authorization, the Court will not depart from statutory words"); *cf.* Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195-96 (1983) (arguing that the plain meaning of statutory language outweighs its legislative history). Judge Patricia M. Wald notes:

> When the plain meaning rhetoric is invoked, it becomes a device *not* for ignoring legislative history but for shifting onto legislative history the burden of proving that the words do not mean what they appear to say. . . . While the plain meaning rule does not preclude a detailed examination of legislative history, its invocation almost invariably signals that the legislative history will not meet the burden of rebutting the reading of the text that is "readily apparent" to the author of the opinion.

Id. (footnote omitted). For an example of a case in which the Court followed legislative history

row circumstance, the words' plain meaning controls.

The plain-meaning standard has been criticized. Some commentators contend that the search for plain meaning is illusory because words standing by themselves do not have a single meaning.

> Words do mean different things in different contexts. Holmes said: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." To stop at the purely literal meaning of a word, phrase, or sentence—if indeed the purely literal meaning can be found—ignores reality.[5]

The courts have also drawn criticism for their selective application of the plain-meaning standard. What Professor Harry Wilmer Jones said fifty years ago could be repeated today: "the doctrine is not followed invariably by the courts, and . . . the incidence of its application has been uncertain and unpredictable."[6]

Despite the force of these critical comments, the modern Supreme Court has applied the plain-meaning standard even when it has produced harsh results that the drafters and adopters of a particular statute did not intend. For example, in *Griffin v. Oceanic Contractors, Inc.*,[7] the Court followed the literal language of a federal statute in deciding that the trial court did not have discretion in calculating a wage penalty:[8]

> [T]he unadorned language of the statute dictates that the master or owner "*shall pay* to the seaman" the sums specified "*for each and*

because that history indicated a result contrary to the words of the statute, see Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 23-24 (1976).

5. Wald, *supra* note 4, at 199 (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918) (footnote omitted)); *see* Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 341 (1976). Professor John M. Kernochan comments:

> [T]he literal rule runs counter to the findings of student of the symbolic aspects of language. Pitched as it is in terms of *the* plain meaning of statutory words, it assumes that words may have a single necessary meaning independent of their full context, without regard to how those words were used. This is dangerous and unwise. At root, the literal approach puts the wrong question. The question in human interchanges is not what the words mean but what the user of the words meant by them.

Id. (footnote omitted). For an example of Supreme Court Justices splitting as to whether words had a plain meaning, see FBI v. Abramson, 456 U.S. 615, 625 n.7 (1982).

6. Jones, *supra* note 2, at 11. Jones concluded that "[i]n short, the plain meaning rule is applied or ignored, apparently at the discretion of the interpreting judges, and it is impossible to frame any generalization concerning the conditions of its applicability which will fit all of the cases." *Id.* at 17. Professor Arthur W. Murphy also observed that the cases give the impression that

> the courts have no clear idea about what the plain meaning rule is and, what is more, that they really do not care. Indeed, it frequently seems that some courts feel that recitation of the plain meaning rule in one of its forms is a compulsory rite, the meaning of which is lost in antiquity, and which, since it is essentially meaningless, can be supported by meaningless citation.

Murphy, *supra* note 3, at 1308; *cf.* Kernochan, *supra* note 5, at 343 (noting that "[t]he argument is sometimes made for the literal rule that its application is necessary to assure certainty in the law").

7. 458 U.S. 564 (1982).

8. *See* 46 U.S.C. § 596 (1982).

> *every day* during which payment is delayed." The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion in either deciding whether to exact payment or in choosing the period of days by which the payment is to be calculated.[9]

The Court's application of the literal meaning of the statute's words meant that an employer's refusal to pay 412 dollars in wages led to a recovery of over 300,000 dollars. Although the Justices characterized this result as absurd and not foreseen by Congress,[10] the majority concluded that "[i]t is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not."[11]

The plain-meaning standard also led to harsh and unforeseen results in *United States v. Locke*.[12] In that case, a family-held mining claim worth millions of dollars, which had been legally held and actively maintained for a score of years, was escheated to the Government.[13] The Federal Land Policy and Management Act of 1976,[14] requires a mining claim holder to file a yearly notice with the Bureau of Land Management "prior to December 31."[15] Locke filed his 1980 notice on December 31. Although Locke contended without contradiction that Bureau personnel had stated that the notice could be presented *on* December 31, the Court held that his filing violated the plain language of the statute, which indicated December 30 as the last permissible date.[16] The Court thus allowed the Government to take Locke's mining claim. Although this result was unfair, the Court concluded it was required by the statute's words:

9. *Griffin*, 458 U.S. at 570.

10. The dissent concluded that "since the result [that the plain-meaning] construction produces in this case is both absurd and palpably unjust, this is one of the cases in which the exercise of judgment dictates a departure from the literal text in order to be faithful to the legislative will." *Id.* at 586 (Stevens, J., dissenting). The majority conceded that "[i]t is probably true that Congress did not precisely envision the grossness of the difference in this case between the actual wages withheld and the amount of the award required by the statute." *Id.* at 576.

11. *Id. Griffin* rejected the argument that allowing the trial court discretion in setting the penalty would best serve the legislative purposes of the statute, noting that the contracting company "is unable to support this view of legislative purpose by reference to the terms of the statute." *Id.* at 571. Although the opinion conceded that "in rare cases the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, and those intentions must be controlling," *id.*, no better evidence of the legislative purpose exists than the words used to make up the statute. Only the truly "exceptional case" could cause a departure from the plain language. *Id.*

12. 471 U.S. 84, 96 (1985).

13. *Id.* at 89-91.

14. Pub. L. 94-579, 90 Stat. 2743 (current version codified at 43 U.S.C. §§ 1701-1784 (1982)).

15. 43 U.S.C. § 1744(a) (1982).

16. *Locke*, 471 U.S. at 96.

> the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. . . . Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result. . . . The phrase "prior to" may be clumsy, but its meaning is clear. Under these circumstances, we are obligated to apply the "prior to December 31" language by its terms.[17]

The Supreme Court is now also applying the plain-meaning standard to the Federal Rules of Evidence. The plain-meaning standard applied to the Rules will decide evidentiary controversies, reverse settled points of law, and produce some uncontemplated outcomes. The changes brought about by application of the plain-meaning standard will, of course, be the law until Congress acts. The plain-meaning standard will take away much of evidence law's dynamic quality, forcing courts to decide cases without considering evidentiary policy. None of the potential changes are too startling by themselves. But together the changed practices will significantly transform the evidentiary landscape into a topography unforeseen and unintended by those who drafted and adopted the Rules.

Part II of this Article traces the Supreme Court's application of the plain-meaning standard to particular provisions of the Federal Rules of Evidence. The Article then shows that the Court's logic indicates that the standard should be applied to the Rules in their entirety. In Part III, the Article presents illustrations of how the plain-meaning standard will affect specific, diverse portions of the Rules. Finally, the Article concludes with a discussion of the plain-meaning standard's general effect on federal evidence law.

II. The Supreme Court's Application of the Plain-Meaning Standard to the Federal Rules of Evidence

A. Bourjaily v. United States

The Supreme Court first applied the plain-meaning standard to the Federal Rules of Evidence in *Bourjaily v. United States*.[18] In that case, a drug seller's out-of-court statements implicated the defendant.[19] The Government claimed that these statements were admissible under Rule 801(d)(2)(E), which allows the admission of hearsay when the maker of

17. *Id.* at 95-96 (citation and footnote omitted).
18. 483 U.S. 171, 178-79 (1987).
19. *Id.* at 174.

the statement and the defendant are part of the same conspiracy and the statements are made in furtherance and during the course of the conspiracy.[20] The evidence could be admitted under this theory only if the prosecution first proved two facts: that a conspiracy existed and that the defendant was part of that conspiracy.[21] The question presented in *Bourjaily* was whether the disputed evidence itself, which was not admissible until the preliminary facts were established, could be used to help prove those preliminary facts.[22] The Supreme Court held that the disputed evidence could be used to help prove the preliminary facts because the plain language of the Rules mandated that result.[23]

The Court's conclusion—that presumptively inadmissible hearsay can be used to help make itself admissible—abolished a longstanding prohibition against such bootstrapping. Almost a half-century earlier, in *Glasser v. United States*,[24] the Supreme Court stated that coconspirator "declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."[25]

This prohibition against bootstrapping was so firmly ensconced that more than thirty years later, in *United States v. Nixon*,[26] the Supreme Court, without discussion, repeated it: "Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, *by independent evidence*, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy."[27]

Rule 104(a), however, states that "[p]reliminary questions concern-

20. "A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E).

21. The Court held that a preponderance of evidence was the proper burden to apply in determining whether the foundation facts had been established. *Bourjaily*, 483 U.S. at 176. The dissent agreed. *See id.* at 186 n.1 (Blackmun, J., dissenting).

22. The Court did not decide whether the preliminary facts could be established *solely* by the hearsay statements.

> We need not decide in this case whether the courts below could have relied solely upon [the coconspirator's] hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence. . . . It is sufficient for today to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted.

Id. at 181.

23. *Id.* at 178-79 & n.2.

24. 315 U.S. 60 (1942).

25. *Id.* at 74-75 (citations omitted).

26. 418 U.S. 683 (1974).

27. *Id.* at 701 (emphasis added).

ing . . . admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges."[28] The plain language of this Rule, which Congress adopted after the *Glasser* and *Nixon* decisions, specifically sanctions using inadmissible evidence in deciding preliminary factual questions that control admissibility of evidence. Taken on its face, Rule 104(a) permits the trial court to weigh the presumptively inadmissible hearsay in determining whether a conspiracy existed and whether the defendant was part of it; it permits the bootstrapping that *Glasser* and *Nixon* banned.

At the time of *Bourjaily*, however, the majority of the circuit courts continued to follow *Glasser* and *Nixon*.[29] The framers of the Federal Rules of Evidence, these courts reasoned, were well aware of the long-settled practice against such bootstrapping. When the drafters wished to change the traditional approach to an evidence rule, they said so. Because the drafters did not articulate an intent to change *Glasser*, their silence indicates that the bootstrapping ban was meant to and did survive the adoption of the Federal Rules.[30]

The *Bourjaily* majority, however, flatly rejected this reasoning. The Court instead concluded:

> It would be extraordinary to require legislative history to *confirm* the plain meaning of Rule 104. The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege. We think that the Rule is sufficiently clear that to the extent that it is inconsistent with . . . *Glasser* and *Nixon*, the Rule prevails.[31]

28. FED. R. EVID. 104(a); *see also* Bourjaily v. United States, 483 U.S. 171, 178 (1987) ("The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege.").

29. "The Courts of Appeals have widely . . . held that in determining the preliminary facts relevant to co-conspirators' out-of-court statements, a court may not look at the hearsay statements themselves for their evidentiary value." *Bourjaily*, 483 U.S. at 181. The dissent's survey concluded that only the First and the Sixth Circuit allowed the hearsay statements to be weighed in determining the preliminary facts while the Second, Third, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits did not. The D.C. and Seventh Circuits had not passed on the issue. *See id.* at 196 n.9 (Blackmun, J., dissenting).

30. *See, e.g.*, *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 261 (3d Cir. 1983) (concluding that neither Rule 801(d)(2)(E) nor Rule 104(a) "was intended to change the settled law that there must be independent proof *aliunde* of the existence of and membership in a conspiracy before coconspirator statements are admissible against a party"), *rev'd on other grounds sub nom.* Matsushita Elecs. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978) (rejecting the suggestion "that the new Federal Rules of Evidence have altered the requirement that the admissibility of a coconspirator's statement be determined on evidence exclusive of the statement itself" and concluding, "[w]e believe that the requirement of independent evidence is an important safeguard, however, and therefore adhere to our traditional rule.").

31. *Bourjaily*, 483 U.S. at 178-79. Then-Justice Rehnquist, who wrote the Court's opinion in

Although the Court could have interpreted the legislative history in a manner that preserved the prohibition against bootstrapping that had been in effect before the Rules were adopted,[32] the Court instead simply chose to follow the literal words of Rule 104(a). In *Bourjaily*, then, the plain language of the Rule prevailed even though the contrary practice had been long and widely accepted and even though nothing in the legislative history showed any intention to change that practice. Plain meaning won out over both evidentiary history and legislative silence.

B. Huddleston v. United States

The Supreme Court again applied the plain-meaning standard to the Federal Rules of Evidence in *Huddleston v. United States*.[33] The question presented was whether the trial court properly admitted testimony as evidence of a similar act or prior crime under Rule 404(b),[34] which forbids the introduction of such evidence for the purpose of establishing the defendant's character, but does not prohibit it when introduced for

Bourjaily, took the opposite view of legislative silence when he wrote the majority opinion in Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981). *McNary* involved a suit under 42 U.S.C. § 1983 for damages for the allegedly unconstitutional administration of a state tax. The Tax Injunction Act, 28 U.S.C. § 1341 (1982), expressly bars federal courts from enjoining the collection of state taxes, but it does not prohibit a federal damages claim. Rehnquist noted that comity principles would relegate the plaintiffs to state court, but also noted "that comity does not apply where § 1983 is involved." *McNary*, 454 U.S. at 105. Even though the plain language of § 1983 allowed the money claim and even though the plain language of the Tax Injunction Act and its legislative history show no intent to bar such claims, Rehnquist relied on the absence of an express legislative statement to reverse the previous practice prohibiting the federal action: "Neither the legislative history of the Act nor that of its precursor . . . suggests that Congress intended that federal-court deference in state tax matters be limited to the actions enumerated in those sections. Thus, the principle of comity which predated the Act was not restricted by its passage." *Id.* at 110 (citations omitted); *see also* Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 23-24 (1976) (refusing to enforce the literal language of a statute because those words would have required a "significant alteration" of past practices and the legislative history did not clearly indicate that the change was intended).

