

# THE WITHERING AWAY OF EVIDENCE LAW: NOTES ON THEORY AND PRACTICE

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## I. INTRODUCTION

I suggest here that continuing the momentum toward a regime of truly free proof makes sense from the perspectives of two quite different theories of the American trial. However, certain forms of liberalization, particularly of traditional notions of materiality, draw even greater support from a perspective consistent with the centrality of the jury trial to our history and constitutional tradition. Further, in the era of the “vanishing trial,” the additional complexity that our current rules impose on trials implies a higher standard of proof on defenders of our present evidentiary regime.

Evidence scholars like to think of themselves as among the tough-minded and sometimes even manifest mild condescension for tender-minded colleagues who work in more obviously normative or value-laden areas.<sup>1</sup> The tough-minded tend to admire logical rigor and empirical evidence. When they theorize about the trial, they are attracted by modes of thought that seem to have a quantitative character. If deductive modes of thought are unavailable, so the argument goes, we should at least aspire to models that can express what we do at trial in quantitatively precise probabilistic language. These “logistic” modes of thought—simple units of information connected deductively or probabilistically—provide one irreducible perspective on institutions and practices, and are sometimes helpful, but have no general hegemony over other modes of thought, which may appear more “tender-minded.”<sup>2</sup>

The attraction of logistic methods has a number of manifestations in discussions of evidence law. One manifestation is that the touchstone of the validity-of-evidence doctrines is usually understood to be their instrumental value in leading the trier of fact to “the truth,” which is conceived hard-mindedly. The truth is implicitly imagined as factual or empirical truth, what you

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<sup>1</sup> The distinction is from WILLIAM JAMES, *PRAGMATISM* (1979). In James’s view, it tended to be a matter of temperament or sentiment that determined into which group any individual fell. He thought himself to have a foot in each. I believe that is a fine ideal.

<sup>2</sup> For a good account, rooted in American philosopher Richard McKeon’s views on the relativity of logistical modes of thought, see WALTER WATSON, *THE ARCHITECTONICS OF MEANING: FOUNDATIONS OF THE NEW PLURALISM* 73–84 (1993).

would have seen had you been present at the events about which the trial is concerned, “already out there now real.”<sup>3</sup> The imagined trial is a criminal case where the only real issue is the identity of the perpetrator—the O.J. Simpson murder trial, for example. There is no doubt that these are important trials,<sup>4</sup> but they form only a subset of the disputed issues that actually bring cases to trial. Although there are narrowly factual issues that arise in all trials, often the jury’s task is to make a judgment on “what this case is about,” as trial lawyers like to say in opening statements. It is a task that is primarily interpretive and evaluative and, as I have argued at length in the past, it is a task to which the trial’s “consciously structured hybrid of languages” is very well-designed to further.<sup>5</sup> Because factual matters are always known “under a description,” and because the narratives<sup>6</sup> that provide our access to past events are inevitably normative, understandings of the trial as an instrument for achieving “purely” factual truth are incomplete. They are distortions of our actual trial practices, which themselves reflect our “considered judgments of justice,”<sup>7</sup> judgments that have normative weight. And understandings of evidence law that assume that the incomplete model of the trial can lead us in the wrong direction. Evidence law should be responsive to *all* the issues that the trial is actually asked to resolve.

A somewhat related failing is to consider evidence law in abstraction from all the particular practices of the adversary trial. The temptation here is to treat evidence law as if it had to bear all the burden of establishing all the conditions of good judgment and thus to forget that the narrative and argumentative devices of the trial themselves advance that goal. Cross-examination, argument,

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<sup>3</sup> BERNARD J.F. LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 252 (1956).

<sup>4</sup> Professor Risinger has done an important service in emphasizing the importance of these trials and the seriousness of the injustice that can occur when they go wrong. D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 *HOUS. L. REV.* 1281 (2004).

<sup>5</sup> ROBERT P. BURNS, *A THEORY OF THE TRIAL* 53 (1999).

<sup>6</sup> As Alasdair MacIntyre has argued, to attempt to attain a kind of factual truth that is “below” those narratives will achieve merely “the disjointed parts of some possible narrative.” ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 209–85 (2d ed. 1984).

<sup>7</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 21 (1971).

and rebuttal cases can highlight weaknesses without the loss of evidence that almost always has some probative value. (We must never forget that exclusion of evidence eliminates *all* the probative value of tendered evidence. This is true regardless of the theory of the trial one embraces.) Scholars can be complicit with judges in this mode of thought. The inevitable result is the hypertrophy of evidence doctrine. This occurs because it is being asked to do too much work. And in the *teaching and learning* of evidence law, the result is that students come away with a diminished appreciation of the important distinction between admissibility and weight: Every possible limitation on a piece of evidence's weight can be translated too quickly into a bar to admissibility. The hazard leads us too readily to dismiss the real probative value of evidence, in light of possible prejudicial effect, although in every case an advocate has determined that the evidence actually does advance his or her theory of the case.

## II. THE DISTINCT FUNCTIONS OF THE LAW OF EVIDENCE

The law of evidence serves a number of distinct functions. One is the parliamentary function of assuring a clear and orderly presentation of the cases, reducing the likelihood of confusion and elevating the cognitive powers of the jury. This function increases the likelihood that the jury will reach a reasonable interpretation of events. Formality is important here, as is a continual requirement that witnesses answer the simple question, "How do you know *X*?" or more skeptically, "Why do you believe *X*?" *before* they are permitted to testify to *X*. That is why Rule 602's requirement of testimony concerning whether and how the witness has personal knowledge,<sup>8</sup> together with its implicit requirement that testimony be in "the language of perception," is one of the fundamental and generative principles of evidence law.<sup>9</sup> As will become apparent, I would generally recommend *strengthening* the parliamentary function of evidence law.

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<sup>8</sup> FED. R. EVID. 602.

<sup>9</sup> It is a further question as to whether witnesses who admit that they do not have such knowledge should be permitted to offer their opinions and conclusions without that perceptual foundation.

A second and distinctive function of the law of evidence is exclusionary. These exclusionary rules have four different normative sources. One source is a paternalistic judgment regarding the supposed limitations of jurors to assign evidence its appropriate weight. This judgment generates: (1) all the specific rules requiring some threshold of sufficient reliability to be admitted, such as prior act evidence,<sup>10</sup> hearsay, best evidence, and authentication; and (2) the requirement of “logical relevance,”<sup>11</sup> an epistemically valid link between evidence and a material fact. The former assumes that jurors cannot appreciate the limitations on the weight of evidence that those doctrines reflect, and the latter suggests that jurors have limited powers of consecutive reasoning (and that judges have more). The second source is a political–philosophical judgment about the nature of the rule of law and the place of the jury in determining the law. This judgment generates: (1) the requirement of materiality<sup>12</sup>—that the proponent be seeking to prove a fact that the substantive law of rules makes significant rather than appealing to a normatively excluded consideration; and (2) Rule 403’s provision that a judge may exclude evidence that, though probative, also invokes a normatively excluded consideration.<sup>13</sup> Third, there are pragmatic concessions to the shortness of life, which allow the judge to exclude evidence posing a danger of “undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>14</sup> Fourth, there are exclusionary rules whose purpose is to achieve a “policy goal” distinct from and sometimes in derogation of the purpose of the trial—ascertaining the truth and securing a just determination.<sup>15</sup> These rules include the privilege and extrinsic policy rules found

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<sup>10</sup> Prior act evidence under Rule 404(b) requires both factual reliability, though with a low threshold, and a logical link to a material fact; some categories of which are specified in the rule. Rule 404(a) generally excludes as insufficiently reliable evidence of a pertinent trait of character offered to show action in conformity therewith on a particular occasion.

