THE MODERN TRIAL AND EVIDENCE LAW: HAS THE "RAMBLING ALTERCATION" BECOME A PEDANTIC JOUST?

Daniel D. Blinka[*]

TABLE OF CONTENTS

[*] Professor of Law, Marquette University Law School. J.D., Ph.D., University of Wisconsin—Madison.

I. INTRODUCTION

In its last Term, the Supreme Court decided three cases that reveal much about our conflicted attitude toward the modern trial. In *Perry v. New Hampshire*[1] the Court held that rules of evidence, not due process rights, are prime guarantors of reliable lay testimony, including eyewitness identification. In *Williams v. Illinois*,[2] however, we learned that maybe evidence law, especially core rules involving hearsay and expert testimony, may not be so helpful after all. Yet maybe none of this matters anyway because in *Lafler v. Cooper* we are told that "criminal justice today is for the most part a system of pleas, not a system of trials."[3]

Our Symposium centers on Justice Jackson's observation that evidence law, or at least a part of it, had become a "grotesque structure."[4] Conventionally, the ugliness remarked upon by Justice Jackson resides in knotted doctrine and hypertechnical rules. His metaphor, however, may also be illuminated by the history of the trial.

Trials are not built on a foundation of evidence law. Evidence rules were instead imposed on an often unruly, informal, and inelegant process of lay decisionmaking, the very amorphousness of which made the enterprise difficult. Even today, trials turn on a popular epistemology we often call common sense. This is the epistemology of everyday life, rooted in the prevailing notions about how people think and act. It values the stories, narratives, and characters that evidence law struggles to contain, channel, and sometimes exclude.[5] What is often grotesque about evidence

---

[1] *See* 132 S. Ct. 716 (2012) ("Given the safeguards generally applicable in criminal trials [including rules of evidence] . . . we hold that the introduction of Blandon's eyewitness testimony, without a preliminary assessment of its reliability, did not render Perry's trial fundamentally unfair.").

[2] *See* 132 S. Ct. 2221, 2228 (2012) (plurality opinion) (holding that the Confrontation Clause does not bar an expert's opinion based on inadmissible hearsay, a lab report, that was not formally introduced into evidence).

[3] 132 S. Ct. 1376, 1388 (2012).

[4] Michelson v. United States, 335 U.S. 469, 486 (1948).

[5] *See* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 22 (2009) ("[W]e necessarily understand human actions, the subject of every trial, in the language of narrative, and we necessarily see partial descriptions, such as the ones offered in the direct examinations of witnesses, as truncated parts of some more complete narrative."); STACY P. MCDERMOTT, THE JURY IN LINCOLN'S AMERICA 191 (2012) (discussing the identity of jurors

law is this struggle to accommodate, if not to limit and control, the popular culture that permeates the courtroom and that shapes the thoughts of lay witnesses, lay jurors, and even lawyers and judges.

It is unclear to me that today's evidence law serves trials well, or as well as it can and should. My purpose in this Article is to place these developments in a historical context. Part II is a historical précis, examining how evidence law sought to accommodate the amorphous lay culture that has always been the trial's core. Increasingly, however, there now seems to be less emphasis on accommodating lay culture and more on displacing it altogether.

Part III assesses several troubling trends. First, there is a tendency toward clever rules that ill-serve the law and lay factfinders. Spurious instructions draw legally elegant distinctions that contribute nothing to informed factfinding. Second, there is a yearning for "science" to provide answers to all that troubles us, including factual disputes at trial as well as the content of evidence rules themselves. Together, these trends reveal the law's discomfort with, and at times contempt for, contemporary lay thinking, the common sense of everyday life that breathes legitimacy into the trial. It matters not, in today's trials, that evidence law is out of synch with current social and cultural attitudes because esoteric science and clever rules are the standards. Lost, then, is the chance to improve trials by eliminating the outmoded social thinking reflected in certain rules. Why should we have confidence in the trial, an institution that—because of its dissonance with how most people think today—invites flawed factfinding and faces a loss of legitimacy?

II. TRIALS AND HISTORY

Even the briefest of historical overviews yields two points. First, there is no inexorable relationship between evidence law and trials. Second, courts in Britain and the United States conducted jury trials for centuries little bothered by evidence rules. From the start, trials were a quintessentially lay institution featuring

---

with the parties and lawyers before them).

narratives and stories. Products of prevailing popular culture, trials embraced lay witnesses and lay factfinders who relied on common experiences. Only later did the law impose evidence rules on this decidedly unruly process in an attempt to assert control and to promote a very different vision of the trial. The result has been uneven, to say the least: Trials still depend largely on information from lay witnesses that is evaluated by lay factfinders in ways often in tension with the law.

Eighteenth-century trials were conducted *viva voce* (face-to-face), as they are today, but their form and function dramatically differed from that of their progeny. Trials were as much about social confrontation and accommodation as about resolving purely legal issues or finding "truth," however defined. Three aspects stand out.

First, trials were unstructured, even disorganized, by present standards. Much excellent historical work has explored British criminal cases.[6] Trials were conducted largely by judges, who questioned witnesses and summarized evidence and law for the jury. Aptly described as a "'rambling altercation'" between accused and accuser,[7] the old-style trial featured no nice distinctions between the prosecution and defense cases-in-chief.[8] The court assumed that the accused was guilty; the burden rested on him or her to prove innocence, or at least to surface a reasonable doubt.[9] Few rules of evidence and even fewer lawyers hampered the process.[10] Only after 1750 did trials begin to assume a more familiar form that, at least technically, tested the strength of the prosecution's evidence.[11]

---

[6] *See generally* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800 (1986) (examining the English process of prosecution and the character of English criminal trials); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003) (examining the transformation of the older altercation-style trial into the "adversary trial" between the seventeenth and nineteenth centuries).

[7] John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 130 (1983) ("rambling altercation").