32. The dissenters in *Bourjaily* concluded that the legislative history affirmatively indicated the preservation of the antibootstrapping rule. After tracing the difficulties of finding a good rationale for the admission of coconspirator statements, they noted that the advisory committee adopted the common law's agency rationale.

> The Advisory Committee, however, expressed its doubts about the agency rationale and, on the basis of these doubts, plainly stated that the exemption should not be changed or extended: "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." In light of this intention *not* to alter the common-law exemption, the Advisory Committee's Notes thus make very clear that Rule 801(d)(2)(E) was to include *all* the components of this exemption, including the independent-evidence requirement.

Bourjaily, 483 U.S. at 193-94 (Blackmun, J., dissenting) (citation omitted) (quoting FED. R. EVID. 801 advisory committee's note); *see also id.* at 194 n.8 (asserting that "[i]n particular, the [legislative] history indicates that the independent evidence requirement was understood to be retained in the Rule").

33. 485 U.S. 681, 687-88 (1988).

34. *See id.* at 682.

some other purpose.[35]

Huddleston was charged with selling and possessing stolen video cassette tapes. He contended that he did not know that the goods were stolen. The prosecution introduced evidence that he had previously sold televisions at very low prices.[36] Huddleston conceded that this disputed evidence was relevant as to whether he knew the tapes were stolen and, thus, admissible to show his state of mind.[37] Yet, the evidence was probative of Huddleston's state of mind only if the televisions had been stolen.[38] Huddleston contended that, because evidence of a prior crime—theft of televisions—might lead to undue prejudice and an unfair conviction, the prosecution should have to convince the trial court by a preponderance of the evidence that the sets had been stolen before testimony about them could be admitted.[39]

Huddleston's position had solid support. Many courts had imposed special standards for the admission of evidence under Rule 404(b) because evidence of other crimes presents unique dangers to a fair verdict.[40] Such evidence is so powerful that jurors are likely to misuse the evidence.

> Unless one is willing to make the almost certainly mistaken assumption that the jury can follow instructions and consider other

35. Rule 404(b) provides:

> . . . *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404(b).

36. *Huddleston*, 485 U.S. at 683.

37. *See id.* at 686.

38.

> The Government's theory of relevance was that the televisions were stolen, and proof that petitioner had engaged in a series of sales of stolen merchandise from the same suspicious source would be strong evidence that he was aware that each of these items, including the Memorex tapes, was stolen. As such, the sale of the television was a "similar act" only if the televisions were stolen.

Id. (footnote omitted).

39. Huddleston's brief argued that the similar act had to be proved by clear and convincing evidence. At oral argument, Huddleston's counsel conceded that such a position was untenable in light of *Bourjaily*. *See id.* at 687 n.5.

40. *Huddleston*'s own survey of the circuits concluded:

> The First, Fourth, Fifth, and Eleventh Circuits allow the admission of similar act evidence if the evidence is sufficient to allow the jury to find that the defendant committed the act. Consistent with the Sixth Circuit, the Second Circuit prohibits the introduction of similar act evidence unless the trial court finds by a preponderance of the evidence that the defendant committed the act. The Seventh, Eighth, Ninth, and District of Columbia Circuits require the Government to prove to the court by clear and convincing evidence that the defendant committed the similar act.

Id. at 685 n.2 (citations omitted); *cf.* C. MUELLER & L. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 508 (1988) ("Most other acts proved pursuant to FRE 404(b) are themselves crimes, and most courts require the government to prove these extrinsic offenses by 'clear and convincing evidence.' ").

> crimes evidence only for the limited purpose on which it is admitted, the dangers which the propensity rule is designed to guard against exist when other crimes evidence is admitted for any purpose.[41]

Thus, if jurors are likely to misuse evidence of other crimes, extraordinary care must be taken to ensure fair and accurate determinations.[42]

A unanimous Supreme Court, however, once again applied the plain-meaning standard and rejected the argument that special criteria should be applied for the admission of evidence of other crimes. The Court concluded that Huddleston's position was "inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b). . . . The text [of 404(b)] contains no intimation . . . that any preliminary showing is necessary before such [extrinsic act] evidence may be introduced for a proper purpose."[43] Instead, the Court continued, evidence of other crimes should be treated like any other question of conditional relevancy.[44] The evidence about the televisions only tended to establish Huddleston's guilt if the jurors first found that the televisions were in fact stolen. When the relevance of one piece of evidence is conditioned or dependent on the finding of another fact, the Court concluded, the trial court, in determining whether the evidence should be admitted, does not determine whether the foundation fact exists.[45] Instead, the

41. R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 220 (2d ed. 1982) (footnote omitted). Courts and other commentators have reached similar conclusions. *See, e.g.*, United States v. Byrd, 352 F.2d 570, 574 (2d Cir. 1965) (noting that "there can be no complete assurance that the jury even under the best of instructions will strictly confine the use of [evidence of other crimes] to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar criminal act, probably committed the one with which he is actually charged"); G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.15, at 162 (2d ed. 1987) (discussing "the great potential for prejudicial consequences inherent in other crimes evidence"). Because of the important consequences of admitting this sort of evidence, no "part of the law of evidence is more litigated than that having to do with the admissibility of evidence of other crimes." J. WEINSTEIN, J. MANSFIELD, N. ABRAMS & M. BERGER, EVIDENCE: CASES AND MATERIALS 959 (8th ed. 1988) [hereinafter J. WEINSTEIN].

42. *See* FED. R. EVID. 102 ("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.").

43. *Huddleston*, 485 U.S. at 687-88. This time the Court also went on to indicate that the legislative history of Rule 404(b) supported the plain language of the Rule. *See id.* at 688-89.

44. *See id.* at 688. Questions of conditional relevancy arise whenever jurors can treat evidence as relevant only if they first find some other fact to exist: "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. . . . Such questions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b)." *Id.* at 689. Rule 104(b) provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." FED. R. EVID. 104(b).

45. *See Huddleston*, 485 U.S. at 690.

court merely decides whether the jury could find that it exists.[46] If the jury in its deliberation then finds that the preliminary fact was established, it will treat the evidence as relevant and weigh it. If the jury finds that the preliminary fact was not proved, it will disregard the evidence.

The Court reached its result in *Huddleston* by mechanical application of the Rule's literal language. The Court did not acknowledge the impossible task it was assigning to juries,[47] or even consider that a contrary result may have better served federal evidence policy. The Court did not examine which approach was most likely to achieve accurate fact determinations.[48] Just as plain meaning won out in *Bourjaily* over evidentiary history and legislative silence, the plain-meaning standard triumphed in *Huddleston* over the overarching policy concerns of the Rules themselves.[49]

C. United States v. Owens

The Supreme Court again applied the plain-meaning standard in *United States v. Owens*.[50] Owens was tried for a brutal attack on a prison guard.[51] The guard suffered severe memory loss, and at trial he could not identify his assailant or remember the assault.[52] He did remember

46. *See id.*

47. *See supra* note 41 and accompanying text.

48. The *Huddleston* Court did, however, note:

> We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

Huddleston, 485 U.S. at 691-92 (citations and footnote omitted).

49. At times, the Supreme Court has taken the opposite approach; it has ignored a statute's literal words in favor of overarching policy concerns. For a prime example, see Lehman v. Lycoming, 458 U.S. 502 (1982). In that case, the Court addressed whether a natural mother could maintain a habeas corpus challenge to a state's placement of her children in foster care. *See id.* at 505-09. Although it conceded that both the words and past interpretations of the federal habeas statute supported the argnment that foster care was "custody" within the statute's meaning, the Court held that the mother could not invoke federal jurisdiction, stating:

> The federal writ of habeas corpus, representing as it does a profound interference with state judicial systems and the finality of state decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns. Congress has indicated no intention that § 2254 encompass a claim like that of petitioner.

Id. at 515-16 (footnote omitted).

50. 484 U.S. 554, 561-62 (1988).

51. *Id.* at 556.

52. *Id.*

and the trial court allowed him to testify, however, that he had previously identified the defendant as his attacker.[53] The subsequent cross-examination revealed only that the guard did not recall the crime and remembered almost no details about his identification of Owens.[54]

The trial court admitted the guard's testimony under Rule 801(d)(1)(C),[55] which exempts from the hearsay-ban evidence of out-of-court identifications when the identifier is subject at trial to cross-examination concerning the statement.[56] Owens contended that because the guard had no memory of the assault, Owens could not cross-examine him within the meaning of 801(d)(1)(C).[57] The Ninth Circuit, relying on the policy underlying the Rule, agreed and held that prior identification evidence may be admitted only when the declarant can be cross-examined about the basis of the identification.[58]

> The cross-examination requirement of Rule 801(d)(1)(C) is intended to permit the opposing party to explore the trustworthiness of the extra-judicial statement of identification. . . . In order to explore adequately the trustworthiness of the prior identification, and thereby satisfy the purpose of the Rule, the opposing party must be permitted to cross-examine the declarant on the facts and circumstances underlying the identification. . . .
>
> . . . We conclude that [the guard's] inability to answer questions on cross-examination prevented appellant from adequately exploring the basis for [the guard's] out-of-court identifications and that the jury did not have sufficient grounds for evaluating the correctness of those identifications.[59]

Because the guard's memory loss prevented meaningful cross-exam-

53. *Id.*

54. The appeals court gave the following description of the guard's cross-examination:

> On cross-examination, Foster [the guard] reaffirmed his inability to recount the details of the attack. When asked if he remembered making any statements during his hospitalization, Foster testified that the only statements he remembered making were the statements of identification made to Mansfield [an investigator]. Defense counsel sought to refresh Foster's recollection with certain hospital records indicating that while he was hospitalized Foster had alternately disclaimed knowledge of his attacker and attributed the assault to someone other than Owens. However, Foster was still unable to remember making any statements other than the ones to Mansfield. Similarly, Foster was unable to remember any visitors other than Mansfield, nor could he remember whether any of these visitors had suggested that Owens had been his assailant. Finally, Foster reaffirmed that he could "vivid[ly]" recall his statement to Mansfield and that at the time he made the statement, he knew why he had identified Owens. However, he was unable to remember any fact or reason that had caused him to state that Owens was the assailant.

United States v. Owens, 789 F.2d 750, 753 (9th Cir. 1986), *rev'd*, 484 U.S. 554 (1988).

55. *See Owens*, 484 U.S. at 557 n.1.

56. *See* FED. R. EVID. 801(d)(1)(C) (providing that a statement of identification of a person is not hearsay if made after perception, at trial or a hearing, and when subject to cross-examination concerning the statement).

57. *Owens*, 484 U.S. at 561.

58. *Owens*, 789 F.2d at 756.

59. *Id.* at 756-57.

ination, the guard's testimony was inadmissible hearsay. Without even discussing the purpose of the cross-examination requirement, the Supreme Court rejected the Ninth Circuit's analysis.[60] As long as the evidence meets the plain, facial requirements of the Rule, according to the Court, it is admissible.[61] Prior identification evidence is admissible as long as the declarant testifies under oath and answers questions at trial, even if the declarant cannot meaningfully testify about the crime or the identification.

> [T]he more natural reading of "subject to cross-examination concerning the statement" includes what was available here. Ordinarily a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and responds willingly to questions. . . . [L]imitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the rule no longer exists. But that effect is not produced by the witness's assertion of memory loss . . . . Rule 801(d)(1)(C), which specifies that the cross-examination need only "concer[n] the statement," does not on its face require more.[62]

Plain language again controls. The Rule on its face just requires that the declarant be "subject to cross-examination" about his prior statement. The words do not demand the ability to examine the declarant about the basis for his identification. Because the witness took the oath and answered all questions about the identification to the best of his ability, the defendant was not deprived of his right to cross-examine the declarant. The fact that the cross-examination was virtually meaningless did not matter to the Court because the cross-examination satisfied the plain language of the Rule. The Court made no effort to determine the purpose of the Rule's cross-examination restriction. The plain meaning of the words was more significant in deciding the content of an eviden-

60. The Court did say:

> Congress plainly was aware of the recurrent evidentiary problem at issue here—witness forgetfulness of an underlying event—but chose not to make it an exception to Rule 801(d)(1)(C).
>
> . . . The premise for [the] Rule . . . was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications . . . [and] their use was to be fostered rather than discouraged. . . . To judge from the House and Senate Reports, Rule 801(d)(1)(C) was in part directed to the very problem here at issue: a memory loss that makes it impossible for the witness to provide an in-court identification or testify about details of the events underlying an earlier identification.