<sup>11</sup> This is embedded in Rule 401’s requirement that the tendered evidence have “any tendency” to change the probability of a material fact.

<sup>12</sup> This is embedded in Rule 401’s requirement that the fact the proponent of evidence seeks to prove be “of consequence” in determining the action.

<sup>13</sup> Rule 403’s provision for exclusion of evidence that poses “unfair prejudice, confusion of the issues, [or] mislead[s] the jury” falls mainly under this rubric.

<sup>14</sup> FED. R. EVID. 403.

<sup>15</sup> FED. R. EVID. 102.

in Article IV of the Federal Rules of Evidence. For the reasons I give below, it would be ideal to eliminate most of the exclusionary rules in the first three categories. The burden ought to be high to maintain exclusionary rules based on the fourth category.

### III. COMPETING VISIONS OF THE TRIAL

Judgments identifying the best evidence law doctrine are sometimes dependent on an inevitably normative understanding of what the trial is and should be. “Is and should be” because the justification of public institutions and practices is inevitably circular and, at its best, seeks a “reflective equilibrium” between our actual practices, those that reflect “considered judgments of justice,” and broader political philosophies.<sup>16</sup> Our actual practices may serve as a corrective to overgeneralized principles, and very general principles may serve, usually mediated by reasoning by analogy, as a corrective to decadent practices.<sup>17</sup> The direction of the appropriate revision in any particular case cannot be predicted.

The implicit notion of the trial that has long formed the background for discussions of evidence law is what I have called “the received view of the trial.” This view has real power for a number of reasons. It is partially reflected in the actual practices of the trial as we have it. It forms the basis of the “rationalist tradition in evidence scholarship” that has, in turn, affected the rules of the trial and so the trial itself. It is at peace with certain important rule of law values, where the rule of law is understood, in Justice Scalia’s happy phrase, as “a law of rules.”<sup>18</sup> It can be justified, though in my view not fully, by the same process of circular reasoning used to reach reflective equilibrium, moving between our actual judgment practices with regard to the admissibility of evidence at trial and the broader values of formal

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<sup>16</sup> RAWLS, *supra* note 7, at 20–21.

<sup>17</sup> See generally Robert P. Burns, *The Dignity, Rights, and Responsibilities of the Jury: On the Structure of Normative Argument*, 43 ARIZ. ST. L.J. 1147 (2011) (juxtaposing “rights” and “responsibilities” as related to jury service).

<sup>18</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

justice, liberal citizen freedom,<sup>19</sup> and social stability that support “the rule of law as a law of rules.”

The received view<sup>20</sup> of the trial is actually *derived* from the structure of traditional Anglo–American evidence law. It can be “read off” that structure. It is also historically conditioned. In the United States, most of that law was created during the nineteenth century as part of a judge-led campaign to cabin the authority of juries that had been embedded in the Fifth, Sixth, and Seventh Amendments to the Constitution<sup>21</sup> and, to put it bluntly, to override their “original meaning.”<sup>22</sup> This campaign had a number of aspects, including the greater ease with which judges allowed themselves to direct verdicts<sup>23</sup> and the rise of instructions to the jury requiring it to follow the law whether the jury agrees with it or not.<sup>24</sup> (The recent resurgence of summary dispositions in federal courts, either by summary judgment<sup>25</sup> or on motions to dismiss,<sup>26</sup> are a more recent expression of this campaign, now in the form of a partial counterrevolution to the general expansion of jury rights over the last fifty years.<sup>27</sup>) The law of evidence allows the judge to “micromanage” the presentation of evidence at trial

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<sup>19</sup> See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

<sup>20</sup> The received view turns out to be a partial view for the same reason that evidence law and the determinations made pursuant to it offer only a partial view of what the trial is.

<sup>21</sup> See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 37 (1994) (“The jury exited the [nineteenth] century duty-bound to follow judicial instructions . . . whether it agreed with [them] or not.”).

<sup>22</sup> See, e.g., Suja A. Thomas, *Foreword: Originalism and the Jury*, 71 OHIO ST. L. J. 883, 883 (2010) (“[T]he Court’s decisions have sometimes fallen short of the original meaning of the Sixth and Seventh Amendments.”); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1851 (2008) (discussing effects of recent Court decisions on the motion to dismiss); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 139 (2007) (discussing the constitutionality of summary judgment under the Seventh Amendment right to trial by jury).

<sup>23</sup> See *Galloway v. United States*, 319 U.S. 372, 396 (1943) (Black, J., dissenting) (remarking on the “erosion” of the Seventh Amendment guarantee).

<sup>24</sup> *Sparf & Hansen v. United States*, 156 U.S. 51, 51 (1895) (noting the jury’s duty to apply the law “as given by the courts”).

<sup>25</sup> See generally *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

<sup>26</sup> See generally *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>27</sup> On the civil side, see *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) and *Local No. 391, Chauffeurs v. Terry*, 494 U.S. 558 (1990). On the criminal side, see *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

and is consistent with a paternalistic skepticism about the ability of the jury to give to evidence presented the weight it deserves. As Margaret Burger, one of our most important evidence scholars, put it:

Excluding information on the ground that jurors are too ignorant or emotional to evaluate it properly may have been appropriate in England at a time when a rigid class society created a wide gap between royal judges and commoner juror, but it is inconsistent with the realities of our modern American informed society and the responsibilities of independent thought in a working society.<sup>28</sup>

Evidence law depends on generally atomistic,<sup>29</sup> one-at-a-time applications of binary exclusionary rules that allow or disallow the jury to see discreet “bits” of evidence. In the hands of a judge whose sensibilities tilt toward one side or the other or who lacks the imagination to understand the importance of a crucial factual detail to a theory of the case, this sort of exclusion can result in a distorted picture of the persons and events on trial. And so the general liberalization of evidence law that we have seen over the past three decades is broadly positive: “[W]e are gradually relaxing our death-grip on evidence, placing more and more faith in the maturity and reasoning powers of juries, and entrusting them with more information.”<sup>30</sup>

It should come as no surprise that the received view of the trial can be read off the structure of evidence law. Evidence law was created to enforce one specific view of what the trial and the rule of law should be. That vision is abstract or utopian, in the same way that Karl Polanyi argued that the ideal of a self-regulating market

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<sup>28</sup> 1 MARGARET A. BURGER ET AL., EVIDENCE, at iii (1994), *quoted in* United States v. Shonubi, 895 F. Supp. 460, 493 (E.D.N.Y.1995), *vacated*, 105 F.3d 1085 (2d Cir. 1997).

<sup>29</sup> Some evidence rules do invite the judge to place each bit of evidence in the context of each advocate’s theory of the case; for example, when determining whether the probative value of particular evidence is substantially outweighed by its prejudicial effect. *E.g.*, FED. R. EVID. 403.

<sup>30</sup> Peter W. Murphy, *Some Reflections on Evidence and Proof*, 40 S. TEX. L. REV. 327, 328 (1999).

was an abstract and utopian imposition on traditional and more “natural” forms of economic interaction.<sup>31</sup> In his view, the market was an imposed utopia because it was an abstract framework that affected the real practical choices of policy makers, in the same way that the law of evidence surely affects the actual decisions of judges at trial. I am *not* saying that the received view expresses what the trial actually *is*, because aspects of the practices that we actually employ at trial are inconsistent with that vision.<sup>32</sup> The trial as we have it is, in major part, constituted by the tension between those practices and the constraining effects of the vision of the trial largely expressed by the law of evidence. The trial is in this, as in so many other matters, a tension of opposites.