[8] *See* DAVID J.A. CAIRNS, ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL 1800–1865, at 30 (1998); *see also* LANGBEIN, *supra* note 6, at 253 ("The accused conducted his own defense, as a running bicker with the accusers.").

[9] BEATTIE, *supra* note 6, at 341.

[10] *Id.* at 363.

[11] *Id.* at 375.

Second, the older-style trial was exceedingly brief, eschewing any pretense of a "deliberative ideal." Most criminal trials lasted just a "few minutes"![12] Judges questioned the victim and other witnesses; the defendant usually had no lawyer. To increase the pace, juries sometimes heard multiple cases before retiring to deliberate on the entire series. When jurors complained that they had (understandable) difficulty keeping the evidence straight, judges permitted juries to decide cases after each was presented. The result was even faster trials because juries seldom left the courtroom. To facilitate this brief "huddle" among jurors, who might otherwise be scattered about the courtroom, the innovation of the "jury box" permitted them to rapidly exchange comments and eye contact.[13] One finds this same pattern even in civil litigation in Virginia, before and after the American Revolution, where juries sometimes decided cases without hearing any evidence, relying instead on their own knowledge.[14]

Third, the trial's objective was not uncovering the historical truth of the matter. Unlike today's trials where character is ostensibly excluded, character played a central role in eighteenth-century trials because discretion was "shot through" the process.[15] The old-style trial's leading historian, J.M. Beattie, observes that jurors and judges "paid attention not just to the facts alleged and the defense offered. They were particularly anxious to discover something about the men and women on each side."[16] Beattie places character at the center of the old-style trial:

> Crimes came forward for consideration as the deeds of actual men and women who obviously differed hugely. . . . The jury and the judge regarded this as important information that ought to play a crucial role in their decisions. *Who the prisoner was—his character and reputation—was as critical a question as*

---

[12] *Id.* at 376.

[13] *Id.* at 347. The jury's huddle, which Beattie describes as a "rapid survey" to see if the other jurors agreed with the foreman, usually lasted no more than several minutes. *Id.*

[14] Daniel D. Blinka, *Trial by Jury on the Eve of Revolution: The Virginia Experience*, 71 UMKC L. REV. 529, 568 (2003).

[15] BEATTIE, *supra* note 6, at 406, 420–22 ("shot through").

[16] *Id.* at 440.

> *what he had done (and even in some cases whether he had done it), and it was centrally the business of the trial to find the answer.* The discretionary options available to both the juries and the judges were exercised with that question and with those answers very much in mind.[17]

Some trials "involved as much a weighing up and balancing of the reputation and social worth of the principals on each side as of the evidence."[18] In one case, the judge called upon the defendant to produce "better character witnesses," not a "better factual defense."[19] Absent character witnesses, judges and juries looked to how people dressed, spoke, and acted in court; demeanor, then, was a proxy for character.[20] In sum, the older form of trial brought parties, witnesses, and jurors together for a verdict that was less about finding "truth" than arriving at an acceptable social judgment.

The modern trial emerged in the nineteenth century charged with the mission of finding historical truth and featuring evidence rules aimed to curb both a jury's discretion and the trial lawyers who now presented the evidence. The trial, however, was still about "humor, emotion, and storytelling."[21] The altercation became somewhat less rambling, yet the core remained: lay factfinders listened to lay witnesses. The old and new was often a difficult fit.

Evidence rules grew ad hoc; there was no master plan. Some were aimed at controlling trial lawyers, who had taken the reins from the judges in presenting evidence and whose advocacy sometimes transgressed proper bounds.[22] Other rules served to

---

[17] *Id.* at 436 (emphasis added).

[18] *Id.* at 442.

[19] *Id.* The trial's goal was to identify the "old offenders" who repeatedly violated the law. *Id.* at 443.

[20] *Id.* at 443, 447; *see also id.* at 406 ("In the courtroom itself the trial jurors and the judges and magistrates were also keenly aware of the character of the prisoner and of the prosecutor, and of the wider social needs to be served by their verdict and by the penalties that would follow.").

[21] MCDERMOTT, *supra* note 5, at 141.

[22] *See* CAIRNS, *supra* note 8, at 54–55 (explaining that evidence rules responded to the tendency of trial lawyers to emotionally persuade jurors).

control jury decisionmaking by restricting the information that might be put before it or by allowing judges to decide cases without the jury's input.[23] Curbing jury discretion entailed channeling lay thought in the courtroom, a difficult task.

Ad hoc rules meant that evidence law lacked coherence and comprehensiveness. Some hoped to remedy this undisciplined mishmash. Simon Greenleaf, who taught evidence law at Harvard Law School in the 1830s and 1840s, authored the first American treatise on the subject in the early 1840s. Greenleaf found harmony among the law, science, and popular thought. His evidence treatise incorporated the tenets of Scottish Common Sense epistemology, which provided a "system of principles" conforming to both the best "human science" in antebellum America and prevailing popular thought.[24] In short, evidence law was, in Greenleaf's eyes at least, a science of proof that adopted the Common Sense tradition's faith in human experience and perception in finding facts. Moreover, the same tradition suffused popular culture, including the dominant evangelical religious faiths.

Greenleaf had far greater confidence in the rules than he did in the trial itself. To demonstrate their power to facilitate factfinding, Greenleaf, himself a devout evangelical Episcopalian, wrote a tract that proved the truth of the Gospels "By the Rules of Evidence."[25] Rather than putting Matthew, Mark, Luke, and John on trial, he analyzed their credibility in accordance with evidence law in much the same way an archeologist critically examines an ancient vase. His principal purpose was to win converts for his legal science among an overwhelmingly Christian public, including

---

[23] *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 166, 170–71 (1975) (explaining the emergence of judicial controls, including evidence law, over juries and trial outcomes).