Owens, 484 U.S. at 562-63. The Court did not explain or discuss why, then, the Rules contain any cross-examination requirement. If the Court's observations are correct, the Rules should have made evidence of prior identifications an unqualified exception to the hearsay rule.

61. *See id.* at 562.

62. *Id.* at 561-62.

tiary provision than the specific policies that caused the drafters to use those words.

D. Green v. Bock Laundry Machine Co.

The one recent Supreme Court case that does not rigidly follow the literal language of the Federal Rules of Evidence is *Green v. Bock Laundry Machine Co.*[63] Bock, the defendant in a products liability suit, impeached the plaintiff's testimony by eliciting the fact that plaintiff had been convicted of felonies. On appeal, the plaintiff contended that the trial court should have excluded the impeaching evidence.[64] This contention required an interpretation of Rule 609(a)(1), which states that evidence of a felony conviction "shall be admitted" to impeach the testimony of a witness if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[65] Applying the plain meaning of this Rule in civil cases would mean that evidence of convictions could always be used to impeach a plaintiff. The Rule only allows the evidence to be excluded when the court determines that the prejudice from the evidence *to the defendant* outweighs its probative value and impeaching the plaintiff will not prejudice the defendant.[66] On the other hand, the Rule's plain meaning would permit such impeaching evidence of a civil defendant to be excluded because the prejudicial effect to the defendant of this impeachment might not be outweighed by its probative value. The Court noted that this strange imbalance between the rights of civil plaintiffs and defendants could have no sensible purpose and was probably unconstitutional.[67]

63. 109 S. Ct. 1981, 1984 (1989).

64. *See id.* at 1983.

65.

> For the purpose of attacking the credibility of a witness, evidence that the witness had been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant . . . .

FED. R. EVID. 609(a).

66. Justice Stevens, writing for the majority, noted:

> The Rule's plain language commands weighing of prejudice to a defendant in a civil trial as well as in a criminal trial. But that literal reading would compel an odd result in a case like this. Assuming that all impeaching evidence has at least minimal probative value, and given that the evidence of plaintiff's convictions had some prejudicial effect on his case—but surely none on defendant Bock's—balancing according to the strict language of Rule 609(a)(1) inevitably leads to the conclusion that the evidence was admissible. In fact, under this construction of the Rule, impeachment detrimental to a civil plaintiff always would have to be admitted.

Green, 109 S. Ct. at 1984-85.

67. *See id.*

Consequently, the Court held that the Rule could not mean what its literal words stated:

> No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant. The Sixth Amendment to the Constitution guarantees a criminal defendant certain fair trial rights not enjoyed by the prosecution, while the Fifth Amendment lets the accused choose not to testify at trial. In contrast, civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause. . . . [C]ivil litigants almost always must testify in depositions or at trial. . . . Evidence that a litigant or his witness is a convicted felon tends to shift a jury's focus from the worthiness of the litigant's position to the moral worth of the litigant himself. It is unfathomable why a civil plaintiff—but not a civil defendant—should be subjected to this risk. Thus we agree with the Seventh Circuit that as far as civil trials are concerned, Rule 609(a)(1) "can't mean what it says."[68]

While *Green* is a rejection of the plain-meaning standard in this particular instance, the Court gave no indication that it was doing anything more than temporarily abandoning the standard. Instead, all the Justices indicated that the unique circumstances of this specific Rule required plain meaning to be momentarily set aside to avoid an irrational result that probably would have been unconstitutional.[69]

68. *Id.* at 1985 (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987)) (footnote omitted). On January 26, 1990, the Supreme Court promulgated an amended Rule 609 (a). If Congress does not act, the amended Rule will take effect on December 1, 1990. The new Rule's language comports with the Court's interpretation in *Green*, providing:

> General rule.—For the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

58 U.S.L.W. 3490 (Feb. 6, 1990).

69. Justice Scalia concurring in the judgment stated:

> We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. . . .
>
> . . . .
>
> The word "defendant" in Rule 609(a)(1) cannot rationally (or perhaps even constitutionally) mean to provide the benefit of prejudice-weighing to civil defendants and not civil plaintiffs. Since petitioner has not produced and we have not ourselves discovered even a snippet of support for this absurd result, we may confidently assume that the word was not used (as it normally would be) to refer to all defendants and only all defendants.

Id. at 1994 (Scalia, J., concurring). Justice Blackmun in dissent, joined by Justices Brennan and Marshall, also concluded that the provision could not mean what it said on its face. *See id.* at 1995 (Blackmun, J., dissenting).

The majority, after concluding that plain meaning did not control, extensively examined the

E. United States v. Zolin

United States v. Zolin[70] indicates that the abandonment of the plain-meaning standard was, indeed, temporary as the Court, only one month after *Green*, again relied on that standard in its interpretation of the Federal Rules of Evidence.[71] The Internal Revenue Service sought tapes, claimed to be protected by the attorney-client privilege, but which the IRS contended fell within the crime-fraud exception to that privilege.[72] The lower courts found the tapes to be privileged without listening to them *in camera* as the IRS had contended should have been done.[73]

The Supreme Court noted that Rules 104(a) and 1101(c), which indicate that privileges apply to all stages of proceedings and that privileges must be honored in determining whether a privilege exists, might seem to forbid a court from reviewing communications between an attorney and client when deciding whether that communication is privileged.[74] The Court noted, however, that this interpretation would lead to the absurd situation in which the crime-fraud exception could almost never be established.[75] The unanimous Court[76] then went on to reject that restrictive

provision's legislative history and concluded that Rule 609(a)(1) requires a trial judge to admit impeachment by prior felony convictions of all civil witnesses regardless of the prejudice resulting to the party offering the testimony. For a criticism of this result, especially as it will affect prisoner civil rights suits, see *The Supreme Court, 1988—Leading Cases*, 103 HARV. L. REV. 137, 300-10 (1989). Significantly, the Supreme Court's recent amendment to Rule 609(a) requires a Rule 403 balancing analysis before witnesses, other than criminal defendants, may be impeached by evidence of prior convictions. *See* 58 U.S.L.W. 3490 (Feb. 6, 1990). For the text of amended Rule 609, see *supra* note 61.

70. 109 S. Ct. 2619 (1989).

71. *See id.* at 2628.

72. The Federal Rules of Evidence do not create any privileges. Instead, Rule 501 states that when federal rights are adjudicated in federal courts privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501. The Court has accepted a privilege for confidential attorney-client communications, but not for advice which counsels future wrongdoing—the "crime-fraud" exception to the attorney-client privilege. *See Zolin*, 109 S. Ct. at 2625-26.

73. *See id.* at 2623.

74.

> At first blush, two provisions of the Federal Rules of Evidence would appear to be relevant. Rule 104(a) provides: "Preliminary questions concerning the qualification of a person to be a witness, *the existence of a privilege*, or the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence *except those with respect to privileges* . . . . Rule 1101(c) provides: "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." Taken together, these Rules might be read to establish that in a summons-enforcement proceeding, attorney-client communications cannot be considered by the district court in making its crime-fraud ruling: to do otherwise, under this view, would be to make the crime-fraud determination without due regard to the existence of the privilege.

Zolin, 109 S. Ct. at 2627-28.

75. The Court noted:

> Even those scholars who support this reading of Rule 104(a) acknowledge that it leads to an absurd result . . . .
>
> . . . "There is virtually no way in which [the crime-fraud] exception can ever be

reading, concluding that it is not consistent with the provision's clear meaning:

> We find this Draconian interpretation of Rule 104(a) inconsistent with the Rule's plain language. The Rule does not provide by its terms that all materials as to which a "clai[m] of privilege" is made must be excluded from consideration. In that critical respect, the language of Rule 104(a) is markedly different from the comparable California evidence rule, which provides that "the presiding officer may not require disclosure of information *claimed to be privileged* under this division in order to rule on the claim of privilege." There is no reason to read Rule 104(a) as if its text were identical to that of the California rule.[77]

Together, *Bourjaily*, *Huddleston*, *Owens*, *Green*, and *Zolin* indicate that when a Rule has clear language,[78] the plain-meaning standard will now control outcomes under the Federal Rules of Evidence unless the literal language would produce an unfathomable result that is probably unconstitutional. The Court has applied the plain-meaning standard to diverse Rules, even though it produced results that conflict with those mandated by evidentiary history and widely accepted by lower courts. The plain-meaning standard controls without any determination of the purpose for a Rule's specific restriction. All nine Supreme Court Justices

> proved, save by compelling disclosure of the contents of the communication; Rule 104(a) provides that this cannot be done."

Id. at 2628 (quoting 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5055, at 276 (1977)).

76. Justice Brennan did not participate. *Id.* at 2620.

77. *Id.* at 2628 (quoting CAL. EVID. CODE § 915(a) (West 1966 & Supp. 1989)) (citation and footnote omitted). The Court went on to hold that upon a factual showing to support a reasonable, good-faith belief that the crime-fraud exception applied, the trial court could engage in an *in camera* examination of the communications between an attorney and client to see if the communications were privileged and that the party opposing the privilege could use any nonprivileged evidence to support its request for the *in camera* review. *Id.* at 2631-32.

78. Beech Aircraft Corp. v. Rainey, 109 S. Ct. 439 (1988), illustrates the obvious point that if a Rule does not have a plain meaning, the plain-meaning standard cannot be applied. The issue in that case was whether Rule "803(8)(C), which provides an exception to the hearsay rule for public investigatory reports containing 'factual findings,' extends to conclusions and opinions contained in such reports." *Id.* at 443. The Court indicated that its analysis went beyond examining the language of the provision only because those words did not have an inescapable plain meaning:

> Because the Federal Rules of Evidence are a legislative enactment, we turn to the "traditional tools of statutory construction," in order to construe their provisions. We begin with the language of the Rule itself. . . .
>
> . . . To say the least, the language of the Rule does not compel us to reject the interpretation that "factual findings" includes conclusions or opinions that flow from a factual investigation. Second, we note that, contrary to what is often assumed, the language of the Rule does not state that "factual findings" are admissible, but that "*reports* . . . setting forth . . . factual findings" (emphasis added) are admissible. On this reading, the language of the Rule does not create a distinction between "fact" and "opinion" contained in such reports.

Id. at 446-47 (citations omitted). Only after reaching these conclusions about the relevant language did the Court go on to examine the Rule's legislative history, the practicality of competing interpretations, and the policy effects of its conclusion. *See id.* at 447-50.

subscribe to this standard.[79] If the reasoning and rationales of Supreme Court decisions are to be taken seriously,[80] then the Court has clearly indicated that the plain-meaning standard now controls the interpretation of all the Federal Rules of Evidence.

The plain-meaning standard, however, has not controlled all applications of the Federal Rules of Evidence. Instead of always following the precise language of a Rule, courts have many times based their interpretations on legislative history, the common law, and evidentiary policies.[81] That, of course, should change now that literalism is preeminent. Litigators, judges, and scholars should reexamine the entire Federal Rules of Evidence in light of the Supreme Court's plain-meaning standard. A greatly changed evidence law will result.

III. Hypothetical Applications of the Plain-Meaning Standard to the Federal Rules of Evidence

A. The Notice Requirement of the Residual Hearsay Exceptions

The plain-meaning standard gives an answer to a continuing controversy over the notice requirement of the residual hearsay exceptions. The notice requirement provides:

> [A] statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name

79. *Huddleston*, for example, was a unanimous decision. *See* Huddleston v. United States, 485 U.S. 681, 682 (1988).

80. If the Supreme Court's reasoning is not taken seriously there are other plausible explanations for the Court's Federal Rules of Evidence decisions. For example, one could cynically conclude that the controlling force of the major plain-meaning decisions is simply that in each case the Government won and a criminal defendant lost. More neutrally, one might note that each recent Supreme Court interpretation of the Federal Rules of Evidence allows the wider admission of evidence, a policy that the Court may favor. In spite of the Court's explanations for its outcomes, plain meaning might not control the results; instead the standard may have been selected to justify outcomes that were reached for other reasons. *See* Murphy, *supra* note 3, at 1315. Murphy observes:

> Anyone who has ever taught legislation will attest to the speed with which his students become totally cynical about the courts' good faith when interpreting statutes. It does not take many instances of the same judge's embracing legislative history in one case and rejecting it in another to convince the already skeptical student that courts decide first how they want the ease to come out and then find the evidence to support the result.

Id.

81. *See* Werner v. Upjohn Co., 629 F.2d 848, 856 (4th Cir.) (arguing that in order to fill gaps and omissions in the Federal Rules of Evidence, both the policies behind the Rule and its common-law basis must be examined), *cert. denied*, 449 U.S. 1080 (1980); S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL at xlii (4th ed. 1986) (noting that the advisory committee notes "contain[] a wealth of authority to which Judges and lawyers may wish to refer to understand the Rule . . . . Moreover, it is the beginning of a 'legislative' history that is all important in understanding how the final draft came into being").

and address of the declarant.[82]

The notice requirement prevents surprise to the adversary.[83] It guarantees the opponent a reasonable chance to combat the hearsay. This purpose, of course, might be satisfied in some cases even if the notice is not given in advance of trial. Not unexpectedly, the majority of courts considering the question have rejected a rigid interpretation of the provision when the goal of the notice requirement can still be met.[84] For example, one court wrote:

> We believe that the purpose of the rules and the requirement of fairness to an adversary contained in the advance notice requirement of Rule 803(24) and Rule 804(b)(5) are satisfied when, as here, the proponent of the evidence is without fault in failing to notify his adversary prior to trial and the trial judge has offered sufficient time, by means of granting a continuance, for the party against whom the evidence is to be offered to prepare to meet and contest its admission.[85]

Such flexibility may be a sensible policy,[86] but sensible policies are

82. FED. R. EVID. 803(24), 804(b)(5) (identical language appears in both Rules). The two residual hearsay exceptions were highly controversial. At the very end of the drafting process, the conference committee inserted the notice provision. *See* Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 438-40 (1986).