Consider how the law of evidence is wonderfully consistent with the received view of the trial. There are two generative rules of evidence from which virtually all the others can be derived. The first is the requirement, now embedded in Rule 602, that witnesses may only testify to matters that they have “personal knowledge.” The latter is a term of art and refers, in a good empiricist manner, to evidence that reports the witness’s present memory of a past perception. This testimony must be given, to the extent practicable, in the “language of perception.”<sup>33</sup> The second is the requirement of relevance, a link based on a common-sense generalization recognized by the judge<sup>34</sup> to the authoritative norms

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<sup>31</sup> See generally KARL POLANYI, *THE GREAT TRANSFORMATION* (6th prt. 1965) (discussing the social implications of the market economy).

<sup>32</sup> I provide some examples of how it is inconsistent in BURNS, *supra* note 5, at 26–33.

<sup>33</sup> Rule 701 allows for lay witness opinion testimony that is “rationally based on the witness’s perception.”

<sup>34</sup> The paradox here is that the *judge* makes these determinations of logical relevance, though his or her strength is usually thought to be on matters of legal doctrine, not common sense. For traditional American skepticism about the judge as a repository of common sense, consider the speech of delegate Benjamin Butler at the Massachusetts Constitutional Convention of 1853, who, in support of the right of jurors to be judges of the law as well as of the facts, commented that he had “seen quite as many errors on the bench as in the jury box” and argued further:

Which is the best tribunal to try [a] case? This man who sits upon the bench, and who . . . has nothing in common with the people; who has hardly seen a common man in twenty years . . . Is he the better man to try the case than they who have the same stake in community, with their wives, and children, and their fortunes, depending on the integrity of the verdicts they shall render?

ABRAMSON, *supra* note 21, at 84 (internal citation omitted).

to be found in the instructions, usually mediated by the proponent's theory of the case.<sup>35</sup> Where evidence is not relevant based on a competent witness's perceptual knowledge, the law of evidence requires the proponent to "lay a foundation," which may address authenticity, best evidence, hearsay, or the exception to the non-opinion rule for expert witness testimony.<sup>36</sup> This foundation supplies some surrogate for the reliability that in-court testimony in the language of perception is usually thought to have.

How does the latter serve the rule of law as a law of rules? It is consistent with our Anglo-American conviction that perceptions, though certainly fallible, are less likely to be inaccurate than are opinions, interpretations, and conclusions. If we cannot accurately reconstruct the past based on reliable evidence, then we cannot ensure that events will be subject to the authoritative rules. We will not be judging *the real human acts that have actually occurred*, so those events will escape the web of the law of rules. (It would also profoundly disappoint those practical utopians who were the common law lawyers of the nineteenth century.) Law would not rule our actual lives but rather a fictitious reconstruction of those lives. The combination of the requirements of relevance and testimony in the language of perception also advances the received view of the trial in another important way. Our conviction is that testimony in the language of perception will allow the jury to reconstruct an account that is not only accurate but also relatively *value-free* and utterly plastic to the only norms that will be allowed to enter the trial—those found in the jury instructions.

Factual accuracy is important at trial. The arguments concern the methods for achieving factual accuracy and whether it may sometimes have to be balanced against other values, which, of course, we regularly do in specific contexts.<sup>37</sup> More generally, it is possible that rules tending to increase the likelihood of converging

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<sup>35</sup> For example, though motive is not an element of most criminal offenses, motive *is* an important aspect of any persuasive theory of the case, so evidence probative of motive is generally admissible. *See, e.g.*, FED. R. EVID. 404(b)(2) (providing that evidence of prior crimes, wrongs, or acts may be admissible to prove motive).

<sup>36</sup> *See, e.g.*, FED. R. EVID. 901(a) (addressing authentication of an item of evidence).

<sup>37</sup> Consider the evidentiary rules of privilege, the Fifth Amendment privilege, and the extrinsic policy rules found in FED. R. EVID. 407–11.

on the empirical truth of a past event disable or limit the jury's ability to fairly interpret and evaluate that event. And, of course, the nature of the concretely best trial as determined at reflective equilibrium<sup>38</sup> should cast light on how to resolve that tension, though there is no reason to think its resolution could simply be deduced from a conception of the best trial. But accuracy is important for different conceptions of the trial, not merely for the received view; it is also important in the view of the trial that I defend, in which common-sense moral ideals play a larger role. After all, Iris Murdoch tells us that such ideals are central in the moral world, where "what looks like mere accuracy at one end looks more like justice or courage or even love at the other," such that morality involves "an exercise of justice and realism and really *looking*."<sup>39</sup>

There is more to truth than accuracy, and there is more to the trial than accuracy or even truth. The Federal Rules themselves do not forget this. Their ultimate purpose, one that is to guide their interpretation, is that the truth may be ascertained and proceedings justly determined.<sup>40</sup> Not factual accuracy, important as that is, but "truth." The meaning, even of the law of evidence, depends on an understanding of truth. Not determined "consistently with the substantive law," but "justly." The meaning, even of the law of evidence, depends on an understanding of justice. Yes, one may understand justice to be equivalent to "the rule of law" and the rule of law to be "a law of rules," but that is *one* understanding, and hardly a self-evidently true understanding, given the history of the American jury<sup>41</sup> and our considered judgments of justice embedded in actual trial practices.

The trial itself, the concrete linguistic practices that the law of evidence partially structures, seems to reflect understandings of justice that are in some tension with a notion of justice roughly equivalent to Justice Scalia's "law of rules."<sup>42</sup> General verdicts,

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<sup>38</sup> Such a trial would incarnate a "situated ideal," one that could often be achieved, not a utopian ideal.

<sup>39</sup> IRIS MURDOCH, *THE SOVEREIGNTY OF GOOD* 89–91 (1970).

<sup>40</sup> FED. R. EVID. 102.

<sup>41</sup> See ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 40–68 (2009) (discussing historical perspectives on the American trial).

<sup>42</sup> See BURNS, *supra* note 5, at 26–33 (discussing anomalies in the legal structure of the

rules against the impeaching of verdicts, opening statements and closing arguments that evoke all of the norms with a place in the jury's life-world, the relative (though declining) ease by which civil cases may survive dispositive defense motions, the sharp limitations on directed verdicts (absolute in criminal cases against the defendant) all reflect a broader understanding of the trial than is expressed by the received view.

What is the received view of the trial, and what is the shape of evidence law within that view? For the received view, the trial is the institutional device for enforcing the rule of law where there are issues of fact. The law consists of the meanings of authoritative texts that provide a set of rules: constitutional, statutory, and common law. Within that view the jury's task basically has two steps. From circumstantial evidence, first assemble an accurate, value-free narrative of past events. (It should ideally be value-free because, within this ideal type, all the values or norms to be applied by the jury should come from the jury instructions, not from the common-sense moral-political values that abound in the life-world.) Second, determine whether the events so reconstructed fall within the meanings of the authoritative rules provided to the jury in jury instructions.<sup>43</sup> Once this cognitive act of "fair categorization" occurs, there is nothing more to do. If the crucial episodes in the reconstructed narrative fall within the categories established by the jury instructions, then the party with the burden of proof is entitled to a verdict. If the party with the burden of proof cannot convince the jury that those episodes cannot fairly be characterized as within the meaning of the rules establishing the elements of the claim or charge, then the jury should return a verdict for the defendant. End of story.