[24] *See* Daniel D. Blinka, *The Roots of the Modern Trial: Greenleaf's Testimony to the Harmony of Christianity, Science, and Law in Antebellum America*, 27 J. EARLY REPUBLIC 293, 303, 316 (2007) (discussing Greenleaf's Common Sense philosophy and how it affected his vision of evidence law).

[25] *Id.* at 302–06 (discussing SIMON GREENLEAF, AN EXAMINATION OF THE TESTIMONY OF THE FOUR EVANGELISTS BY THE RULES OF EVIDENCE ADMINISTERED IN COURTS OF JUSTICE, 2–3, 7–10, 21–38, 42 (1846)).

the intellectual community, devoted to the Common Sense methodology.[26]

Despite Greenleaf's high hopes for the rules, trials remained a lay enterprise, and lawyers understood that outcomes turned as much on the jurors as the law. Ensuring that like-minded men served on juries proved more effective than evidence rules in controlling, or at least influencing, trial outcomes. While Greenleaf pondered rules, Abraham Lincoln and other lawyers tried cases before juries who looked and thought much like they did.

The symmetry was deliberate. Mid-nineteenth century American law fostered the very middle-class values and beliefs that formed the burgeoning market economy's core. Judges and lawyers shared these same beliefs with jurors, who were drawn from the same social and economic demographic. A recent study, *The Jury in Lincoln's America*, recounts how Midwestern courts, recognizing the limits of rules and the jury's relative autonomy, ensured that both grand juries and trial juries consisted of like-minded men.[27] Courts drew from a relatively small pool of men who repeatedly served on juries, a practice that provided experience and familiarity among courthouse actors.[28] Lawyers waiting for their cases might also serve on juries.[29] Lincoln himself served on six juries.[30] Thus, the common law trial imbued the very middle-class values and beliefs, including Common Sense epistemology, held by jurors, judges, and lawyers—all deemed to be persons of "good moral character."

Over a hundred years later, the Federal Rules of Evidence (FREs) built on the common law's model of the lay trial and evidence rules. Yet the FREs were incomplete in two senses. First, they deliberately did not include all common law rules. Second, the FREs respected the wide sway given to lay testimony, lay factfinders, and lay thinking. There was no pretense that the FREs served as a proof template or rigidly regulated

---

[26] *Id.* at 320.

[27] MCDERMOTT, *supra* note 5, at 144–50.

[28] *Id.* at 157–58 (noting that laws concerning juror qualifications ensured a homogenous jury pool).

[29] *Id.* at 169.

[30] *Id.*

decisionmaking. Weight and credibility, the essence of trials, still reposed in common experience and everyday life.

Today, it may be that our discomfort with trials stems from our own unease with the vision of lay culture hardwired into the common law trial and evidence rules. The complacent middle-class assumptions that served the nation, and the legal profession, so well since the early-nineteenth century have come under heavy criticism. Lincoln tried cases before men who thought like he did. Yet jury composition today is undeniably more democratic and egalitarian, reflecting a diverse, often fractious lay culture that is is vividly illustrated by the Occupy movement. Evidence law resides in a different time.

III. THE CURRENT STATE OF THE TRIAL AND EVIDENCE RULES: A CRITIQUE

Whatever may be the causes or effects of the vanishing trial, it seems clear that it has lost luster within the legal profession. The dissatisfaction is partly manifest in a yearning for esoteric rules, some of which embrace fictions that border on fantasy. More striking is a turn to nonlegal forms of specialized knowledge, especially psychology and social sciences, as not only a source of proof but also as a litmus test for evidence rules themselves. Both trends are a rebuke to lay thinking, as illustrated by three examples.

A. HAS CHARACTER EVIDENCE GONE FROM "GROTESQUE" TO "QUIXOTIC" AND "DOWNRIGHT PERVERSE"?

Justice Jackson famously observed that the rules governing character proof are "grotesque."[31] Perhaps this is so because they attempt the impossible—to make ordinary people think differently in the courtroom than they would in everyday life.

Character judgments are part of our social fabric. When seeking jobs, especially in law, letters of recommendation, supportive e-mails, and "references" are commonplace. Culturally, we are hardwired to label people as hardworking, diligent, lazy,

---

[31] Michelson v. United States, 335 U.S. 469, 486 (1948).

violent, and even "good." No (good) parent would hire a babysitter without knowing something about him or her. In our daily interactions, we are constantly asking, what kind of person is this? Yet there is a clear disjunct between the law's approach to character and popular thinking.

The law of evidence purportedly excludes character as proof, especially to show propensity, but trial lawyers know better. Absent formal evidence or even argument about character, juries will look at whatever clues are available, just as lay people do in everyday life. The disjunct is underscored by the law's confusion over the very definition of character today. Is it a psychological construct for which we need science to guide us in its use at trial? Or is it instead a social construct, a product of popular thought that has become increasingly volatile because it embraces values that are hotly contested today? It's little wonder that character evidence remains grotesque.

In an otherwise routine 1998 homicide prosecution, the State charged Monte Milcray with the murder of Randolph Cuffee, who was stabbed to death in his own apartment.[32] Initially Milcray denied any involvement but later said he had picked up Cuffee, a cross-dresser, thinking he was a female prostitute.[33] When Cuffee attempted to sexually assault Milcray, the two struggled and Milcray stabbed Cuffee numerous times.[34] Milcray fled the apartment, leaving Cuffee to die. At trial, the jury acquitted Milcray of homicide[35]—not, it appears, because it was convinced of Milcray's innocence or credibility but rather because it found that the State had not disproved his self-defense claims beyond a reasonable doubt.[36]

The jury foreperson was D. Graham Burnett, whose book *A Trial by Jury*[37] insightfully looks at problems of proof and jury deliberations in a criminal trial. A specialist in the history of science at Princeton University,[38] Burnett revels in the messiness