83. *See* JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, CONF. REP. NO. 1597, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7106 (indicating that "this notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement").

84. *See* United States v. Calson, 547 F.2d 1346, 1355 (8th Cir. 1976) (asserting that the notice requirement of Rule 804(b)(5) "should not be an inflexible and imposing barrier to the admissibility of probative evidence when the peculiar circumstances of a case militate against its invocation"), *cert. denied*, 431 U.S. 914 (1977); United States v. Iaconetti, 540 F.2d 574, 578 n.6 (2d Cir. 1976) (arguing that "[p]re-trial notice should clearly be given if at all possible, and only in those situations where requiring pre-trial notice is wholly impracticable, as here, should flexibility be accorded"), *cert. denied*, 429 U.S. 1041 (1977).

85. United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978); *accord Carlson*, 547 F.2d at 1355; *Iaconetti*, 540 F.2d at 578; *see also* Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 901 (1982) (concluding that a majority of the courts have "imparted sufficient flexibility to permit the admission of hearsay under the residual exceptions despite the absence of pretrial notice to the adverse party when the proponent has not become aware of the need to offer such evidence until after trial has commenced"); *cf.* United States v. Atkins, 618 F.2d 366, 372 (5th Cir. 1980) (noting that Congress intended the notice provision of Rule 803(24) to be rigidly construed); United States v. Oates, 560 F.2d 45, 73 n.30 (2d Cir. 1977) (asserting that "[t]here is absolutely no doubt that Congress intended that the requirement of advance notice be rigidly enforeed").

86. *See* Sonenshein, *supra* note 85, at 904. Sonenshein presents the following argument for a flexible approach to the notice requirement:

> Given the uncertain nature of the trial process, there will be occasions when a conscientious and farsighted litigator will be faced with situations of genuine surprise, which could not have reasonably been anticipated. The flexible view satisfies the purpose of the notice requirements, which is to provide adequate time for the opponent to prepare, placing the opponent in no worse position than he would have faced had pretrial notice been given.

Id.; *see* Piva v. Xerox Corp., 654 F.2d 591, 596 (9th Cir. 1981). The *Piva* court noted:

not relevant to the Supreme Court's interpretation of the Rules. Instead, the plain language controls. The plain language of the notice provision not only fails to authorize such flexibility; it flatly forbids it. Trial judges cannot admit evidence under Rules 803(24) and 804(b)(5) unless the proponent of the evidence has given notice in advance of trial.[87]

B. Novel Scientific Evidence

Rule 702 governs the admission of novel scientific evidence in federal courts. That Rule states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[88]

> The purpose of the notice requirement is to give adverse parties an opportunity to attack the trustworthiness of the evidence. Piva had ample opportunity to do so, and the record shows that her attorney extensively cross-examined the preparers of the exhibit concerning the original data on which it was based and the actual construction of the exhibit. In addition, Piva had more than a year after the admission of the evidence until the end of the trial on her individual claims to move to strike the exhibit or rebut it with additional evidence.

Id.; *cf.* R. LEMPERT & S. SALTZBURG, *supra* note 41, at 504 (arguing against a flexible approach because the notice requirement serves several purposes in addition to providing the adversary with a chance to attack the reliability of the proffered evidence).

87. *See, e.g.*, R. LEMPERT & S. SALTZBURG, *supra* note 41, at 504 (noting succinctly that "[i]f there is one portion of the residual exceptions that seems invulnerable to judicial discretion, it is the [notice] requirement"); Sonenshein, *supra* note 85, at 904 (noting that "[t]he language of Rules 803(24) and Rule 804(b)(5) unequivocally require pretrial notice"); Yasser, *Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 TEX. TECH L. REV. 587, 608 (1980) ("The advance notice requirement is so clearly stated that to sidestep it is to flirt with lawlessness.").

Thus, Judge Jack B. Weinstein and Professor Margaret A. Berger are just ignoring the plain language of the Rules when they contend that the Rules can be complied with without pretrial notice. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 803(24)[01], at 803-380 (1987) (asserting that "[i]f the question arises during trial through no fault of the proponent—something bound to occur from time to time, no matter how careful is discovery—the court can comply with the rule by granting a continuance").

88. FED. R. EVID. 702. Rule 703, in defining the acceptable basis for an expert opinion, also helps govern the admissibility of scientific evidence:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703; *see* McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 888 (1982). McCormick asserts:

> [R]ule 703 also may have some bearing on the [admissibility of scientific evidence]. The second sentence of rule 703 allows an expert to base an opinion on data that could not have been admitted in evidence, provided it is of the type reasonably relied on by experts in forming opinions in that field. The expert is not limited to reliance on data that have achieved general acceptance.

Id.; *cf.* Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 600 n.16 (1988) (noting that "[t]he Federal Rules of Evidence contain no explicit requirement that the reasoning that underlies a scientific opinion conform to any standard" and that "[s]ome courts have used Rule 702 or Rule 703 to exercise control in this area").

Under the plain-meaning standard, all scientific evidence is admissible if it helps the jury decide the case properly. Jurors can best determine a material issue when they have as much pertinent information about the issue as possible.[89] Information is pertinent to a material issue when it changes the likelihood of that issue.[90] The plain meaning of Rule 702, thus, incorporates the basic relevancy principle, for "by definition relevant evidence helps to prove a fact of consequence to the case."[91]

Rule 702, however, is not merely a reiteration of the relevancy provisions;[92] Rule 702 expands relevancy by explicitly allowing the admission of expert evidence that helps explain other relevant evidence. Under the plain-meaning standard, judges will admit evidence claimed to be scientific because the only "scientific" test that does not fall within the literal words of Rule 702 is a meaningless or superfluous one.[93]

This interpretation, of course, means the end of the *Frye*[94] or "general acceptance" test, which dominated the standards for admission of novel scientific evidence at the time Congress adopted the Federal Rules of Evidence.[95] The *Frye* test, taken from a 1923 case rejecting the admissibility of a form of polygraph evidence, states:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to de-

89. *See* Black, *supra* note 88, at 628 n.158 (" 'Any relevant conclusions supported by a qualified expert witness should be received unless there are distinct reasons for exclusion.' ") (quoting E. CLEARY, MCCORMICK ON EVIDENCE § 203, at 608 (3d ed. 1984)).

90. Rule 401 pertains to materiality: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Rule 403 adds a balancing test: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. Taken together, the Rules support the fact that information becomes pertinent to a material issue when it changes the likelihood of the issue.

91. G. LILLY, *supra* note 41, at 33; *see also* 3 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 702[02], at 702-11 (concluding simply that "[t]he helpfulness test subsumes a relevancy analysis").

92. Rule 401 also defines relevancy. For the text of Rule 401, see *supra* note 90. Rule 402 states that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

93. *See* FED. R. EVID. 702 advisory committee's note (asserting that "[w]hether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier" and that "[w]hen opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time"); *see also* 3 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 702[02], at 702-11 (concluding that "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful"); *cf.* United States v. Downing, 753 F.2d 1224, 1235 (3d Cir. 1985) (concluding that Rule 702's helpfulness requirement "necessarily implies a quantum of reliability beyond that required to meet a standard of bare logical relevance," but failing to explain how relevant evidence could ever fail to assist the trier of fact).

94. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

95. *See Downing*, 753 F.2d at 1234.

> fine. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[96]

Neither the Rules nor their history explicitly mention *Frye*'s continuation.[97] Many courts and commentators have interpreted this silence, like the Rules' silence about *Glasser* and *Nixon*,[98] to mean that the *Frye* test still applies.[99] The plain-meaning standard, however, as *Bourjaily* and *Huddleston* indicate, forbids judges from imposing procedural or substantive requirements in addition to those contained in the actual words of the applicable provision. If the *Frye* test or some other standard for gauging the admission of novel scientific evidence means something more than Rule 702's language—"assist the trier of fact"—it is not part of the Federal Rules of Evidence.[100] Courts used the *Frye* test because they wanted to produce uniform rulings with precedential effect, counter the possibility that jurors may view science as having mystic infallibility, and make sure that experts will be available to both sides.[101] These concerns are not part of Rule 702. They might be factors that a sensible evidentiary system would consider in establishing rules for the admission of scientific evidence, but because they are not in Rule 702's words, they cannot be considered by a court deciding whether novel scientific evidence is admissible.

96. *Frye*, 293 F. at 1014.

97. *See Downing*, 753 F.2d at 1234; McCormick, *supra* note 88, at 888; *cf.* 3 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 702[03], at 702-16 (asserting that "[t]he silence of the rule and its drafters should be regarded as tantamount to an abandonment of the general acceptance standard").

98. *See supra* notes 29-30 and accompanying text.

99. *See, e.g.*, United States v. McBride, 786 F.2d 45, 49 (2d Cir. 1986) (requiring that expert testimony be "based upon a reliable area of expertise as has come to be embodied in the rule associated with [*Frye*]"); S. SALTZBURG & K. REDDEN, *supra* note 81, at 633 (indicating that "[i]t would be odd if the Advisory Committee and the Congress intended to overrule the vast majority of cases excluding such evidence as lie detectors without explicitly stating so"); Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1229 (1980) ("[I]t ean be argued that because *Frye* was the established rule and no statement repudiating *Frye* appears in the legislative history, the general acceptance standard remains intact."); *see also* 3 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 702[03], at 702-17 to -18 (observing that "[a] number of federal courts have responded to the enactment of Rule 702 by rejecting the *Frye* standard, but at this writing a number of Circuits still predicate the admission of scientific evidence on general acceptance in the community").

100. *See* Lacey, *Scientific Evidence*, 24 JURIMETRICS J. 254, 257 (1984) ("The difference between the *Frye* approach and the 'relevancy' approach is immediately apparent. *Frye* imposes a special burden on the proponent of novel scientific evidence that other types of evidence are not subject to—the technique must be generally accepted by the relevant scientific community.").

101. *See* McCormick, *supra* note 88, at 904; *see also* United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (asserting that the conservative *Frye* test is necessary because "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen").

The plain-meaning standard not only erases the *Frye* test, it also introduces considerable uncertainty into Rule 702 determinations. Rule 702's words do incorporate some concern for the unreliability of testimony based on novel science. If a new test is not reliable or accurate, then testimony based on it will fail Rule 702's requirement that it "assist the trier of fact." Evidence based on spurious science will not help the jury in deciding the case, but will only present irrelevancies. The problem is that someone has to determine whether a scientific test is reliable before a juror can rely on it. This preliminary issue seems difficult, especially because trial judges will seldom have the expertise to assess scientific worth,[102] but the solution to this difficulty under the plain-meaning standard is that the judge does not decide scientific reliability. The admission of scientific evidence is a question of conditional relevancy. Testimony based on the scientific test aids the jury if it is relevant; it is relevant only if the test is reliable.[103] As *Huddleston* made clear, the judge has a minimal role in the factual resolution of conditional relevancy. The court does not use *Frye* or any other standard to determine for itself whether the proffered evidence is reliable enough to help the jury decide the case. The trial judge only "decides whether the jury could reasonably find the conditional fact."[104] Therefore, relevant scientific evidence based upon tests of uncertain accuracy and validity are admissible if the jury could reasonably find the tests to be reliable.[105]

102. *See* 3 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 702[03], at 702-34 to -35 (noting that, before admitting scientific evidence, the judge must determine whether the information is sufficiently reliable to assist the jury and observing that "the court almost never will have sufficient personal expertise to evaluate the validity of the new development").

103. *See* Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577, 598 (1984).

104. Huddleston v. United States, 485 U.S. 681, 690 (1988); *see supra* notes 43-46 and accompanying text.

105. Professor Edward J. Imwinkelried made a similar argument that Rule 901(a), the basic authentication provision, requires conditional relevancy principles to be applied to scientific evidence. Rule 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED. R. EVID. 901(a). This Rule, of course, merely restates the conditional relevancy doctrine of Rule 104(b). Imwinkelried argued that "the most sensible interpretation is that the rule applies to the preliminary fact of a scientific principle's validity." Imwinkelried, *supra* note 103, at 608. He draws support for his conclusion from one of the authentication illustrations, Rule 901(b), which provides: "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: . . . Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." FED. R. EVID. 901(b)(9). The advisory committee note to this provision indicates that it was meant to cover X-rays and computers. *See* FED. R. EVID. 901(b)(9) advisory committee's note. Imwinkelried concluded that because the Rule was clearly meant to apply to these scientific techniques, "one may reasonably infer that the drafters intend the rule to apply to any other variety of scientific evidence." Imwinkelried, *supra* note 103, at 609.