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trial).

<sup>43</sup> Even when the law is judge-made common law, the jury is provided only a set of fairly bare-bones rules. Neither the facts of the cases in which the rules were created nor the rationales provided by those courts for establishing them are given. This raises an interesting question, about which little has been written—why do we provide the jury such schematic statements of the law of rules? Another interesting question is, whether any realistic alternative exists. My suspicion is that the answer to the first question implies a recognition of the limited place of the jury instructions in the actual deliberations of juries.

Scholars who study the trial through the lens provided by the law of evidence and its implicit ideals are strongly tempted to commit Whitehead's "fallacy of misplaced concreteness," of substituting one abstract aspect of a concrete reality for the reality itself.<sup>44</sup> The reality of the trial can only be understood by multiplying perspectives on the practices that it comprises. Most prominent among those perspectives is that afforded by a careful description and interpretation of the practices in which we actually engage at trial. Similarly, much can be learned from social scientific accounts of trial practices (though here some caution is necessary), historical narratives about the trial's place in our political culture, and philosophical accounts that serve to justify that place. As Clifford Geertz put it, we need to engage in "a continuous dialectical tacking between the most local of local detail and the most global of global structures in such a way as to bring both into view simultaneously."<sup>45</sup> Different aspects of the law of evidence may provide some of that local detail, while other aspects may provide some of the global structure, but the law of evidence provides only a limited perspective on the trial.

What is an alternative view of the trial? I have tried to expound a view of the trial in which the received view receives its due but does not overwhelm the reality of the trial. In my view, the trial offers the jury<sup>46</sup> the opportunity to make a judgment of relative importance. The values surrounding the rule of law as a law of rules are significant, and there is every reason to think that juries respect them. But, as the "discipline of the evidence" reveals in a particular case, the law of rules may fail to identify what is most important about that case. There are a number of reasons for this. The Western tradition has long recognized that strict legal justice, following preexisting inevitably over generalized rules, can miss the mark in particular cases.<sup>47</sup> Justice may require

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<sup>44</sup> ALFRED NORTH WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 59 (1925).

<sup>45</sup> CLIFFORD GEERTZ, "From the Native's Point of View": *On the Nature of Anthropological Understanding*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 55, 69 (1983).

<sup>46</sup> I used "the jury" as a placeholder. Most of what I say applies as well to bench trials, whose results do not differ dramatically from those of juries. *See generally* HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 165 (1966).

<sup>47</sup> Plato's *STATESMAN* and Aristotle's treatment of *epikeia* (equity) in *NICOMACHEAN*

something more than simply the lexicographically fairest interpretation of legal rules. In a given case, the law of rules may deviate systematically from the community's sense of justice, as in the days when the doctrine of contributory negligence denied all recovery to plaintiffs whose own negligence contributed in the slightest degree to their injuries and overt nullification was the only path to justice.<sup>48</sup> The structures of the trial allow the jury to prefer the common-sense judgment, disciplined and refined by the dialectical devices of the trial. Those devices allow the jury to see the political significance of the case in the broader self-definition of the community and to prefer a particular self-definition to the lexicographically fairest interpretation of the rules. All of these operations are consistent with important understandings of the rule of law,<sup>49</sup> though not completely congruent with the rules of law as exclusively a law of rules. I have written at length on how the multiple tensions within the linguistic practices of the trial impose a real discipline on jury decisionmaking, elevate that judgment, and allow for a form of justice that is consistent with what we need. At the heart of this account is the notion that the trial succeeds through a harshly agonistic process:

Still, practical truth emerges at trial from the most demanding tension of opposites. We have already seen how there exist tensions among the questions that a juror will put to himself. There are also related tensions among the various linguistic devices that the trial comprises. There are tensions between the fully characterized narratives of opening statement and the bare, stripped-down narratives of direct examination. There are tensions between the narratives of direct examination and the deconstruction of those

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ETHICS are the classical texts.

<sup>48</sup> See BURNS, *supra* note 5, at 147, n.87 (citing other examples provided by Kalven and Zeisel).

<sup>49</sup> See generally Robert P. Burns, *The Rule of Law in the Trial Court*, 56 DEPAUL L. REV. 307 (2007) [hereinafter Burns, *The Rule of Law in the Trial Court*]; Robert P. Burns, *The Lawfulness of the American Trial*, 38 AM. CRIM. L. REV. 205 (2001); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997).

narratives on cross-examination. There are tensions between what a witness wants to say and what he can defensibly and admissibly say. There are tensions among the roles of the judge, the advocate, and the witness, and in jury trials, between the judge and the jury. There is a tension between the narratives of opening statement and direct examination and the argument of closing, often aided by cross. And so the trial is the “crucible of democracy.” What it allows is the emergence of a truth beyond story telling.<sup>50</sup>

These linguistic tensions serve as important lenses and metaphors for the sorts of tensions that constitute our broader society:

American society exists as a tension among different spheres, each relatively autonomous, each operating according to principles that are discontinuous with those of others. The market economy, the political sphere, the legal sphere, the moral sphere, professional life, family life—each has its own constitutive principles. Cases that go to trial often question the relative importance to this concrete case of the principles informing those spheres. *Somewhere* in such a society judgments have to be made about the relevance of the principles of each sphere to a particular problematic situation. It is no surprise that in such a society the constitutive rules and practices of the trial have evolved to allow an incisive choice by the jury of what is most important about a controversy, which of the often conflicting principles ought to control. That is what the trial has become for us.<sup>51</sup>

This revised and broadened understanding of the trial is actually deeply conservative,<sup>52</sup> though this understanding is not

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<sup>50</sup> BURNS, *supra* note 5, at 200–01.

<sup>51</sup> *Id.* at 201.

<sup>52</sup> See generally Robert P. Burns, *A Conservative Perspective on the Future of the*

often theorized and thematized in evidence decisions and scholarship. It expresses what “everybody knows,” but that knowledge is not often brought to bear on thinking about evidence law. That is part of the reason why evidence law is “adrift.”<sup>53</sup> My view is that the liberalization of evidence law over the past forty years is in part reflective of this untheorized knowledge. There is little doubt that this liberalization actually empowers the jury to perform its historical and constitutional functions. It may be of use, however, to rethink the broad outline of evidence law in light of a more explicit account of the actual practices of the jury trial and the ideals that underlie them.

#### IV. IS EVIDENCE LAW REALLY LAW?

We find ourselves in an odd situation in which inherited formalisms may have lost touch with the rationales that once supported them. They continue to claim the authoritativeness of enacted law. And they continue sometimes to function as exclusionary rules whose hard edges have the force of positive law. They are regularly invoked by trial judges to exclude evidence that an advocate believes supports a theory of the case.

There is, however, a good deal of illusion in this. The now generally accepted standard for review of the trial court’s evidentiary decisions is abuse of discretion, one of the most deferential standards of review. This is indeed odd, because determining whether a particular basic fact—here a particular bit of evidence—falls within a general rule does not (in the ordinary sense) involve an exercise of what we usually call discretion. Indeed, administrative law usually distinguishes between the arbitrariness of an act of agency discretion and the sufficiency of the evidence to support an agency conclusion. In my experience, trial judges are generally reluctant, even when tempted by a provocative trial lawyer seeking to make a record, to go beyond an unelaborated “Sustained” or “Overruled.” Least of all do they want to articulate clearly an understanding of an evidence rule, for fear of transforming an act of “discretion” into a question of law.