---

[32] D. GRAHAM BURNETT, A TRIAL BY JURY 5–6 (2001).
[33] *Id.* at 40–41.
[34] *Id.* at 42.
[35] *Id.* at 165–66.
[36] *Id.* at 165.
[37] *Id.*
[38] For Burnett's background, see *The Department of History*, PRINCETON UNIVERSITY, http://

of the factual record and the competing, sometimes inconsistent inferences that one could have reasonably draw from evidence. On display throughout is Burnett's determination to uncover the historical truth behind the homicide.[39] Milcray's jury confronted the tangled facts, eschewing "shortcuts, no matter how obvious they seem[ed]," in favor of the "long route."[40]

Burnett fulminates about the fictions and awkwardness by which the trial process purports to educate the jury about the "facts" of the case. Particularly offensive and unhelpful are the law's restrictions on character evidence. The paucity of information about the main actors, Cuffee and Milcray, exasperated Burnett: "From the start of the trial, this careful court practice—separating the admissible 'facts' of the case from inadmissible information about the 'characters' involved—struck me as more than quixotic; it was downright perverse."[41]

Who was Milcray? "That was the inescapable question. Was he a person whose account I could believe?"[42] Had Milcray "been arrested a half a dozen times for shaking down gay men in the West Village?"[43] The jurors found it "infuriating[ ]" that they would hear such evidence (so they thought) only if Milcray testified.[44] They had similar questions about the victim, Cuffee. "Who was he?" The jurors were "being asked to believe that he resorted to physical violence in a ravenous sexual rage. Was [Cuffee] a person of whom such a thing could be thought?"[45]

"Information bearing directly on this question," observed Burnett, "was essentially prohibited to us, by law."[46] Burnett

---

www.princeton.edu/history/people/display-person.smal?netid=dburnett (last visited Feb. 12, 2013).

[39] One other juror was also an academic historian. *See* BURNETT, *supra* note 31, at 16.

[40] *Id.* at 61–62. Burnett colorfully describes this as the jury's preference for "Ockham's knitting needles" over "Ockham's cold razor": Where the razor "cut out everything but the necessary," the knitting needles were a very different "epistemological tool, more labor-intensive, more creative, better able to work with those tangles." *Id.* at 61.

[41] *Id.* at 70.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 71.

[45] *Id.*

[46] *Id.*

lambasts the character rule as "counterintuitive" from both the perspective of everyday common-sense and historical methodology:

> Somehow, in the history of jurisprudence, these issues—who people were, what they had done in the past—had come to be thought of as different in kind from the "facts" of a case, different from blood on the wall and reams of phone-company records. How had this idea gotten going, when it is was so counterintuitive? I was being asked to decide if a crime had occurred—in other words, if *someone* did *something* to *someone else*. How could the nature of either "someone" stand off-limits?[47]

Apparently, the defense did not call character witnesses or otherwise make formal use of character proof, but clues abounded. Milcray himself testified to his scant criminal record and provided some background about his personal history—education, employment, family, etc.[48] On cross-examination, the prosecutor ineffectually attacked Milcray about an innocuous fib he had told years earlier when trying to enlist in the Marines. Demeanor too was stressed. In Burnett's rendering, Milcray appeared "benign," a "mild-mannered person—one with no history of violent crime."[49]

What role did such character proof play in the verdict? It is hard to know. The jury studiously noted the many inconsistencies and contradictions among the prosecution's witnesses and was particularly troubled by the absence of motive.[50] The defense fared little better; Milcray's credibility had also been shredded. The prosecution, however, bore the burden of disproving the self-defense claim beyond a reasonable doubt. Credibility merged imperceptibly into a broader assessment of "who" these people

---

[47] *Id*.

[48] *Id*. at 71–72.

[49] *Id*. at 72, 74. Demeanor seemed central to the finding that Milcray was "apparently so benign—young and slight, well spoken with a handsome dark face." *Id.* at 72. See too Burnett's characterizations of the "cross-dressers" who testified for the prosecution. *Id*. at 51–52.

[50] *Id*. at 59–60, 73 (noting that the prosecutor's shortcomings caused Burnett to favor the defense).

were, as best the jury could determine. For both Milcray and Cuffee the question, to repeat, was the same: "Was he a person of whom such a thing could be thought?"

Burnett, the historian and juror, is in good company when he blasts the prohibition of character evidence as "counterintuitive," "quixotic," and "downright perverse."[51] Yet the larger lesson of *A Trial by Jury* is how shallow and futile the character rule is. Character estimations loom large in our daily "factfinding" outside the courthouse, and predictably juries crave such information in the courtroom as well. Absent formal character proof, the factfinder *will* fill in the gaps with whatever is readily available. A witness's demeanor serves as a fertile source for character inferences, regardless of what it may reveal about credibility. Another doctrinal leak is the well-accepted practice of eliciting a witness's "background" on direct examination. A leading trial advocacy text emphasizes the importance of background when jurors ask the critical question, "Can I believe him?":

> Witnesses who lead responsible, stable lives; who are members of the community; who have resided in it for a substantial period; and who have served their community or country are more believable. Such witnesses meet jurors' comfort level because they are "just like us." Common background information usually includes residence, family, education, job, and perhaps military and public service.[52]

"Jurors," we are told, "want to know if the witness is a reliable member of the community or society and has attained notable goals, worked hard, and overcome adversity along the way. Those are the people we admire, and the ones we believe when they become witnesses during trial."[53] Background, then, is character evidence by another name.

Burnett also exposes the law's self-delusion that evidence may be used for limited purposes. Evidence of past criminal

---

[51] *Id.* at 70–71.

[52] THOMAS A. MAUET, TRIALS 125 (2d ed. 2009).

[53] *Id.* at 126.

convictions, for example, is routinely admitted as relevant to a witness's credibility on the theory that it sheds light on one's "character for truthfulness," yet juries will understandably use it more broadly, irrespective of nice legal distinctions, in trying to make sense of what happened and "who" people are.