United States v. Downing, 753 F.2d 1224, 1240 n.21 (3d Cir. 1985), rejects this analysis, distin-

The plain-meaning standard applied to Rule 702, however, may not remove all reliability determinations from the court. Relevant expert testimony will not assist the jury, and is therefore not admissible under Rule 702, when that testimony will so confuse the jury that it cannot properly weigh the evidence, when the jurors will be overimpressed with the expert testimony and give it undue weight, or when the testimony wastes the jury's time by repeating the obvious. An expert opinion may—as Rule 403 provides—"be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[106]

Rule 702, however, is not merely subject to the balancing of Rule 403;[107] Rule 702 actually incorporates into itself Rule 403-like concerns. This distinction can make a difference. Rule 403 authorizes the exclusion of evidence only when unfair prejudice *substantially* outweighs the evidence's probative value. The balance must be more than slightly tipped; the scale must plummet to the side of prejudice. The plain-meaning standard, however, does not indicate whether the same balancing test must be used in Rule 702. Does Rule 702 evidence become unhelpful to the jury when the prejudice *simply* outweighs the probative value or only when the prejudice *substantially* outweighs the probative value? If the

guishing the well-established principles of x-rays and computers from novel scientific techniques. *Downing*, however, ignores the fact that nothing in the Federal Rules of Evidence indicates that scientific techniques like x-rays should be distinguished from novel science. *Downing* instead saw a parallel between novel scientific evidence and hearsay. *See id.* at 1237 n.15. The Third Circuit noted that the trial court must determine that the requirements of a hearsay exception have been met before the hearsay can be admitted under an exception. *See id.* "These conditions on the admission of hearsay seem to ensure a level of trustworthiness such that the testimony is likely to enhance the truthseeking function of litigation. A preliminary determination that a scientific technique is reliable serves a similar purpose." *Id.* If determining whether the definition of a hearsay exception has been met was the same as determining reliability, then the trial judge would have to decide whether the preponderance of the evidence supported reliability. *See* United States v. Bourjaily, 483 U.S. 171, 176 (1987) (holding that before a statement can be admitted as a coconspirator statement, the trial court must find by a preponderance of the evidence that the requirements of Rule 801(d)(2)(E) have been satisfied). But they are not the same. The logical relevancy of an out-of-court statement does not depend on whether the definition of a hearsay exception has been satisfied. A statement made during the concealment phase of a crime is relevant whether or not the concealment is considered part of the conspiracy. A statement made too late to be considered an excited utterance may still have probative value. On the other hand, testimony based on a scientific test is only probative if the test works. The scientific reliability is an essential link in the logical chain that makes the testimony relevant. If the test is not reliable, then the evidence is irrelevant. The reliability, like the determination of whether the prior act in *Huddleston* was a crime, is a condition precedent for the relevancy of the evidence; it is a question of conditional relevancy.

106. FED. R. EVID. 403.

107. *See, e.g.*, United States v. McBride, 786 F.2d 45, 49 (2d Cir. 1986). "[O]therwise admissible expert testimony may be excluded if its probative value is substantially outweighed by the dangers that it might confuse the issues, be unfairly prejudicial, cause undue delay or waste judicial resources." *Id.* (citing FED. R. EVID. 403).

higher standard of Rule 403 does not apply, of course, the trial judge will have greater leeway to exclude testimony based upon novel scientific procedures under Rule 702 than under Rule 403. The language of Rule 702 does not provide a clear answer.

Because Rule 702 does require some degree of balancing of probative value and unfair prejudice, the court, before admitting the evidence, must assess how strongly the evidence tends to prove a fact in issue. This assessment, of course, requires the judge to determine the reliability of the scientific test. This requirement resurrects the question of how the judge should make the reliability determination. Even under the plain-meaning scheme, Rule 702 seems to cry out for *Frye* or some other standard to assess scientific reliability. Once again, however, *Huddleston*'s plain-meaning interpretation forecloses the use of such a standard.

The *Huddleston* Court concluded that Rule 404(b) contains no special procedures for the admission of evidence of other crimes offered for a proper purpose, but that such evidence was still subject to Rule 403 balancing. Huddleston had argued that uuless the trial court first found by a preponderance of the evidence that the defendant committed the prior crime, the trial court must find, under Rule 403, that the unfair prejudice from the evidence substantially outweighed its probative value.[108] The Court, however, rejected "this suggestion because Rule 403 admits of no such gloss and because such a holding would be erroneous for the same reasons that a preliminary finding under Rule 104(a) is inappropriate."[109] Similarly, the assistance-to-the-trier standard of Rule 702 admits of no such gloss as a fixed procedural or substantive test for measuring the reliability of expert testimony. The trial judge, therefore, can use no such test in determining whether evidence is admissible under Rule 702. The judge must determine scientific reliability while balancing probative value versus prejudice on a case-by-case basis—the same ad hoc approach that the plain-meaning standard mandates for assessing the admissibility of evidence of other crimes.[110]

108. *Huddleston*, 485 U.S. at 689 n.6.

109. *Id.* The Court continued: "We do, however, agree with the Government's concession at oral argument that the strength of the evidence establishing the similar act is one of the factors the court may consider when conducting the Rule 403 balancing." *Id.*

110. Some of the *Frye* concerns may make their way into this ad hoc balancing. *See, e.g.*, McCormick, *supra* note 88, at 879-80. McCormick notes:

> [T]he trial court has the right to assess the strength of the foundation for admissibility. That includes the right to know the accuracy and reliability of the technique on which the evidence is based. When the error rate is unknown, undisclosed, or unreasonably high, the trial court is justified in excluding the evidence. Lack of consensus in the scientific community concerning this factor may lead the trial or appellate court to conclude that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice because of the uncertainty concerning the evidence's trustworthiness. In appropriate

Applying the plain-meaning standard to novel scientific evidence will, thus, have a number of effects. For example, because the limited judicial screening function must be done on a case-by-case basis, there will be less consistency as to whether a particular scientific procedure is admissible. This ad hoc approach will lead to fewer meaningful precedents on the admissibility of scientific evidence, and trial courts, therefore, may be confronted with even more litigation concerning scientific evidence.

The plain-meaning standard will once again increase the complexity of a juror's job. Because the Federal Rules of Evidence largely prohibit the trial judge from determining reliability before admitting the evidence, more dubious scientific evidence will be presented to the jury. Lay jurors, without any assistance from the trial judge, will increasingly have to make the sophisticated determination of whether a piece of scientific evidence is truly reliable.

C. Rule 607 and Impeachment of a Party's Own Witness

The plain-meaning standard not only will resolve some present evidentiary controversies, such as those concerning notice for the residual hearsay exceptions and the criteria for admitting scientific evidence, but it will also reverse some settled practices. Rule 607, which allows the party calling a witness to impeach that witness, provides: "The credibility of a witness may be attacked by any party, including the party calling the witness."[111]

The Rule "raises the problem of the calling party's potential misuse of impeachment by prior inconsistent statements."[112] The problem oc-

> cases the court may well consider the lack of consensus in the scientific community as a factor that bears heavily on the admissibility decision.

Id. Weinstein and Berger also point out:

> Whether or not the scientific principles involved have been generally accepted by experts in the field may still have a bearing on reliability and consequent probative value of the evidence. . . .
>
> After assessing probative value, the court must also assess the dangers posed by this particular kind of expert scientific evidence. The court will have to evaluate the degree to which the jurors might be over-impressed by the aura of reliability surrounding the evidence, thereby leading them to abdicate their role of critical assessment. . . .
>
> In balancing the probative worth of the novel scientific evidence against the dangers specified in Rule 403, the court must also consider such factors as the significance of the issue to which the evidence is directed, the availability of other proof, and the utility of limiting instructions.

3 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 702[03], at 702-18 to -20 (footnote omitted).

111. FED. R. EVID. 607.

112. M. GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL 161 (2d ed. 1987); *see also* 3 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 607[01], at 607-18 (discussing the fear of courts and commentators that "a new route has been created for the admission of unreliable evidence in the guise of impeaching one's own witnesses").

curs because prior inconsistent statements are generally excluded for their truth under the hearsay rule.[113] A potential conflict with the hearsay rule arises when a trial witness testifies adversely to the calling party. If the trial judge admits prior inconsistent statements under Rule 607, he will instruct the jury that the statements are admitted only for use in assessing the credibility of the witness. There is always the risk, however, that the jurors will ignore the instruction and treat the impeachment as substantive evidence, thus weighing the prior statement as substantive evidence of the truth that it asserts. An implicit violation of the hearsay rule would then result; indeed, this may have been the goal of the party calling the witness.[114]

Before Congress adopted the Federal Rules of Evidence, the Fourth Circuit, in *United States v. Morlang*,[115] held that a party could not attempt this evasion of hearsay doctrine.[116] The party could not present an unfavorable witness for the purpose of getting otherwise inadmissible evidence before the jury:

> While it is the rule in this circuit that a party calling a witness does not vouch for his credibility, it has never been the rule that a party may call a witness where his testimony is known to be adverse for the purpose of impeaching him. To so hold would permit the government, in the name of impeachment, to present testimony to the jury by indirection which would not otherwise be admissible.
>
> . . . .
>
> . . . [I]mpeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the

113. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 34, at 73 (3d ed. 1984).

114.

> Congress' failure to permit substantive use of all prior inconsistent statements where the declarant is presently available for cross-examination may force prosecutors, deprived of what is potentially the most relevant evidence in their case, to engage in the subterfuge of offering a statement for impeachment purposes in the hope that, despite the court's instruction to the contrary, the jury will give the statement substantive weight.

Ordover, *Surprise! That Damaging Turncoat Witness Is Still with Us: An Analysis of Federal Rules of Evidence 607, 801(d)(1)(A) and 403*, 5 HOFSTRA L. REV. 65, 66 (1976).

With a few exceptions, traditional evidence rules prohibit a party from impeaching its own witness. This restriction makes little sense if prior inconsistent statements are excepted from the hearsay rule and generally admitted for their truth. *See* 3 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 607[01], at 607-18 ("Professor Chadbourn in his study for the California Law Revision Commission found that no reason for the no-impeachment rule existed if prior inconsistent statements were given substantive effect."). An early draft of the Federal Rules of Evidence proposed admission of all prior inconsistent statements and accordingly removed the prohibition on impeachment of a party's own witnesses. *See* Fed. R. Evid. 801(d)(1), 51 F.R.D. 315, 413 (1971) (Revised Proposed Draft). The impeachment provision became enacted as Rule 607, but Congress rejected the draft's position on inconsistent statements. Instead, it enacted present Rule 801(d)(1)(A), which generally classifies prior inconsistent statements as inadmissible hearsay. Thus, prior inconsistent statements used to impeach are generally excluded for their truth.

115. 531 F.2d 183 (4th Cir. 1975).

116. *Id.* at 190.

jury evidence not otherwise admissible.[117]

This limitation makes sense. If a party knows that a witness will not give testimony useful for his case, he has no legitimate reason to call the witness; indeed, he probably would not put that witness on the stand but for the impeaching material. It is improper to present a witness with the hope that the jury will disregard the judge's instructions. Courts should not sanction an intentional effort to evade the rules of evidence. Forbidding a party from calling witnesses for the sole purpose of impeachment helps prevent evasion.[118]

The *Morlang* doctrine is so sensible[119] that every circuit considering

117. *Id.* at 189-90 (citation omitted).

118. The key factor in determining the propriety of impeachment under *Morlang* is whether the impeaching party knew before calling the witness that the witness would give testimony useless to the party calling the witness. *Compare* United States v. Webster, 734 F.2d 1191, 1192-93 (7th Cir. 1984) (holding that the impeachment was not improper, the court said that "there was no bad faith here" and noting that "[w]e do not see how in these circumstances it can be thought that the prosecutor put [the witness] on the stand knowing he would give no useful evidence") *with* United States v. Hogan, 763 F.2d 697, 703 (5th Cir. 1985) (holding that the impeachment was error because the prosecution knew what the witness would say, the court said that "[t]he primary if not sole purpose in calling him to testify again was focused on getting [his] prior statements before the jury"), *aff'd in relevant part*, 771 F.2d 82 (5th Cir. 1986).

119. *See, e.g.*, *Webster*, 734 F.2d at 1192. The *Webster* court observed:

> [I]t would be an abuse of [Rule 607], in a criminal case, for the prosecution to call a witness that it knows would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence—or, if it didn't miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant, which Rule 607 does not contemplate or authorize.

Id. At least one commentator has also noted:

> Congress has insisted on maintaining the hearsay bar to the substantive use of informal prior inconsistent statements. Given that policy declaration by Congress, where the government has advance knowledge that its witness has recanted, it is absurd to allow it to create confusion and prejudice against itself by (a) putting the witness on the stand and (b) then claiming that the confusion so created mandates that it be permitted to impeach the witness by introducing an out-of-court statement which is highly prejudicial and which cannot be used as substantive evidence.

Ordover, *supra* note 114, at 72-73.