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*American Jury Trial*, 78 CHI.-KENT L. REV. 1319 (2003).

<sup>53</sup> See generally MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* (1997).

And because evidence often is supported by multiple theories of relevance, and courts are happy to give the next-to-useless limiting instructions, an appellee is almost always able to identify a consideration that supports the judge's act of "discretion."

Thus, the trial court commits "error" only when the judge abuses discretion in admitting or excluding evidence. But, of course, not all error is reversible error. First, there are procedural obstacles. The requirement that error-admitting evidence be preserved by timely and specific objections and error-excluding evidence be preserved by complete offers of proof serves to insulate many evidentiary decisions from appellate review. By sharp contrast, there is the doctrine that allows the appellate court to identify any theory of admissibility or exclusion supporting the trial judge's decision, even though it never occurred to anyone in the trial court at all.

Then there is the expansive doctrine of harmless error. We often hear that a litigant is entitled to a fair trial, not a perfect one. Even if the trial judge has, in the view of the appellate court, abused his or her discretion and committed a particularly significant error, we still will not have a reversal unless, for nonconstitutional error, the appellant can convince the appellate court by a preponderance of the evidence, that the error would have affected the result. If one reads the cases in which this question is considered, one often comes away with an uneasy feeling that appellate courts are too quick to find the evidence "overwhelming." In my view, a large percentage of the cases that actually go to trial are "triable" cases, as lawyers like to say. Otherwise they should settle. Though there may be explanations in some cases, it seems strange that so many of them turn out to have been "overwhelmingly" tilted in one direction. Finally, in my view, appellate courts are very much inclined to overconfidence in their ability to divine the counterfactual significance of evidence that the jury never saw.

The effect of all these layers of deference is a strange combination of often relatively detailed exclusionary rules where admissibility turns on binary, razor's-edge determinations of foundational elements: sometimes the proponent bears the burden

of proof by evidence sufficient to support a finding,<sup>54</sup> and sometimes by a preponderance of the evidence, the latter most significantly in the hearsay exceptions.<sup>55</sup> On the other hand, the trial judge will rarely be reversed for exercising discretion to admit evidence that falls outside the most obvious meaning of an exclusionary rule or to exclude evidence that seems to fall inside it. It can easily occur that a trial judge who has never been reversed<sup>56</sup> for an evidentiary ruling consistently makes rulings that are just wrong.

It is not too far wrong to say that we mainly have just Rule 403, with quite some number of guidelines for its application. Only now and again will a formalistic bolt from the blue render some important piece of evidence inadmissible. The bolt may fall in the trial court or occasionally in the court of appeals, though the selection of cases in which it happens is far from predictable. Institutionally, all the rules beyond Rule 403 serve to give the appellate court some residual power to reverse cases on evidentiary grounds, without the somewhat uncomfortable and rather uncollegial holding that the trial judge lacked “sound discretion.” (Would you want to tell a colleague that his or her judgment was “unsound?”) Former-judge Irving Younger said a long time ago that appellate review of a trial court’s evidentiary rulings involves a kind of holistic “smell test”: reversal occurs where the aggregate weight of debatable rulings falls too heavily and unfairly on one side.

Our current approach often works pretty well, especially in the hands of the iconic “wise and strong” trial judge,<sup>57</sup> of whom we

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<sup>54</sup> See FED. R. EVID. 104(b), 901(a).

<sup>55</sup> See FED. R. EVID. 104(a). This rule’s “admissibility of evidence” applies most significantly to the hearsay exceptions.

<sup>56</sup> I recall such a boast from a truly terrible trial judge.

<sup>57</sup> *Michelson v. United States*, 335 U.S. 469, 485–86 (1948). The entire often-quoted passage deserves quotation:

We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to

have many. But there remain nagging issues. It can, as I explain below, pose the problem of overcomplexity and delay in the era of the “vanishing trial.” Professor David Crump estimated that approximately one-third of the trial time in a simple tort claim was spent on matters of evidence law.<sup>58</sup> This might make more sense if evidence law were truly dispositive of the many issues that a party may raise rather than simply an inventory of possible arguments. And as Judge Frankel put it in a slightly different context, the American judge, without the dossier which his Continental cousins have and reliant largely on what the opening statements say about the litigants’ theories of the case, can easily be a relatively uninformed bull in the china shop of the cases they present, where one small detail may be the difference between a plausible or an implausible, a compelling or a bland story.<sup>59</sup>

Simplification is necessary in the age of the vanishing trial. There is some reason to think that jury trials are longer than they need to be because of the time devoted to evidentiary arguments. Given the aforementioned estimation that approximately one-third of the time consumed in a relatively simple tort case involved matters of evidence law, the American trial—as Professor Pizzi has observed—resembles American football, where the flow of the game is continuously interrupted by legal wrangling over disputed calls.<sup>60</sup>

Formality is important for the reasons that the late Milner Ball carefully explained,<sup>61</sup> though the productive formality concerns the

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upset its present balance between adverse interests than to establish a rational edifice.

*Id.* at 486. There are two problems with the Court’s explanation. First, alas, not all trial judges are wise and strong. Second, it is often a matter of happenstance whether each party *in a particular* case is the beneficiary of the counter-privileges that offset the irrational advantages his opponents may enjoy.

<sup>58</sup> David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 601 (2006).

<sup>59</sup> This latter is the distinction that the Court recognized in *Old Chief v. United States*, 519 U.S. 172, 189–92 (1997) (allowing a defendant to stipulate to a statute’s prior felony conviction element, rendering inadmissible evidence of the name and nature of his prior offense—assault causing serious bodily injury).

<sup>60</sup> WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 8, 9 (1999).

<sup>61</sup> MILNER S. BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC, VIEW OF LEGAL PROCESS 42–63 (1981) (analogizing “the Elements of Form” to theatrical

parliamentary functions of evidence law, not the exclusionary functions. Americans love baseball, which is a legalistic game involving a rhythm between group action (mainly on defense, except for the pitcher) and individual action (mainly on offense). But adherence to the rules of a game can be thought of as an example of pure procedural justice—there is no external standard for success of the game as a whole.<sup>62</sup> We think that the rigorous enforcement of sometimes-complex rules is important and makes for a better game. The trial, by contrast, is not an example of pure procedural justice.<sup>63</sup> We think that a trial can go forward according to the rules, with the advocates engaged in the kind of vigorous disputation that makes for a good trial, and yet go wrong. It can go wrong because, in a criminal case, the innocent may be convicted or the guilty acquitted. DNA evidence in cases of wrongful conviction has shown that this has occurred, though usually where the trials have been distorted in a small number of recognizable ways by the bureaucratic structures within which they are placed.<sup>64</sup> Some go wrong because of eyewitness misidentification abetted by faulty line-ups and evidentiary rulings that deny juries the benefit of the social science scholarship about eyewitness misidentification. Others are the result of police or prosecutorial misconduct. Some occur because of coerced confessions. Some may be the result of unreliable “forensic science” often admitted for reasons of habit rather than science. (It is to these bureaucratic failings, rather than to more demanding exclusionary rules, that we should look to improve the quality of trials.) Those of us interested in evidence law need to spend more time thinking about the empirical evidence that addresses the circumstances in which our trials go badly wrong; almost none of them have anything to do with the law of evidence and certainly nothing to do with the doctrinal basis for excluding evidence, especially evidence offered by criminal defendants.

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convention).

<sup>62</sup> RAWLS, *supra* note 7, at 85.

<sup>63</sup> Rawls calls the trial an example of “[i]mperfect procedural justice” because there is an external standard and, measured by that standard, the trial can go wrong. *Id.* at 85–86.