Doctrinal leaks aside, evidence law is conflicted about the very nature of character itself. There is no apparent consensus on what character is. Some leave the term undefined or profess not to know what it means.[54] Others debate whether character has an essential "moral" component, which nicely illustrates how evidence law has forgotten its nineteenth-century roots in the Common Sense tradition and its celebration of "good moral character."[55] Perhaps the dominant approach sees character as a product of bad psychology, the detritus of the now-discredited "trait" school that one day may be superseded by promising developments in the neurosciences and psychology.[56] Significantly, it is not that the law looks to science for help—this is often a good thing; rather, it is the misbegotten assumption that character itself is a psychological construct that must be understood in scientific terms.[57]

What this overlooks is how we understand character in our daily lives. Burnett saw Milcray as "benign" and "even tempered."[58] This is not the stuff of psychology, it is the *lingua franca* of everyday life experiences. Character is constructed from social relationships, varying in time and among communities, expressed in diverse vernaculars. The law's attempts to cabin it are, as Burnett sagely observes, quixotic and perverse.[59]

---

[54] *E.g.*, DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH 321 (2d ed. 2008) ("Unfortunately, we do not have a good definition [of character].").

[55] *See, e.g.*, ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 127 (3d ed. 2011) (attempting to define "character").

[56] *See, e.g.*, LEONARD & GOLD, *supra* note 53, at 322–23 (discussing trait theory and recent developments in psychology).

[57] *See generally* Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741 (2008) (discussing developments in trait psychology and their potential effects on evidence law).

[58] BURNETT, *supra* note 32, at 72–73.

[59] *Id*. at 70.

Moreover, character's values and standards are contingent. Historically, they are deeply entrenched in the middle-class values of nineteenth-century liberalism. The culture wars of the last several decades and the recent Occupy movement vividly remind us that character is today hotly contested. Values and standards differ among groups based on region, class, ethnicity, race, and religion. Their crudeness, fluidity, and amorphous qualities undoubtedly explain why evidence law has had such great difficulty "defining" character and so little regard for its probative value in proving past events. The belief that law's understanding of character rests on bad science and must be replaced by good science elides the far messier problems that roil society today.

It is distressing that Burnett, an acute observer, dismisses evidence law as quixotic and perverse. One would hope that law would assist juries instead of obstructing them. More disconcerting is that evidence law's failings are not limited to character.

B. EVIDENTIARY ALCHEMY: WHEN THE INADMISSIBLE BECOMES ADMISSIBLE

All trials include hearsay evidence. Most trials today, especially civil cases, also feature some form of expert opinion testimony that in turn is largely predicated on hearsay. Given the near ubiquity of hearsay-based expert testimony, one would hope that evidence law has worked out most of the problems. *Williams v. Illinois* reveals that significant hurdles remain, some of which are of the law's own making.[60] Reified rules have generated elegant distinctions that are difficult to apply at trial except by resort to limiting instructions that are too often incomprehensible and occasionally nonsensical. *Williams*, a criminal case, raises evidentiary issues common to, and perhaps more prevalent in, civil trials. At bottom it raises the question, when is evidence "admitted" at trial?

A young woman was sexually assaulted.[61] Vaginal swabs revealed the presence of semen when tested by the state crime

---

[60] Williams v. Illinois, 132 S. Ct. 2221, 2227 (2012) (plurality opinion).

[61] *Id.* at 2229.

lab.[62] The swabs were sent to a private lab, Cellmark Diagnostics, which developed a male DNA profile from the semen.[63] The state crime lab conducted a computer search that matched this DNA profile with a sample taken from Williams after his arrest on unrelated charges.[64] At a lineup, the victim identified Williams as her attacker.[65]

At Williams' bench trial for sexual assault, the prosecution called the two state crime lab technicians who had identified the semen on the swabs and profiled Williams' known DNA after his arrest.[66] A third expert, Lambatos, testified to the match itself based on her comparison of the Cellmark profile, taken from the vaginal swabs, with the sample from Williams.[67] She explained that Cellmark was an "accredited crime lab" and that it was "commonly accepted practice within the scientific community" for DNA experts to rely on one another's records.[68] No one from Cellmark testified at trial, nor was the Cellmark report itself formally admitted into evidence.[69] On cross-examination, Lambatos admitted that "she had not seen any of the calibrations or work that Cellmark had done in deducing a male DNA profile from the vaginal swabs."[70] The judge convicted Williams. The state court of appeals affirmed on grounds that the Cellmark report was not used for the "truth of the matter asserted," but only for the limited purpose of explaining Lambatos's opinion.[71]

The Supreme Court affirmed in a split 4-1-4 opinion.[72] Although the Sixth Amendment confrontation right was a central issue, more salient for us is the Court's struggles to apply evidence rules governing hearsay and the presentation of expert opinions.[73] Both issues swirled around the evidentiary status of the Cellmark

---

[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *See id.* (describing the testimony of state's crime lab technicians).
[67] *Id.* at 2230.
[68] *Id.* at 2229 (internal quotation marks omitted).
[69] *Id.* at 2231.
[70] *Id.* at 2230.
[71] *Id.* at 2231 (internal quotation marks omitted).
[72] *Id.* at 2227.
[73] *Id.*

report.[74] Justice Alito wrote the plurality opinion in which Justice Thomas concurred only in the judgment; Justice Kagan wrote the dissent.[75]

The starting point is hearsay. Rule 801(c) defines hearsay as any statement made other than while testifying used to prove the truth of the matter asserted. The plurality stated that the "Cellmark report itself was neither admitted into evidence nor shown to the factfinder."[76] Lambatos never quoted or read from it and did not "identify it as the source of any of the opinions she expressed."[77] Her opinion, of course, relied on the Cellmark report's DNA profile, which matched Williams's known DNA, but the Alito plurality observed that it had not been formally offered for the truth of what the Cellmark lab asserted.[78] Other evidence (mailing receipts) established the "provenance of the profiles," but Rule 703 authorized Lambatos to base her opinion (that the profiles matched) on the inadmissible Cellmark report as well as the state crime lab's (admissible) report: "Under that Rule, 'basis evidence' that is not admissible for its truth may be disclosed even in a jury trial under appropriate circumstances. The purpose for allowing this disclosure is that it may 'assis[t] the jury to evaluate the expert's opinion.' "[79]