Prior to the enactment of the Rules, a party could not impeach its own witness with a prior inconsistent statement unless it "could convince the court that it was both surprised and affirmatively damaged by the witness' in-court testimony." *Id.* at 67; *see* 3 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 607[01], at 607-10 to -12 (listing the circumstances under which a party could impeach his own witness). "[T]he surprise and affirmative damage tests were formulated as a deterrent to prosecutorial violation of both the vouching and hearsay rules." Ordover, *supra* note 114, at 72. Professor Michael H. Graham has argued that the surprise and damage requirements be read into Rule 607 to preserve the policies of the hearsay rule. *See* Graham, *The Relationship Among Federal Rules of Evidence 607, 801(d)(1)(A), and 403: A Reply to* Weinstein's Evidence, 55 TEXAS L. REV. 573, 576 (1977) (arguing that the use of established common-law principles presents fewer practical difficulties than a case-by-case analysis); Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled*, 54 TEXAS L. REV. 917, 966-72 (1976) (arguing that the revision of Rule 801(d)(1)(A) mandates the reimposition of the traditional requirements). Courts have not adopted this position. *See, e.g.*, *Hogan*, 763 F.2d at 702 (holding that "[t]he government may call a witness it knows may be hostile, and it may impeach that witness's credibility. Surprise is not a necessary prerequisite to impeaching one's own witness under FRE 607"); *see also Webster*, 734 F.2d at 1193 (asserting that "it would be a mistake to graft [a surprise

it under the Federal Rules of Evidence has continued the restriction.[120] Moreover, the restriction existed when the Rules were adopted, and no comments by the drafters specifically indicate an intent to remove it. Sensible policy, widespread judicial approval, and no stated intention to change are all good reasons to conclude that the Federal Rules of Evidence preserve the *Morlang* restriction.

Such factors, however, cannot compel a result when the language of a Rule is plain on its face. According to the Supreme Court, judges must apply the literal words, and the words of Rule 607 contain no restrictions.[121] The plain language of the Rule permits impeachment without limitation.[122] The *Morlang* doctrine is no longer part of federal evidence law.

A party, therefore, can impeach a witness that he calls as long as the witness gives relevant evidence. The party does not have to call the witness in good faith to be able to impeach the witness—the calling party can be aware that the witness will testify adversely.[123] The only restriction is Rule 403's general requirement that the potential for unfair prejudice, due to the impeachment, not substantially outweigh the testimony's probative value.[124]

and harm] requirement to Rule 607, even if such a graft would be within the power of judicial interpretation of the rule").

120. "Although *Morlang* was decided before the Federal Rules of Evidence became effective, the limitation that we have quoted on the prosecutor's rights under Rule 607 has been accepted in all circuits that have considered the issue." *Webster*, 734 F.2d at 1192; *accord Hogan*, 763 F.2d at 702 ("Every circuit to consider this question has ruled similarly."). *Morlang*'s restriction preventing impeachment of a party's own witness has been applied in civil, as well as criminal, cases. *See, e.g.*, Balogh's of Coral Gables, Inc. v. Getz, 798 F.2d 1356, 1358 n.2 (11th Cir. 1986) (noting that "a witness may not be called solely for the purpose of impeaching him and thereby obtaining otherwise inadmissible testimony"); Whitehurst v. Wright, 592 F.2d 834, 839-40 (5th Cir. 1979) ("To use a prior inconsistent statement [to get before the jury evidence not otherwise admissible] exceeds the scope of impeachment, and is an attempt to use hearsay evidence for substantive purposes.").

121. "[A] literal interpretation of Rule 607 [imposes] no restriction . . . upon impeachment by a party of his own witness with a nonsubstantively admissible prior inconsistent statement." M. GRAHAM, *supra* note 112, at 162.

122. The advisory committee's note to Rule 607 begins: "The traditional rule against impeaching one's own witness is abandoned as based on false premises."

123. Rule 404(b) provides an appropriate analogy. Evidence admitted for a proper purpose under that Rule can be misused. Even so, because the plain language of Rule 404(b) contains no good-faith requirement, it cannot be read into the provision. Even if the defendant could show the Government's bad faith, i.e., that the goal was to have the jury misuse the evidence as impermissible character evidence, Rule 404(b) would not bar the evidence. Instead, the only restriction on the admissibility of such evidence would be the generally applicable one of Rule 403. *See supra* note 109 and accompanying text.

124. The intention of the party cannot be imported into the Rule 403 balancing because the party's intention does not appear in the plain language of that Rule. Instead, Rule 403's concerns are only with unfair prejudice, misleading the jury, and wasting time.

This plain-language interpretation of Rule 607 was foreshadowed by 3 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 607[01], at 607-20. Weinstein and Berger ask, "[i]nstead of placing so much emphasis on the motive of the profferer, an approach more consistent with the underlying

D. Agency Admissions by Government Employees

Before Congress adopted the Federal Rules of Evidence, criminal defendants could not introduce statements by Government employees as agency admissions[125] against the Government. The Court in *United States v. Santos*,[126] gave the reasons for this restriction.[127] Santos was charged with assaulting a federal drug agent.[128] A different federal agent identified in a sworn affidavit someone other than Santos as the assailant.[129] The defendant sought to introduce this statement as an admission against the Government.[130] The appellate court concluded that although this evidence could have been used on cross-examination to impeach the agent who signed it, because of the Government's unique status as a party, the statement did not constitute an agency admission that could be admitted for its truth.[131]

policy of the federal rules of evidence would be to analyse the problem in terms of Rule 403—is the probative value of the impeaching evidence outweighed by its prejudicial impact?" *Id.* They also seem to suggest, however, that the traditional requirements of surprise and damage ought to be factored into the Rule 403 balancing. *See id.* ¶ 607[01], at 607-21 to -22 ("In most cases, of course, the Rule 403 analysis and the surprise-damage requirement will lead to the same result."); *see also* Ordover, *supra* note 114, at 73 ("[B]arring a Congressional amendment, part of the probative value-prejudice analysis with respect to the credibility of the witness should include the questions of surprise and affirmative damage."). Surprise, however, is not part of Rule 403 balancing. Neither the probative value nor the unfair prejudice of what was actually presented is affected by whether or not the party knew what was coming on direct examination. On the other hand, damage should be weighed. Impeachment of a neutral witness is not as probative as impeachment of an affirmatively damaging one. Not much probative value is to be gained by impeaching with prior inconsistent statements the apparent eyewitness who testifies that he does not remember the incident. Although the jury may become dubious about the assertion, no substantive evidence has been presented about the incident. If there is a chance that the prior inconsistent statement will be used as substantive evidence, the potentially unfair prejudice may substantially outweigh any probative value. On the other hand, if the witness testifies directly against the party calling him and testifies, for example, that the defendant did not commit the crime, the probative value of the impeachment becomes much greater. The trier of fact has heard substantive evidence of high probative value, and information that attacks the credibility of this witness will then also have high probative value. Even if the impeachment has a strong tendency to cause unfair prejudice, the impeachment may still be proper because the potential for unfair prejudice may not substantially outweigh its probative value.

125. Under Rule 801(d)(2), a statement is not hearsay if: (1) it was made by a party's servant or other agent, (2) it is offered against that party, (3) it was made during the existence of the agency or employment relationship, and (4) it is related to a matter within the scope of the relationship. This is true regardless of whether the statement would be hearsay in absence of the Rule. *See* 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 426, at 311 (1980).

126. 372 F.2d 177 (2d Cir. 1967).

127. *See id.* at 180-81.

128. *Id.* at 178.

129. *Id.* at 179.

130. *Id.*

131.

> [I]nconsistent out-of-court statements or actions of a government agent said or done in the course of his employment take on quite a different probative character in a government criminal case from that which inconsistent out-of-court acts of agents acting within the scope of their employment generally take on at a trial. Though a government prosecution is an exemplification of the adversary process, nevertheless, when the Government prosecutes, it prosecutes on behalf of all the people of the United States; therefore all persons,

Conceding that this holding might seem grossly unfair because damaging statements by a defendant's agents are admissible for their truth, the court concluded:

> This apparent discrimination is explained by the peculiar posture of the parties in a criminal prosecution—the only party on the government side being the Government itself whose many agents and actors are supposedly uninterested personally in the outcome of the trial and are historically unable to bind the sovereign.[132]

The plain-meaning standard discards the *Santos* doctrine. Although the Rules' drafters were silent on the *Santos* doctrine, the literal words of Rule 801(d)(2)(D) classify the statements of Government employees as vicarious admissions.[133] Rule 801(d)(2)(D) states that an admission by a

> whether law enforcement agents, government investigators, complaining prosecuting witnesses, or the like, who testify on behalf of the prosecution, and who, because of an employment relation or other personal interest in the outcome of the prosecution, may happen to be inseparably connected with the government side of the adversary process, stand in relation to the United States and in relation to the defendant no differently from persons unconnected with the effective development of or furtherance of the success of, the prosecution.

Id. at 180.

132. *Id.* The *Santos* court indicated that similar statements would have been admissible in civil cases. "Therefore, the inconsistent out-of-court statements of a government agent made in the course of the exercise of his authority and within the scope of that authority, which statements would be admissions binding upon an agent's principal in civil cases, are not so admissible here as 'evidence of the fact.' " *Id.* Other courts in pre-Rules cases followed *Santos*. *See, e.g.*, United States v. Pandilidis, 524 F.2d 644, 650 (6th Cir. 1975) ("While evidence of contradictory statements may be used to impeach a government agent, they may not be introduced to prove the truth of the statements offered."), *cert. denied*, 424 U.S. 933 (1976); United States v. Powers, 467 F.2d 1089, 1093-95 (7th Cir. 1972) (adopting the rule in *Santos* and holding that statements by an IRS special agent did not constitute vicarious admissions), *cert. denied*, 410 U.S. 983 (1973). The logic of *Santos*, however, has not gone uncriticized.

> To the suggestion that government agents are "uninterested personally" in the outcome of government litigation, it may be replied that much the same may usually be said of agents employed by private entities. It may be true that to some extent the sheer size of the government and the protections accorded by the civil service system may combine to dissociate any one agent from success or failure in any one case, but there exist similar factors in private industry, which sometimes involves massive entities and restrictions in the form of federal and state regulations and clauses in union contracts which similarly dissociate any one employee from success or failure in a single case. To the suggestion that agents are "unable to bind the sovereigu," it may be replied that this principle only restates (indeed, overstates) the question, which is whether an agent should be able not to "bind" but to make statements admissible against the sovereign.

4 D. LOUISELL & C. MUELLER, *supra* note 125, § 426, at 328.

> The court in [*Santos*] seemed to be distinguishing goverument agents from nongovernment agents (whose statements regarding matters within the scope of the agency may be attributed to their principals) on the rationale that goverument agents are "supposedly uninterested *personally* in the outcome of the trial." The court did not explain the siguificance of this premise. We are not told whether it follows that (a) it would be unfair to impute to the government responsibility for the statements of its agents, or (b) such statements lack the special assurances of trustworthiness that attend the out-of-court statements of nongovernment agents.

United States v. Morgan, 581 F.2d 933, 937-38 n.11 (1978) (citations omitted) (citing United States v. Santos, 372 F.2d 177 (2d Cir. 1967)).

133. A statement is not hearsay if the statement is offered against a party and is "a statement by

party-opponent is an out-of-court statement offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Under the plain-meaning standard, if the Government is a party, then a criminal defendant may introduce the relevant statements of the Government's agents or servants. Normal usage of language calls the Government a party in a criminal case, and the Rules clearly contemplate this labelling.[134] Routine usage also classifies law enforcement personnel or other Government employees as agents or servants of the Government. Consequently, under the plain-meaning standard, those employees' out-of-court declarations concerning matters within their jobs are admissible under Rule 801(d)(2)(D).[135]

Courts, however, routinely hold that statements by Government employees are not vicarious admissions admissible in criminal cases. For

the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." FED. R. EVID. 801(d)(2).

134. For example, Rule 615 authorizes the exclusion of the opposing party's witnesses on request, but exempts "an officer or employee of a party which is not a natural person designated as its representative by its attorney." FED. R. EVID. 615. The advisory committee notes indicate that this exemption was meant to include police officers in criminal cases. The Senate report is more explicit. "Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent may be a witness. The practice is permitted as an exception to the rule of exclusion . . . ." SENATE COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 26, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7072. Rule 803(8) authorizes the introduction of public records which are factual findings resulting from lawful investigations "in civil actions and proceedings and against the Government in criminal cases." FED. R. EVID. 803(8). Rules 615 and 803(8) indicate that the Government is a party in a criminal case. *Compare Morgan*, 581 F.2d at 937 n.10 (citing Rule 803(8): "[w]e note that the Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases, and specifically provide that in certain circumstances statements made by government agents are admissible against the government as substantive evidence") *with* United States v. Kampiles, 609 F.2d 1233, 1246 n.16 (7th Cir. 1979) (concluding Rule 803(8) "would be unnecessary if Rule 801(d)(2)(D) were found to encompass admissions by government employees"). *Kampiles* is wrong. Rule 803(8) serves purposes even if statements of Government employees are admitted as agency admissions. For example, Rule 803(8) allows factual findings in public records to be introduced on behalf of the Government or where the Government is not a party in civil cases. This effect is not made redundant by admitting agency admissions against the Government. Rule 803(8) also allows the admission of factual findings from a government that is not the party in a criminal case. Thus, state public records, under Rule 803(8), can be introduced in a federal criminal prosecution. Rule 803(8) is not superfluous simply because Government employees' statements are introducible as vicarious admissions.