<sup>64</sup> *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited Jan. 31, 2013).

Nor are the interpretive and evaluative aspects of the trial matters of pure procedural justice, though here the issues are more subtle. We can think of any one trial getting the interpretive and evaluative judgments about a case wrong (at least I can). I believe, however, that there is no alternative set of procedures by which to “get at” those interpretive and evaluative questions than those of the trial. This is what I meant when I suggested that the trial is the best we can do in achieving “truth-for-practical-judgment.”<sup>65</sup> That doesn’t mean that we cannot improve trials through the process of achieving reflective equilibrium on matters of trial procedure. The fact that the trial is an example of *imperfect* procedural justice suggests that we should carefully try to make it better, less imperfect. Indeed, that is the effort in which I am engaged here. Philosophers of science sometimes refer to “Neurath’s boat.” The notion is that science allows for a self-corrective process as it moves forward, like repairing a boat while it is at sea, although it has no access to reality other than through its own methods.<sup>66</sup>

#### V. THE DOCTRINE OF MATERIALITY: A SPECIAL CASE

Rule 401’s notion of materiality keeps the trial loosely tethered to the law of rules. In part, it has a parliamentary function. It keeps the discussion disciplined so that the overwhelmingly factual material presented clusters in a productive way on a small number of issues. But someone who took with full seriousness Amar’s notion<sup>67</sup> that the jury serves as an expression of the preconstitutional sovereignty to determine the legitimacy of all laws would dispense with any doctrine of materiality designed to limit the norms that a jury might embrace.

What we do now in making judgments of materiality and related judgments of “pragmatic relevance” lacks any elegant

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<sup>65</sup> BURNS, *supra* note 5, at 235.

<sup>66</sup> NANCY CARTWRIGHT ET AL., OTTO NEURATH: PHILOSOPHY BETWEEN SCIENCE AND POLITICS 89 (1996).

<sup>67</sup> AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 83, 96 (1998) (discussing the centrality of the jury trial to all the amendments in the Bill of Rights and the echo of the sovereignty of the people that remains in some of our deference to jury determinations).

consistency. That is not necessarily a weakness.<sup>68</sup> I would expect that in a society such as ours, the norms relevant to the resolution of important public matters would reflect the multiplicity of perspectives that actually constitute our society.<sup>69</sup> Yes, we have written laws that legitimately claim authority. But they are not self-interpreting, often contain very broad terms, and often have a very debatable application to the complex and detailed factual pictures that may emerge at trial. Trials allow the jury to understand human acts with a level of complexity, subtlety, and depth that far exceeds the often stereotypical and abstract anticipation that legislators have of the significance of the laws. As Kalven and Zeisel found,<sup>70</sup> normative judgments account for a significant amount of the (relatively small) difference between the judgments of juries and judges and stem not from “nullification” in any gross sense but rather from the way value judgments affected the fact-finding process itself.<sup>71</sup> The process by which the jury renders a verdict—deciding what is most important about *this case*—inevitably involves the invocation of norms that cannot be found “in” the substantive legal rules.

Our current practice permits evidence from which the jury is likely to draw an “immaterial inference.” The latter term refers to a conclusion likely drawn by the jury that is not justified by the law of rules. Thus, evidence that the defendant in a murder case where jealousy is the claimed motive previously shot a romantic rival from a distance of fifty yards may not be offered to prove that he is not a peaceful man, but it may be offered to prove that he is a good shot, so long as the probative value is not *substantially* outweighed by the prejudicial effect created by the prohibition on propensity evidence (and unless it may plausibly be offered under Rule 404(b) as a “signature crime”). The prohibited inference is, however, inevitable, and the limiting instruction is next to useless.

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<sup>68</sup> Michael S. Pardo, *Upsides of the American Trial's “Anticonfluent” Nature: Notes on Richard K. Sherwin, David Foster Wallace, and James O. Incandenza*, in IMAGINING LEGALITY: WHERE LAW MEETS POPULAR CULTURE 133, 143 (Austin Sarat ed. 2011).

<sup>69</sup> See Burns, *The Rule of Law in the Trial Court*, *supra* 49, at 332 (discussing the disparity of events’ meanings to individuals, based on their unique circumstances).

<sup>70</sup> See KALVEN AND ZEISEL, *supra* note 45, at 165.

<sup>71</sup> I tried to give some account of how this can happen in BURNS, *supra* note 5, at 185–219.

Notice the pattern: a rule, qualified by highly discretionary balancing, followed by exception reviewed under an abuse of discretion standard, qualified by the harmless error doctrine. A given judge may try to limit the evidence to the least prejudicial details: for example, admitting evidence that the former rival was shot from a distance of fifty yards but prohibiting the evidence that the earlier victim was a romantic rival. These choices, however, simply provide a jagged story that invites the jury to supply a motive, sometimes out of whole cloth. Shari Diamond found that jurors who were, pursuant to the evidentiary exclusionary rule, deprived of knowledge of the existence of liability insurance simply speculated as to the likelihood of its existence during their deliberations and sometimes came to an incorrect conclusion.<sup>72</sup>

We currently allow evidence that suggests immaterial conclusions, some of which have the strong normative resonance that is likely to have persuasive weight discontinuous with the law of rules. This is problematic for the received view of the trial, whence the complex set of rules surrounding the practice derived. It is much less problematic for a view of the jury trial wherein the jury is choosing the norm is of greatest significance for that specific, normatively complex situation. The circumstances under which this “immaterial” evidence actually comes before the jury contribute, in the way I describe below, to the intricacy of the trial.

As I said, there is some reason to retain the status quo with regard to materiality. And, given the natural conservatism of the legal profession, there is every reason to think we will retain the doctrine of materiality, even though the complex web of exceptions and discretionary determinations that it has spawned add significantly to the trial’s complexity. It does however serve to focus the inquiry at trial such that its devices can actually increase the intellectual tensions that make for “the discipline of the evidence.”<sup>73</sup> The issue here is whether lawyers who were freer to present evidence that is persuasive because of its appeal to

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<sup>72</sup> Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1908–09 (2001).

<sup>73</sup> KALVEN & ZEISEL, *supra* note 45, at 165 (comparing the results of jury and bench trials and evaluating the differences in the decision-making process).

“illegitimate” norms, as they apply both to the human acts on trial and the credibility of witnesses, would confuse the issues and sometimes create so many “trials within trials” that the institution’s power would be dissipated. (Visions of the Jerry Springer show arise.)

Perhaps, but perhaps not. The jury’s own sense of legality, the attractiveness of democratically enacted law, vigorous argument as to the insignificance of the immaterial evidence, the court’s instructions as to what was at issue, the relative time allocated to different issues, and the possibility of a directed verdict (except against a criminal defendant) should all serve to keep the case focused. (This seems to occur in at least some arbitrations, which typically proceed under rules that exclude far less evidence.) It is likely that we will never know.

There are some reasons why our current, doctrinally complex compromises between notions of the trial and corresponding doctrinal tensions are unsatisfactory. Currently, advocates’ ability to present evidence that appeals to a norm they consider persuasive depends on their ability to identify another set of “catenate inferences”<sup>74</sup> by which the evidence is connected with a *factum probandum* that the law of rules says is of consequence.<sup>75</sup> This style of argument is pervasive in the trial court: “Your Honor, I am offering this evidence not to prove X but rather to prove Y . . .,” where X is likely to be the fact the jury takes the evidence as supporting and that is likely to be of greater significance in the case.