Justice Kagan's dissent rejects this formalism, labeling it an "abdication to state-law labels," a "subterfuge," and a "neat trick."[80] As the dissent goes on to remark, "[a]nd so it was Lambatos, rather than any Cellmark employee, who informed the trier of fact that the testing of L.J.'s vaginal swab had produced a male DNA profile implicating Williams."[81]

Equally troubling was that Lambatos seemed to have "no knowledge at all of Cellmark's operations" and may well have never "set foot in Cellmark's laboratory."[82] In a separate

---

[74] *See id.* at 2235–41 (evaluating the relevance of the Cellmark report).
[75] *Id.* at 2227.
[76] *Id.* at 2230.
[77] *Id.*
[78] *Id.* at 2239.
[79] *Id.* at 2239–40 (quoting FED. R. EVID. 703 advisory committee's note).
[80] *Id.* at 2272 (Kagan, J., dissenting).
[81] *Id.* at 2267.
[82] *Id.* at 2268.

concurrence, Justice Thomas too concluded that "there was no plausible reason for the introduction of Cellmark's statements other than to establish their truth."[83]

The hearsay analysis, then, turns directly on evidence rules governing the presentation of expert opinion testimony. The pertinent Illinois rules essentially mirror the current FREs.[84] As we have seen, the plurality takes a formalistic approach to Rule 703 that permits the expert's opinion to be based on inadmissible evidence, such as the Cellmark report, while permitting "disclosure" of such bases to assist the trier of fact.[85] "Controversial" when adopted, Rule 703 is designed to "help the factfinder understand the expert's thought process."[86] As the plurality explains:

> The purpose of disclosing the facts on which the expert relied is to ally these fears [of unwarranted inferences]—to show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts.[87]

The dissent took a more functional approach, looking closely at the substance of Lambatos's testimony: "What Lambatos could not do was what she did: indicate that the Cellmark report . . . [stated] that L.J.'s vaginal swab contained DNA matching Williams's."[88] Even the trial judge, as Justice Kagan noted, referred to Williams as "the guy whose DNA, according to the evidence from the experts, is in the semen recovered from the victim's vagina."[89]

---

[83] *Id.* at 2256 (Thomas, J., concurring in the judgment).

[84] *See id.* (explaining acceptable bases for expert opinion under Illinois and Federal Rules).

[85] *See supra* notes 76–79 and accompanying text.

[86] *Williams*, 132 S. Ct. at 2240 (plurality opinion).

[87] *Id.*

[88] *Id.* at 2270 (Kagan, J., dissenting).

[89] *Id.* at 2271 (quoting 4 Record JJJ151, *Williams*, 132 S. Ct. 221 (No. 10-8505)) (internal quotation marks omitted).

Subsumed in *Williams* are fissures within the Court over the proper bases for expert opinion testimony and, more important, what is meant by "evidence." Only the briefest sketch is possible here.[90] At common law, an expert could base an opinion on personal knowledge or on testimony introduced at trial, usually as adduced by a hypothetical question that had to be predicated on admissible evidence, hearsay included. Rule 703 permits expert opinions based even on inadmissible hearsay, provided it is of a type reasonably relied upon by experts in the field. It is this latter feature that rendered Rule 703 "controversial," as the plurality noted. Put bluntly, what is the evidentiary status of the expert's "basis evidence," especially when a crucial part is "inadmissible"?[91]

The case law, as *Williams* exhibits, struggles with the issue. *Williams* raises important constitutional issues for criminal cases, but the problem is likely more pressing in civil cases where far greater use is made of experts. The plurality opinion facilely permits "disclosure" of the inadmissible basis for the limited purpose of explaining the expert's reasoning. Through this evidentiary alchemy, the inadmissible basis is transformed into something admissible for a limited purpose. But in *Williams* the concerns went deeper than disclosure because Lambatos's opinion could only be helpful if her facts were true. Justice Kagan's dissent exposes the dilemma:

> The situation could not be more different when a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, because the statement's utility is then dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the factfinder must

---

[90] For a succinct overview of developments, see 132 S. Ct. at 2257 (Thomas J., concurring in the judgment).

[91] *See generally* Ronald L. Carlson, *Experts, Judges, and Commentators: The Underlying Debate About an Expert's Underlying Data*, 47 MERCER L. REV. 481 (1996) (discussing whether underlying data becomes evidence in its own right).

> assess the truth of the out-of-court statement on which it relies.[92]

Justice Thomas put the matter succinctly: "There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth."[93] Justice Kagan agreed. Such a limiting instruction, she contended, is "implausible," "nonsense," and "sheer fiction."[94]

In sum, *Williams* reveals the problems that arise when core evidence rules become overly refined, resting on excruciatingly subtle or, worse, nonsensical distinctions. A lay factfinder would undoubtedly have understood Lambatos as testifying to the truth of the Cellmark report, the plurality opinion notwithstanding. Nor is the concern that overworked trial courts simply are not up to the task. Despite written briefs, legal memoranda by law clerks, oral arguments, and Ivy League credentials, the *Williams* Court split over whether the Cellmark report had been admitted into evidence or even constituted hearsay. It also seemed ill at ease over the proper presentation of expert opinion testimony. The point is that evidence rules must be readily applicable, and comprehensible, in the largely extemporaneous environment of the trial court. Rules that turn on sophistic distinctions ("Your Honor, I'm not offering the testimony for its truth, but only so the jury better understands the witness's reasoning") not only confuse lay factfinders but also breed cynicism and disrespect for the law. Such alchemy only discredits the trial.