135. *Compare* P. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 5.02, at 409 (1987) ("In light of the unqualified language of this rule, why wouldn't it be more reasonable to interpret it as applying to government employees unless there is some indication in the rule's history that the drafters intended that the Government be excepted from it in criminal cases?") *with* United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 358 (D.D.C. 1980) (stating that a reason for rejecting the Government's position in a civil case that statements made by Government employees could not be agency admissions "is that its arguments would apply with equal force to any large organization with many individuals speaking and acting on its behalf. . . . [and noting that t]he unambiguous language of Rule 801(d)(2) clearly does not contemplate such a result").

example, in *United States v. Kampiles*,[136] the Seventh Circuit, noting the pre-Rules doctrine that "admissions by government employees in criminal cases were viewed as outside the admissions exception to the hearsay rule,"[137] summarized the reasoning of *Santos*,[138] and concluded: "Nothing in the Federal Rules of Evidence suggests an intention to alter the traditional rule and defendant has cited no truly contrary case indicating such a trend."[139]

Bourjaily, however, expressly rejects *Kampiles'* reasoning. Because plain meaning has triumphed over evidentiary history and legislative silence in the interpretation of coconspirator statements, it must also control the scope of agency admissions. Statements of Government agents are thus admissible against the Government.[140] Indeed, some civil courts have recognized that the language of Rule 801(d)(2)(D) requires this result.[141] Of course, if the language requires this result in civil cases, it also

136. 609 F.2d 1233 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980).

137. *Id.* at 1246.

138. Citing *Santos*, the court stated: "Because the agents of the Government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign, their statements seem less the product of the adversary process and hence less appropriately described as admissions of a party." *Id.* (citation omitted).

139. *Id.* The defendant did cite United States v. Morgan, 581 F.2d 933 (D.C. Cir. 1978). The defendant in *Morgan* sought to introduce out-of-court statements from an informant to a detective. This hearsay was characterized as "reliable" by the Government in a search warrant application. *See id.* at 934. Although *Morgan* said that it is not clear whether the cases holding that Government agents' statements could not be introduced as vicarious admissions survived the Federal Rules, *see id.* at 938 n.15, the court held that the informant's statements were admissible because the Government had adopted them by presenting them as reliable to a magistrate. *Id.* at 937.

Other courts have accepted *Kampiles'* logic that the *Santos* doctrine survives because of legislative silence. *See* United States v. Durrani, 659 F. Supp. 1183, 1185 (D. Conn. 1987), *aff'd*, 835 F.2d 410 (2d Cir. 1987); *see also* United States v. American Cyanamid Co., 427 F. Supp. 859, 867 (S.D.N.Y. 1977) (holding that the "[d]efendant cannot use the internal reports of Justice Department attorneys, expressing the opinions of individual government employees, as admissions against the Government").

140. *Cf. Morgan*, 581 F.2d at 938 n.15 ("[T]here is no indication in the history of the Rules that the draftsmen meant to except the government from operation of Rule 801(d)(2)(D) in criminal cases."); 4 D. LOUISELL & C. MUELLER, *supra* note 125, § 426, at 328 ("Certainly nothing on the face or in the history of Rule 801(d)(2) suggests that the admissions doctrine does not apply to statements by government agents."). Indeed, the drafters contemplated wide admissibility of admissions. "The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge . . . calls for generous treatment of this avenue to admissibility." FED. R. EVID. 801(d)(2) advisory committee's note. Quite clearly, Rule 801(d)(2)(D) was meant to expand the common law's notion of agency admissions. *See* FED. R. EVID. 801(d)(2)(D) advisory committee's note.

141. *See, e.g.*, United States v. American Tel. & Tel. Co., 498 F. Supp 353, 357-58 (D.D.C. 1980) (rejecting, in a civil antitrust action, the Government's claim that statements made by Government officials outside the Justice Department were not agency admissions). The court concluded: "[T]he admissibility of an admission by a party-opponent is a consequence, not of trustworthiness or lack of burdensomeness, but of the adversary system of litigation. . . . The adversaries in this litigation . . . are the United States of Ameriea and the American Telephone and Telegraph Company . . . ." *Id.*; *see also* Corrigan v. United States, 609 F. Supp. 720, 727 n.3 (E.D. Va. 1985), *rev'd*, 815 F.2d 954 (4th Cir.), *cert. denied*, 484 U.S. 926 (1987). *Corrigan* was a suit against the United States under the

requires the result in criminal cases. Nothing in the language of Rule 801(d)(2)(D) makes any distinction between civil and criminal actions. The plain-meaning standard allows the introduction of agency admissions under the Federal Rules of Evidence against the Government in all cases.[142]

E. Prior Identifications in Civil Cases

The plain-meaning standard will not only have an effect on past and present evidentiary disputes, but it will lead to uncontemplated results. Prior identifications in civil cases furnish an example.

Rule 801(d)(1)(C) permits out-of-court statements to be admitted for their truth if the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement," and the statement is "one of identification of a person made after perceiving the per-

Federal Tort Claims Act for negligently serving alcohol to a person the Government should have known was underage and intoxicated. The plaintiff in *Corrigan*, over objection, introduced the out-of-court declarations of the bartender, a Government employee at a military club, who had served the drinks. *Id.* The court concluded:

> The disputed statements were offered against the United States, and were made by an agent or servant of the United States, Mrs. Brown, concerning a matter within the scope of her employment. Mrs. Brown's statements were made while she was still an employee of the United States. Therefore, each element of Rule 801(d)(2)(D) has been met.

Id.; *see also* Skaw v. United States, 740 F.2d 932, 937 (Fed. Cir. 1984) (holding that in a civil suit concerning mining claims, statements made by Forest Service employees could be considered against the Government on a summary judgment motion); Burkey v. Ellis, 483 F. Supp. 897, 911 n.13 (N.D. Ala. 1979) (holding that in an injunction action against Government agencies, statements made by Government officials in an environmental impact statement were introducible against the Government).

142. Some state courts using evidence law based on the Federal Rules of Evidence, while accepting the notion that agency statements cannot be introduced against the government in a criminal case, have, in effect, read an admissions doctrine into the business record exception. *See, e.g.*, State v. Therriault, 485 A.2d 986, 993-97 (Me. 1984). In a rape trial, the prosecution objected to the introduction of a state police crime laboratory report indicating no semen or foreign hairs had been found. *Id.* at 990-91. The report had been signed by a trooper who had died by the time of trial. *Id.* at 991. The court first rejected the notion that this report was an agency admission of the government, citing the pre-Rules federal cases and concluding, "[w]e find nothing in the Federal Rules of Evidence nor in Maine's adoption of M.R.Evid. 801(d)(2) suggesting an intent to alter [this] rule . . . ." *Id.* at 992. The court then went on to admit the report as a business record, but indicated that only the defendant would be permitted to introduce such a report under the business record exception:

> [f]urther, even if we concede that the report was prepared in anticipation of litigation, it was not offered by the party on whose behalf the report was made. The "prepared in anticipation of litigation" argument carries no weight when the report is offered by the party who did not request that the report be made.

Id. at 996. A doctrine that allows hearsay to be introduced only against the declarant and not by the party-declarant is really an admissions doctrine. *See* State v. Bertul, 664 P.2d 1181, 1185 (Utah 1983) (admitting a police report against the prosecution under the business records exception and concluding "that police reports of crimes should ordinarily be admitted when offered by the defendant in a criminal case to support his defense[, but w]hen offered by the prosecution, however, they should ordinarily be excluded").

son."[143] The drafters contemplated that this Rule would be used only in criminal cases. The advisory committee cited only criminal cases and statutes relating to criminal matters.[144] Scholars commenting on this provision do not consider the Rule's use in civil cases and assume that issues about the provision arise only in criminal litigation.[145] Not surprisingly, my research has unearthed no civil case citing Rule 801(d)(1)(C).

The words of the Rule, however, do not limit it to criminal matters. The prior identification provision, according to its plain meaning, applies to civil cases. A few hypotheticals illustrate the profound effect such application could have on hearsay doctrine.

Assume that a woman parks her car, asks some acquaintances to watch it, and runs into a house. When she returns, all but one of her acquaintances are gone and so is the car. When asked what happened to the vehicle, the lingering person replies: "Defendant took it." The woman sues defendant for conversion of the car, but at trial the acquaintance testifies that Smith took it. The plaintiff, over an overruled objection, then asks about the out-of-court statement. The acquaintance denies making it, and later the plaintiff testifies that the acquaintance did in fact tell her that defendant took the car.[146]

Plaintiff's testimony about what the acquaintance said, of course, could be introduced as impeachment by a prior inconsistent statement. The truth of the out-of-court assertion, however, is not before the jury if the plaintiff introduces the statement in this way. Instead, plaintiff should introduce the acquaintance's statement under Rule 801(d)(1)(C) as a prior identification. The witness said that the defendant took the car, and that is a statement of identification just as plainly as if the witness had picked the defendant out of a police lineup.[147] If this were a criminal proceeding, the statement would be admissible under Rule 801(d)(1)(C). Under the plain-meaning standard, it is also admissible in the civil case.

Although the drafters may not have intentionally planned such a broad provision, the plain language they chose is expansive. The literal language of the Rule does not require a perception between the event

143. FED. R. EVID. 801(d)(1)(C).

144. *See id.* advisory committee's note.

145. *See, e.g.*, E. CLEARY, *supra* note 113, § 251(c), at 747-48; 4 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 801(d)(1)(C)[01], at 801-176.

146. This is Problem IV-31 in E. GREEN & C. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 327 (1983).

147. *Cf.* 4 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 801(d)(1)(C)[01], at 801-174 (noting that "Rule 801(d)(1)(C) applies regardless of *when* the prior identification was made—whether at the scene of the crime, at a later chance encounter, or at a police line-up" (footnotes omitted)).

which is the subject of the trial and the trial itself.[148] It only requires the identification to be "made after perceiving the person."

Taken on its face, this restriction requires nothing more than that she have firsthand knowledge of what she is identifying. If the declarant saw the defendant commit a robbery, his out-of-court statement identifying the defendant is an identification "made after perceiving the person." If the declarant did see the crime, the out-of-court statement is admissible at trial as long as the declarant is subject to cross-examination at trial.[149]

The words also place no time limit on the necessary perception,[150] and thus, the plain language permits the statement of identification to come at any time after the person was perceived. The statement that "White committed the robbery" falls within the provision even if made long after the robbery and even without some sort of identification procedure.[151] The statement satisfies the Rule's literal requirements simply because the witness made the statement *after* perceiving the person.

The requirement that the statement be an identification is also easily satisfied. The term "identification" is not defined, but certainly the declaration that "the robber is the third person from the left in the lineup" is included or else the provision would have no purpose. If that statement is an identification, then "defendant took the car," in response to the

148. Rule 801(d)(1)(C) "clearly contemplates the situation in which the declarant saw the crime itself (or the subject in some situation which incriminates him) and later saw him again (typically in a lineup) and then comments essentially, 'He's the one who did it,' thus identifying the person seen later as the perpetrator." C. MUELLER & L. KIRKPATRICK, *supra* note 40, at 211; *cf.* FED. R. EVID. 801(d)(1)(C) advisory committee's note (concluding that the Rule is justified because of "the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions").

149. At one time, it might have been contended that the evidence was not admissible as a prior identification because the witness was not "subject to cross-examination concerning the statement." FED. R. EVID. 801(d)(1)(C). *But cf.* 4 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 801(d)(1)(C)[01], at 801-176 (questioning whether there can be adequate cross-examination of a witness "if the witness denies everything, or claims to have no present knowledge about the circumstances of the previous identification, and no recolleetion of the defendant at the time the crime occurred").

Owens, however, definitively indicates that the hypothetical witness was subject to cross within the meaning of the Rule. "Ordinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." United States v. Owens, 484 U.S. 554, 561 (1988). If the witness has voluntarily answered all questions, even if the answer is a denial that the statement was made, the witness has been subject to cross-examination concerning the statement.

150. The original drafts of this provision required the identification to be made "soon" after the perception, but, at Justice Department urging, that limitation was dropped. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 87, ¶ 801(d)(1)(C)[01], at 801-169 to -170 (discussing the history of the provision).

151. For example, if the day after the robbery, the declarant told the FBI that White was the robber and White was his neighbor, and at trial the deelarant states that he was mistaken in labelling White as the culprit, the out-of-court statement could be admitted for its truth.

question of who stole the vehicle, is also an identification. Both are words intended by the speaker to label someone; each statement identifies a person as a robber or thief.

The statement in the hypothetical that "defendant took the car," however, did not come in response to a question of, "Who did it?" Instead it answered, "What happened?" The answer to what happened did not just label someone; it explained actions as well as identified actors. Does the fact that the same statement came in response to the latter question remove it from the realm of an identification? If we give words their normal meaning, the nature of the question cannot alter the classification of the answer. The answer does more than just identify, but it still labels the defendant as the actor. On its face, the reply to "What happened?" is an identification within the reach of Rule 801(d)(1)(C).