I think there is no necessary relationship between the importance of evidence and the contingency of its having an alternative relevance that can be linked up with the norms elevated by the law of rules. One can think in very general terms that this alternative relevance tethers the evidence at trial to authoritative norms in a way that is respectful of constitutional or democratically approved law. I believe that thinking more

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<sup>74</sup> JOHN H. WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* 13 (3d ed. 1937) (defining the chain of inferences from evidence offered to the *factum probandum*, or fact sought to be established, as “catenate inferences”).

<sup>75</sup> This set of catenate inferences need not be strong given the tilt towards admissibility demonstrated in Rule 403.

concretely about the cases where this contingency happens to occur and when it does not would make our current practices seem more anomalous than the abstract account might suggest. However, it may be that because alternative grounds supporting admissibility are so ubiquitous, the current practice is largely discretionary with the trial court.<sup>76</sup> Today, trial lawyers may appeal to norms that are broader than those embedded in the law of rules only if the stories they tell *also* invoke the norms in that law, even if weakly.<sup>77</sup> There is sometimes a bit of rhetorical gamesmanship in these arguments, and if a “prejudicial” fact is embedded deeply in a permissible theory of the case, it is almost always admissible.

#### VI. BEGINNING TO IMAGINE THE UNIMAGINABLE

It is a bit quixotic actually to describe the specific doctrines that might be embraced under the regime I suggest here, so little likely is it to be enacted. And the *actual* consequences of one or other change would have to be evaluated in the full concreteness of the dramatic context of the trial. Abstract theorizing, unaided by concrete experience and imagination, is of little use here. One would want to rely on the actual experience of the thousands of lawyers who deal with these doctrines and see their results on a daily basis to work out the details. So all I offer is a brief sketch of how evidence doctrine might change if we were to move slowly to a system of free proof more consistent with the historical and constitutional prerogatives of the jury.

The general idea is that criteria of admissibility would become foundational questions that would have to be answered, *one way or another*, before evidence would be received. This would impose an orderly process by which the jury would be alerted, before the evidence was received, as to the limitations on the weight of that evidence. Currently, the conditions on admissibility of evidence

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<sup>76</sup> There is something disheartening about a regime with high-minded generalizations that die a death by a thousand qualifications, either on the level of legal doctrine or because trial courts seem consistently to make factual findings in a result-oriented way.

<sup>77</sup> One limit on this practice, however, is when the stories used invoke other norms so strongly that the inclusion of that aspect of the story causes “unfair prejudice” or “confusion of the issues.” FED. R. EVID. 403.

are thought to confer a degree of reliability on evidence until it reaches the point where it is sufficiently reliable to reveal to the jury.

For hearsay, the proponent would be required to lay the foundation for the hearsay exception that most closely approximates the traditional exceptions, but the hearsay would be admissible regardless of the answers:

Q. Was Plaintiff's Exhibit 10 kept in the ordinary course of business?

A. Yes.

Q. Was it part of the business practice of the company to make documents like Exhibit 10?

A. Well, I would say we made such a record in about half of the cases the exhibit refers to.

Q. Was the document made at or near the time of the events it records?

A. Well, within two weeks. There really weren't too many such events, so I can remember them pretty well.

Q. Was it made by someone with knowledge of those events?

A. Yes.

We could admit the document on this foundation, although one could argue that the proponent has failed to establish all the appropriate foundational elements by a preponderance. The opponent and the jury have been alerted to the limitations of the exhibit; the former knows to explore those weaknesses on cross, but the jury also may give the evidence the weight it deserves in the entire "shifting mosaic" of evidence, as Judge Weinstein puts it:

The jury's evaluation of the evidence relevant to a material proposition requires a gestalt or synthesis which seldom needs to be analyzed precisely. Any item of evidence must be interpreted in the context of all the evidence introduced . . . . In giving appropriate, if sometimes unreflective, weight to a specific piece of the evidence the trier will fit it into a shifting mosaic. . . . [C]onfirming evidence of that other line of

proof may require a reevaluation of the witness' credibility and a complex readjustment of the assessment of all the interlocking evidence.<sup>78</sup>

How would this work with garden-variety oral statements? First, we could finally reverse the traditional and contentious view, most recently re-imposed in a limited way by the Court in *Tome v. United States*<sup>79</sup> yet widely ignored in the trial courts, that a witness's testimony to his or her own prior statement is excludable as hearsay. This rule also tends to die a death by a thousand qualifications as the doctrine surrounding appropriate "prior consistent statements" has become liberalized. It is now apparently the dominant rule in the courts of appeals that a witness's testimony as to his or her own prior consistent statement is admissible, at least if the witness is impeached in any of the available dozen or so ways, without regard to its "pre-motive" character, so long as it has "any tendency" to change the probabilities surrounding the credibility of the witness.<sup>80</sup>

Typical oral hearsay statements could be admitted on a foundation suggested by the exceptions found in Rules 803(1) to 803(3). That required foundation might look something like this:

- Q. Did John Smith claim to describe his own perception?  
 A. Yes.  
 Q. How long after that claimed perception did he make that statement?  
 A. I don't know.

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<sup>78</sup> *United States v. Schipani*, 289 F. Supp. 43, 56 (E.D.N.Y. 1968).

<sup>79</sup> 513 U.S. 150, 156 (1995) (holding that a prior consistent statement is only admissible as witness testimony if it was made prior to when an alleged fabrication, influence, or motive came into being). See generally Robert P. Burns, *Bright Lines and Hard Edges: Anatomy of a Criminal Evidence Decision*, 85 J. CRIM. L. & CRIMINOLOGY 843 (1995) (providing an in-depth review of the *Tome* decision and its potential impact on evidence law).

<sup>80</sup> See, e.g., *Holmes v. State*, 698 A.2d 1139, 1143 (Md. 1997) (declining to follow the *Tome* holding because of Maryland's "divergence from the precise language of the federal rule regarding consistent statements"); *State v. Muhammad*, 820 A.2d 70, 85 (N.J. Super. Ct. App. Div. 2003) (noting that in New Jersey there is no temporal requirement for admission of prior consistent statements).

Q. Do you know from your own knowledge how good Smith's memory of the event was?

A. No.

Q. You don't know from your own personal knowledge how good a look the Declarant got, right?

A. No.

Q. Did he make that statement in an excited state?

A. I don't know.

Q. And so you don't know whether or not he had the presence of mind to concoct a false story?

A. I suppose not.

Q. The statement describes something the defendant did?

A. Yes.

Q. It doesn't describe Smith's own state of mind, something he had special access to?

A. No it doesn't.

On this weak foundation, we could admit the hearsay statements. Some of their weaknesses would have been pointed out by this required foundation.<sup>81</sup> The cross-examiner would be given latitude to explore the weaknesses in the testimony at greater length. The court could instruct the jury as to the skepticism which the law has treated hearsay evidence. And the court could take those weaknesses into account in deciding whether a verdict should be directed (except against the defendant in a criminal case).<sup>82</sup>

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<sup>81</sup> Perhaps the judge would be authorized to ask the foundational questions.