C. CREDIBILITY: WHOM DO WE BELIEVE AND WHY?

Evidence law is Janus-faced with regard to testimony. Rule 702 deputizes trial judges as "gatekeepers" charged with assuring the reliability of expert opinion testimony. In contrast, lay opinion testimony is left to the trier of fact. If a reasonable jury *could* find

---

[92] *Williams*, 132 S. Ct. at 2268–69 (Kagan, J., dissenting).
[93] *Id.* at 2257 (Thomas, J., concurring in the judgment).
[94] *Id.* at 2269 (Kagan, J., dissenting) (internal quotation marks omitted).

the witness believable, the lay testimony is admissible.[95] The boundaries of lay testimony are limited only by the vast realm of relevancy and what people claim to know, yet longstanding concerns about the accuracy of eyewitness identifications have peaked in recent decades, especially when DNA evidence provides irrefutable proof of mistakes and even perjury. Nonetheless, evidence law stands pat. The FREs mostly embraced the common law's approach to impeachment, and, more important, its understanding of credibility. Is this arrangement still efficacious? Should credibility be judged instead by the standards of modern psychology (science) instead of popular thinking? And is the vision of popular thinking reflected in the FREs still current, or are some rules founded upon social and cultural assumptions of a bygone time? Finally, do we provide lay factfinders with the information they need to decide credibility?

In *Perry v. New Hampshire*, an eyewitness identified the defendant, Perry, as the man who broke into a car in a parking lot late at night.[96] She saw Perry from a fourth-floor window of her apartment on two occasions, once as she observed the break-in and a second time while police detained him at the site during their investigation.[97] Her identification was "spontaneous"; on both occasions the witness had gone to the window on her own initiative.[98] Although the eyewitness positively identified Perry on the night of the crime, she was unable to pick him from a photo array about a month later.[99] The state courts denied Perry's motion to suppress the witness's out-of-court identifications on due process grounds because the police had done nothing to arrange Perry's parking lot identification.[100]

The Supreme Court affirmed, holding that absent "the taint of improper state conduct," due process does not require the trial judge to screen lay testimony for reliability, including eyewitness

---

[95] FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.").

[96] 132 S. Ct. 716 (2012).

[97] *Id.* at 721.

[98] *Id.* at 722.

[99] *Id.*

[100] *Id.* at 722–23.

identifications made under suggestive circumstances.[101] It is for the jury to assess "creditworthiness" because it "traditionally determines the reliability of evidence."[102] The *Perry* Court well understood the frailties of eyewitness identification yet found other "safeguards built into our adversary system" adequate.[103] The confrontation right and the right to effective assistance of counsel guarantee adequate cross-examination. Jury instructions may also address special proof problems. "State and federal rules of evidence" generally permit trial judges to exclude unfairly prejudicial or misleading evidence, while some courts permit expert testimony to educate juries "on the hazards of eyewitness identification."[104]

In sum, *Perry* portrays "creditworthiness" as a creature of evidence law and an issue of evidentiary weight; lay factfinders assess the value of lay testimony. Yet by what standards? Expert testimony famously requires reliable methods, reliably applied to sufficient facts, etc. Lay testimony, however, is entrusted to the vast reaches of life experience and common sense, which despite its importance is largely unexplored, seldom critically assessed, and often ill-served by evidence law.

What do we mean by "credible" lay testimony? The cases and commentary are strangely silent given the irrefragable importance of the question. Finding testimony credible (believable) turns on four assumptions, according to a leading treatise: (1) the witness accurately perceived the fact through the five senses; (2) the witness is accurately recalling the perception at trial; (3) the testimony accurately describes (narrates) the memory; and (4) the testimony is sincere.[105]

Regrettably, we largely assume the salience of the four testimonial assumptions. Unappreciated are their roots in nineteenth-century faculty psychology. Unexplored is whether

---

[101] *Id.* at 728.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 729.

[105] *See* 27 CHARLES ALAN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE §§ 6023, 6092 (2d ed. 2007) (setting forth the four assumptions). McCormick relegates "credibility" to a footnote. 1 MCCORMICK ON EVIDENCE § 33, at 147 n.5 (Kenneth S. Broun ed., 6th ed. 2006).

these assumptions remain valid in contemporary thinking. For example, the law sometimes analogizes perception and memory to a video camera, a model roundly criticized by scientists, yet does popular thinking still cleave to the same model today?[106] Put differently, does the lay public really hold to these assumptions—the brain records what the witness sees—at a time when the verb "photoshopped" stands synonymous with the deliberate manipulation of images? Neither the cases nor the commentary critically assess whether evidence law differs from both popular thinking and science. *Perry* blandly recognizes that "creditworthiness" is entrusted to the jury, relying on a shopworn list of "factors" drawn from decades-old case law that may reflect neither good social science nor contemporary popular thinking.[107]

Turning to the FREs, what do they reveal about credibility findings at trial? The result is disappointing. The common law governing impeachment was every bit as grotesque as character evidence generally, yet here the FREs' architects shamelessly copied about half the design and then walked off the job. The two prime forms of impeachment, bias and defects in testimonial capacity, are not even addressed by the FREs, although later cases assured us that these venerable rules remained vibrant.[108] Their omission only emphasizes the FREs' debt to the common law of evidence.

Rules 608 and 609, for example, adopted the quaint Victorian conception that all witnesses possess something called a truthful character, a nineteenth-century blend of the "moral science" advanced by Scottish Common Sense thinking and Protestant theology.[109] Rule 608 permits two forms of attack. Reputation or opinion testimony may be offered through character witnesses to establish that the target witness is an "untruthful" person.

---

[106] *See* 27 WRIGHT & GOLD, *supra* note 104, § 6011, at 139 (discussing the video-camera theory and its critics).