Once it is seen that the plain language of Rule 801(d)(1)(C) covers the statement in the hypothetical, "defendant took the car," then the provision's full effect under the plain-meaning standard becomes more clear. For example, assume that two nurses are talking in the hospital cafeteria. One says, "I was in surgery today and Dr. Black left a sponge inside a patient." Is this statement admissible in a subsequent malpractice action? Assume that the statement is not an excited utterance or a present sense impression. It is not a statement for medical diagnosis, and its form precludes it from being a business record. But it is a statement identifying a person. It identifies Dr. Black as having done the action. The statement may be more than an identification; it may also relate what happened, but it is still one naming Dr. Black as the person who took some action. If the nurse is subject to cross-examination at the trial about the statement, the statement is admissible under the plain-meaning standard because it is an identifying declaration made after perceiving the person.

If Rule 801(d)(1)(C) covers the nurse's statement, the Rule's grasp is wide indeed. It takes in every utterance that names an individual doing something, or saying something, or being somewhere. All of these are statements of identification. If the maker of such a statement is subject to cross-examination concerning the statement, then the out-of-court declaration is admissible for its truth. The plain meaning of Rule 801(d)(1)(C) thus leads to an unanticipated, but important change in accepted hearsay exclusions; courts are now obliged to admit an unprecedented array of identifying out-of-court statements under the plain meaning of the Federal Rules of Evidence.

IV. Effects of the Plain-Meaning Standard on the Law of Evidence

This Article has not examined various examples because they all lead to a "right" or "wrong" result. Commentators can debate the wisdom of each plain meaning.[152] Not all plain meanings will lead to momentous changes. Some of the changes wrought by the plain-meaning standard will affect many trials; others will affect just a handful. The new readings will not consistently favor one party. Prosecutors, plaintiffs, and defendants will all be aided by some changes and hurt by others.[153] The plain-meaning standard, however, will have one major

152. This Article explores the effects of the plain-meaning standard on the Federal Rules of Evidence; it does not determine the "best" way to interpret them—if there is a "best" way.

As a general method of statutory interpretation, however, the plain-meaning standard has been strongly criticized. For example, Kernochan notes:

> There are many reasons why the literal or plain meaning approach should be abandoned . . . . Pitched as it is in terms of *the* plain meaning of statutory words, it assumes that words may have a single necessary meaning independent of their full context, without regard to how those words were used. This is dangerous and unwise. At root, the literal approach puts the wrong question. The question in human interchanges is not what the words mean but what the user of the words meant by them. . . . If the communication is to work well, the task must be in the first instance to ascertain not what the words as words mean abstractly or to the court or as a matter of common usage but what the legislature sought to convey when it employed them.

Kernochan, *supra* note 5, at 341 (footnote omitted). Furthermore, as Wald points out:

> To stop at the purely literal meaning of a word, phrase, or sentence—if indeed the purely literal meaning can be found—ignores reality. In the context of the statute, other related statutes, or the problems giving rise to the statute, words may be capable of many different meanings, and the literal meaning may be inapplicable or nonsensical.

Wald, *supra* note 4, at 199.

Others also see that plain meaning puts unrealistic demands on legislatures.

> The invocation of the plain meaning rule results in an insistence upon specification and attention to detail . . . .
>
> . . . [T]here is a very real danger that this attitude may place a burden on legislatures that they simply are not equipped to discharge. Except in special fields . . . attempts by legislatures to deal with the details of broad statutes have not been too successful. Moreover, preoccupation with detail often results in a failure to deal with tough policy questions . . . . It could be tragic if the courts reinforce the belief that preoccupation with detail is the appropriate way for legislators to behave.

Murphy, *supra* note 3, at 1313.

Of course, the application of the plain-meaning standard to the Federal Rules of Evidence is just another example of our legal system's attempt to manage the ever-increasing number of statutes. As Dean Guido Calabresi stated, "We are dealing with the slow adaptation of our whole legal-political system to a major change: the preponderance of statutory law." G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 120 (1982). So far, "[t]here is no consensus on what courts should be doing when they interpret statutes." *Id.* at 214 n.30.

153. The Court's seriousness about interpreting the Federal Rules of Evidence by the plain-meaning standard may become evident if it decides that an accused can introduce statements against the prosecution as agency admissions. *See supra* notes 125-42 and accompanying text. The admissibility of this previously banned hearsay will have a major effect on prosecutions, in part because so many people are government agents, and thus, the number of people who can make agency admissions is so potentially high. *See* United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 358 (D.D.C. 1980) (holding that in a civil antitrust suit, the plaintiff was not just the Justice Department, but all executive branch agencies, departments, and subdivisions, and therefore, out-of-court declarations by officials of such agencies and departments were admissions). The introduction of agency admissions against the Government will also cause much new information to be presented because of

impact—the totality of the changes will transform the law of evidence.

The plain-meaning standard will recast a tremendous amount of our evidence law because, as the examples indicate, applying the plain-meaning standard will transform numerous provisions of the Rules. Taken together, so many changes of such differing magnitudes will profoundly alter the current evidentiary landscape. The required interpretive method will admit some hearsay that was previously excluded; it will exclude some hearsay that was previously admitted; it will admit more evidence of prior crimes; it will remove a restriction on impeachment. It will be as if someone has altered the topography since the last climb up the fire tower; one mountain has grown taller, another has moved, and another has disappeared; streams have widened and scrub pines have been replaced with hardwoods. The overall effect of the plain-meaning standard on the Federal Rules of Evidence will be a new evidentiary map. In short, the standard will lead to a new law of evidence.

We cannot yet see all the details of the evidence law's new topography. The examples in this Article may aid the exploration, but we still need a thorough mapping of plain-meaning's impact. In order to understand fully the transformations of evidence law, we must not ouly comprehensively apply the new literalism to all controversies, we must also systematically apply it to every provision of the Federal Rules of Evidence, for, as the discussion of prior identifications indicates, changes will come to provisions that are not now disputed.

The systematic application of plain meaning seems easy enough; just accept the commonsense meaning of the Rules' words. The task, however, may be more difficult than it appears. All of us familiar with the Rules bring much to our reading of them. Because we know the goals, or history, or policy, or practical operation of a provision, we view the Rules through a fog that may prevent us from seeing the true features of evidence law as defined by plain meaning. It may be difficult to jettison our existing knowledge of evidence law and just mechanically inspect the plain language. Those most interested in mastering the evidentiary landscape may have the most difficulty exploring it. As a result, the judges,

the expansive nature of admissions. An admission is admissible even if the declarant does not speak with firsthand knowledge and even if it incorporates otherwise inadmissible opinions. *See, e.g.*, Russell v. United Parcel Serv., 666 F.2d 1188, 1190 (8th Cir. 1981) (holding that vicarious admissions in the form of opinions are admissible and that firsthand knowledge is not required for admissions); *accord* Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626, 630 (8th Cir. 1979) (holding that neither Rule 805 nor Rule 403 mandates the introduction of an implied requirement of personal knowledge into Rule 801(d)(2)(D); *In re* A.H. Robins Co., 575 F. Supp. 718, 724 (D. Kan. 1983) (holding that statements by employees of the company and relating to their involvement in the project are not hearsay, thus there is no need to demonstrate that the declarant is not expressing an opinion or that he has firsthand knowledge of the facts that he is relating).

litigators, and scholars who best knew the rules may no longer be the best people to interpret the Federal Rules of Evidence.[154] Perhaps, those free of old evidentiary knowledge will have the least difficulty discovering the new plain meaning. We may now find it useful to turn to the neophyte in evidence to discover the content of the law.

The plain-meaning standard will do more than just transform the evidentiary landscape; it will also freeze the new forms into unchanging shapes. Once we discover the most natural reading of the Federal Rules of Evidence's words and clauses, the law will be fixed until Congress acts. And Congress will not act often. "One of the facts of legislative life, at least in this country in this century, is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions."[155]

The plain-meaning rubric thus squelches evidence law's historic dynamism and abolishes common-law methods of resolving evidentiary disputes. For centuries the common law controlled the rules of evidence.[156] Evidentiary doctrine continually developed, as judges attempted to accommodate logic, policy, tradition, new beliefs, and changed circumstances in deciding cases and reinterpreting precedents. As the plain-meaning standard replaces the common-law methods, much of evidence law's capacity for orderly growth is lost.[157] As Justice Harlan Stone rec-

154. Professor Imwinkelried has argued that the Federal Rules operate much like a self-contained civil-law code, abolishing common-law rules that Congress failed to codify and that

> the judiciary has lost its common-law power to formulate exclusionary rules of evidence. . . .
>
> This conception of the Federal Rules understandably is unsettling to commentators and judges schooled in the common law of evidence. In this "Age of Statues," some yearn—almost nostalgically—to return to the common law of yesteryear.

Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 881-83 (1988) (footnote omitted).

155. G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977). The lack of statutory revision occurs for several reasons. *See, e.g.*, Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1524 (1987). Professor Eskridge notes:

> Political theory and experience suggest that because of the many procedural obstacles to legislation in our bicameral committee-dominated Congress, the tendency of interest groups to block rather than advance legislation, and the deference that legislators and their staffs will typically give to virtually any decision of the Supreme Court, such legislative correction will rarely occur.

Id. Dean Guido Calabresi points out that

> one-shot losers . . . have little incentive to lobby for change in the rule. . . . [O]ne major reason for legislative failure to update laws is that if the updating is, like most legislation, prospective only, those who have already lost have little reason to urge legislators to update. Only if there exist powerful people who know ahead of time that they will lose from the out-of-phase result can this technique bring about the legislative reaction it seeks.

G. CALABRESI, *supra* note 152, at 155 (footnotes omitted).

156. *See supra* note 81 and accompanying text.

157. "[T]he genius of the common law, upon which our jurisprudence is based, is its capacity for orderly growth." Lum v. Fullaway, 42 Haw. 500, 502 (1958); *cf.* Stone, *The Common Law in the*

ognized, the common law's "strength is derived from the manner in which it has been forged from actual experience by the hammer and anvil of litigation."[158] Before the Supreme Court adopted the plain-meaning standard, adversaries would debate whether a particular evidentiary practice led to the best trials and best justice. The judges who saw the effect of evidence law daily could adapt it in an attempt to make it better. With plain meaning, that opportunity is lost. From now on, adversaries should only discuss the most commonsense way to read the words of the Rules, and the courts will not have the power to adapt and modify the practices to improve the law.[159] When plain meaning controls, stagnation results.

Stagnation will result both because the courts will no longer adapt evidence law to new knowledge and conditions, and because judges should no longer write opinions that discuss the best and most feasible evidentiary practices.[160] These discussions are, of course, the fuel for debate by scholars and revisers. Those who wish to improve evidence law have lost a major source for understanding the importance and effect of that law. Any changes we may have in the future will be based on information less complete than we have had in the past.

We will now also get decisions without any consideration of the wisdom of the results. The Supreme Court indicates that plain meaning controls even though the Rules' drafters and adopters never considered the specific issue being litigated. Furthermore, the courts interpreting the Rules' plain meaning do not aim to further prudent policies, but only analyze language. Thus, courts will be deciding cases even though no decision maker will have considered the wisdom of a particular outcome.[161] Indeed, *Bourjaily* typifies this circumstance.[162] The Rules' legislative history does not indicate that anyone considered the effect of discontinuing the ban on admitting coconspirator statements through

United States, 50 HARV. L. REV. 4, 6 (1936) ("[T]he most significant feature of the common law, past and present, and the essential element in its historic growth, [is] the fact that it is preeminently a system built up by gradual accretion of special instances.").

158. Stone, *supra* note 157, at 7.

159. *See* Note, *supra* note 4, at 898 ("With the rise of literal intent, judges have become mere servitors of a positivistic sovereign: Congress enacts rules that bind judicial action, rather than policies that guide judicial interpretation. The positive commands of a statute's literal words now demark the bounds of federal judicial power.") (footnotes omitted).

160. *Cf.* G. CALABRESI, *supra* note 152, at 278 n.62 ("[T]he common law needs backwaters, areas of inconsistencies, . . . to have any future growth. . . . [A] fully consistent legal structure would tend to be a static one in which courts could not advance the law.").

161. *Cf.* Note, *supra* note 4, at 905 ("[W]hen Congress is unable to address a problem that arises within a statutory scheme and the Court continues to 'remand' the problem to Congress by operating in the clear-statement model, a substantive decision results without either institution's explicitly confronting the choices implicated in that decision.").

162. *See supra* notes 18-32 and accompanying text.

bootstrapping; the Supreme Court similarly failed to consider the wisdom of its decision. As the logic of *Bourjaily* and the other cases takes control, and as judges apply the plain-meaning standard throughout the Rules, we increasingly will have evidentiary practices imposed with no consideration by anyone of whether those practices are sensible.

V. Conclusion

The Supreme Court has indicated that judges should apply a plain-meaning standard to the Federal Rules of Evidence. This standard will affect so many evidentiary practices that the entire evidentiary landscape will change. Inevitably, however, 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.