[107] *Perry*, 132 S. Ct. at 728, 730 (identifying the jury as the body responsible for weighing credibility and noting the use of factors used in deliberations).

[108] *E.g.*, United States v. Abel, 469 U.S. 45, 50–51 (1984) (discussing the continued availability of bias testimony in impeachment).

[109] *See generally* Allen C. Guelzo, *"The Science of Duty": Moral Philosophy and the Epistemology of Science in Nineteenth-Century America*, *in* EVANGELICALS AND SCIENCE IN HISTORICAL PERSPECTIVE 267 (David N. Livingstone et al. eds., 1999) (explaining the origins of "moral philosophy").

Moreover, any witness may be cross-examined about a specific instance of untruthful conduct, such as a lie on a job application, in order to prove the unremarkable proposition that the witness may have lied before. Is there any person anytime in history who hasn't lied? Does this really require proof? Rule 609 is still more problematic. Evidence of a witness's prior criminal convictions is used to prove a witness's "readiness to do evil," including lying under oath. Felony convictions, prison sentences, and prior acts of deceit are elicited ostensibly to help us evaluate how sincere witnesses may be—or perhaps just how rotten they are.

Trial lawyers well understand that Rules 608 and 609 are convenient gateways for spilling all sorts of unsavory facts about witnesses, especially parties, before the jury. In Milcray's murder trial, mentioned earlier, the prosecutor dredged up the defendant's largely innocuous lies to a military recruiter. The jury put little weight on this evidence mostly because it found Milcray unbelievable for other, better reasons, including his multiple, widely varying accounts of the murder. The larger point is that the rules ostensibly permit the use of this evidence for the limited purpose of assessing the witness's truthful character, yet the reality is that juries will likely ignore, if they can comprehend at all, this crabbed purpose. What then is the point of the exercise?

In light of scattershot rules, inadequate doctrine, and half-hearted huzzahs for cross-examination as the "greatest legal engine for the discovery of truth," it is little wonder that many have lost faith in lay testimony and lay factfinding as portrayed by evidence law. Instead, they have turned to science for salvation. Scientific truth-detection machines are a long-standing dream. Polygraph testing in various iterations has been bandied about for nearly a century, the law waxing and waning in its enthusiasm.[110] Although current doctrine usually excludes polygraph testing,[111] recent developments in the neurosciences have kindled the hope of many searching for a DNA-type breakthrough in determining credibility. Some see functional magnetic resonance imaging tests

---

[110] *See generally* KEN ADLER, THE LIE DETECTORS: THE HISTORY OF AN AMERICAN OBSESSION (2007).

[111] *See* United States v. Mare, 668 F.3d 35, 41–42 (1st Cir. 2012).

as fulfilling this promise, although the courts thus far are not convinced.[112]

Whatever science may contribute to "lie" detection, the larger problem is innocently mistaken testimony by otherwise well-meaning witnesses. They are not lying; rather, they are simply wrong because they misperceived, misremembered, or misdescribed the event. Absent a time machine, also a Victorian fantasy, it is unclear how technology can help us identify sincerely held mistakes. So too social science and psychology has pointed out shortcomings of eyewitness identifications for well over a century, yet it is unclear just how helpful this research is in a courtroom. It suffers both from partisan taint (lawyers only offer witnesses who can help) and internal disagreement among experts themselves. It isn't clear that psychology offers anything more reliable than prevailing popular notions about perception and memory. Jury instructions may be a cheaper, more objective, and ultimately better means of educating jurors about credibility issues, but the devil is in the details of their content.

In sum, we leave credibility, and the ordinary life experiences it encompasses, to the jury. Our evidentiary assumptions, rules, and practices, however, are built on nineteenth-century foundations that must be rethought. Until neuroscience offers a DNA-type solution to credibility, the standard for reliability must be contemporary lay thought and culture.

IV. CONCLUDING THOUGHTS

How well does evidence law serve our trials? The "rambling altercation" of the eighteenth-century trial suffered from an informality that invited capricious outcomes. Evidence law emerged to provide structure and certainty while continuing to anchor trials in the lay culture that gave trials legitimacy. The modern trial, however, is losing that anchor. Taken together, esoteric rules, a reflexive reach for experts to resolve factual disputes, and, most troubling, an inclination to measure the rules themselves by purported scientific standards risk transforming

---

[112] United States v. Semrau, 693 F.3d 510, 511 (6th Cir. 2012).

trials into a pedantic joust that is incomprehensible to the lay public.

This Article's principal goal is to argue that we need to center the trial in today's social and cultural environment. Most existing evidentiary doctrine is a product of the nineteenth century's best thinking, but even a moment's reflection captures the gulf between then and now. The happy harmony between lay and "scientific" thought that Simon Greenleaf assumed in the 1840s is not present today. The solution, however, is not modern science, which in most areas, including psychology, is riven by diverse schools of thought. Nor is it esoteric rules comprehensible only by lawyers specializing in trial work (and maybe not even by them). Rather, we must look to today's popular understanding of character and credibility, for example, when gauging the effectiveness of rules. The lay public (us included) clamor for information about character when making nearly any decision. Evidence law disserves the trial by instead funneling such information through the backdoors of demeanor and "background" instead of more direct forms of proof. Why frustrate jurors like Burnett? Why breed cynicism and gamesmanship at trial by forcing lawyers to distinguish between character (red light) and background (green light) when offering evidence? And if the notion of a "truthful character" strikes the general public as odd and unhelpful, why retain it? The point is that much needs to be rethought.

Historically, evidence law mediates between the lay public which provides both the facts and the factfinders, on the one hand, and the legal institutions that ultimately render judgment on these facts on the other. The legitimacy and usefulness of trials require consistency if not harmony between evidence law and popular thought about credibility and human conduct. Evidence law must look to today's epistemology of everyday life as its polestar, especially where science offers no paradigm to the contrary.