<sup>82</sup> I have to admit that some of my views on this particular set of hearsay exceptions stem from a personal experience defending a murder case in Chicago over twenty years ago. The case involved the fatal stabbing of a young man who had spent the night in a house with perhaps ten other teenagers. Our very young client had given what appeared to be a false confession after a police custodial interrogation. The defense theory of the case was that one of the other youths in the house, a member of a rival gang (who had been killed in a gang-related shooting before our trial) had committed the murder in revenge for a beating he had received at the hands of the victim a week or so before. The problem was that the only evidence of the beating, which provided the crucial motive, was a hearsay statement that the victim made to his sister a while after seeing his old antagonist in the house. It didn't fit the exception for present sense impressions, not really recognized in Illinois anyway, and the victim's sister was very noncommittal about any "excited state" her brother was experiencing. Nonetheless, we offered the statement; the state's attorney was busy checking his file for some other matter and did not object, despite the quizzical look of

Here are some additional suggestions, again without the kind of detail that would have to be developed if these suggestions actually saw the light of day. The judge could have no role at all in determining logical relevance—the “any tendency” of Rule 401. It has always been anomalous that a legal professional should be assigned the task of policing questions of commonsense reasoning. This is especially true because of the strong temptation to forget McCormick’s famous injunction that “a brick is not a wall.”<sup>83</sup> Judges continue to exclude evidence because it “doesn’t prove what you are trying to prove” or even because “the material fact doesn’t necessarily follow.” For the same reason the trial judge would have no role in making a determination whether a particular fact that is logically a precondition of the relevance of offered evidence has been established, even by the low standard of Rule 104(b). The trial judge would no longer need to make determinations whether a particular line of evidence would cause “undue delay, waste time, or needless[ly] present[ ] cumulative evidence.”<sup>84</sup> Those issues, which could disfigure the particular narrative counsel has chosen and could be the rationalization for the exclusion of important evidence, would be addressed by overall time limits on the presentation of the parties’ cases. Further, the requirements for authentication are relatively undemanding, given the low standard imposed by Rule 901(a). Yet, we could handle them in the same way as the possible hearsay exception described above: required foundational questions, followed by admission and vigorous cross-examination.

Expert witness testimony requires other measures than simply a regime of freer proof:

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the trial judge (a former prosecutor), and the evidence came in. It was an important element of the defense and may have contributed importantly to the defendant’s acquittal.

One may, I suppose, argue as to the probative value of this evidence, but I cannot conclude that its probative value is fairly measured by the defense’s ability to convince a trial judge by a preponderance of the evidence, *see* FED. R. EVID. 104(a), *construed in* *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987), that the victim was truly “under the stress of excitement caused by the event or condition” when he made the statement.

<sup>83</sup> 1 MCCORMICK ON EVIDENCE § 185 (Kenneth S. Broun et al. eds., 6th ed. 2006).

<sup>84</sup> FED. R. EVID. 403.

Our present situation is simply chaotic, with generalist judges making virtually unreviewable “discretionary” determinations by consulting a list of over a dozen unsystematized “factors,” many of which do not apply at all to some forms of expert testimony. What order can be found in this chaos seems based more on routine and outcome rather than the quality of the evidence. As these scholars demonstrate, evaluating at least some expert evidence is indeed one of those areas where the devices of the trial are often unable to overcome the bureaucratic and market constraints that surround it. And so the concrete suggestions [scholars] make for improving the quality of scientific evidence, especially forensic evidence, should be aggressively explored. It seems to me our current lot would be improved by *either* higher levels of centralized quality control *or* less authority on the part of trial judges to admit forms of forensic evidence while excluding more reliable forms of social scientific evidence. The latter may be a second-best practicality possible until the former is actually achieved.<sup>85</sup>

The prohibition on “character evidence” presents one of the most difficult hurdles for the defender of a regime of relatively freer proof. Criminal defense attorneys view this as a very important codification of the general principle that “unfair prejudice”<sup>86</sup> could lead the jury to reach false conclusions. Of

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<sup>85</sup> Robert P. Burns, *A Short Meditation on Some Remaining Issues in Evidence Law*, 38 SETON HALL L. REV. 1435, 1440–41 (2008); see also Christopher Slobogin, *Experts, Mental States, and Acts*, 38 SETON HALL L. REV. 1009, 1010 (2008) (“[W]hile expert psychological testimony about past acts ought to be based on scientifically verifiable assertions, expert psychological testimony about subjective mental states relevant to criminal responsibility need not meet the same threshold.”); Edward J. Imwinkelried, *The Case Against Abandoning the Search for Substantive Accuracy*, 38 SETON HALL L. REV. 1031, 1031–52 (2008) (explaining why scholars should continue to search for substantive accuracy in psychological and psychiatric testimony); Jennifer Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 725, 730 (2011) (“[T]he pattern identification disciplines, and forensic evidence more generally, do not currently process—and absolutely must develop—an adequate research culture.”).

<sup>86</sup> FED. R. EVID. 403.

course, presently much “prior crime evidence” comes in through increasingly broad interpretations of Rule 404(b) and, in cases where the defendant testifies, under Rule 609. It may be in the process of dying a death by a thousand qualifications. There is little doubt that prior crime or “prior bad act” evidence does have probative value. It is also true that “propensity” may have more behaviorist interpretations<sup>87</sup> than the traditional notion that prior crimes is evidence of a “character trait”—usually a vice or virtue—out of which the crime charged has emerged. The latter notion has always suggested a quasi-divine capacity to read hearts that we have appropriately thought beyond our powers. We allow prior crimes evidence where the crimes are probative of identity as manifesting an increasingly liberal notion of *modus operandi*. It is not apparent to me that we should not take the last step, again structured by limitations on the time that could be allocated to the evidence of the prior crime, notice to the party against whom it will be offered, liberal opportunity to “explain or deny,”<sup>88</sup> instructions to the jury as to the burden on the prosecution to prove the elements of the charged crime, and a somewhat heightened availability of directed verdicts where the latter is not forthcoming.<sup>89</sup>

The policy exclusions in Rules 407 to 411 and the exclusions of privileged communications pose somewhat different issues. They do not reflect paternalistic determinations that, even with the aid of adversary presentation, the jury cannot assign the appropriate weight to evidence. Rather, they exclude *reliable* evidence and subordinate the truth-finding goals of the trial to “extrinsic” policy goals. It seems to me that we should do as little of this as possible, though I do not express a view as to whether the current policies are justified. (Privilege law has the same characteristic as the rule

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<sup>87</sup> See FED. R. EVID. 413–15 (allowing admission of prior similar crimes evidence in criminal and civil cases involving sexual assault or child molestation).

<sup>88</sup> This is the approach to extrinsic evidence of prior inconsistent statements taken by Rule 613(b).

<sup>89</sup> See generally Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493 (2011) (using empirical data to refute the conventional wisdom about prior crimes, including the assumptions that telling a jury about prior crimes dramatically increases its disposition to convict and that juries generally ignore limiting instructions for nonpropensity prior crimes evidence by making propensity inferences).

against character evidence, constantly facing death by a thousand qualifications stemming from exceptions to the rule and waiver.)

What would increase? Judges' explanations of offered evidence, and what we know—or even what the legal tradition surmises—about the particular weakness of certain kinds of evidence. (We should be doing more of this based on the best social science and less based on hearsay exceptions whose basis lacks all proof, such as the elevation of statements made “under the stress of excitement” caused by such an event.) Where social science evidence reached some high threshold of reliability, the results should be incorporated into the jury instructions.

## VII. CONCLUSION

The law of evidence should continue the development toward greater admissibility for the reasons described above, which can be derived even from the received view of the trial. Each exclusion robs the jury of evidence that has, in the opinion of one of the advocates, some probative value. The devices of the trial, if they are given play, are usually very effective in identifying the weight to be given to each bit of evidence.

However, the theory of the trial matters. One of the traditional grounds for exclusion has been the danger that some evidence implicitly appeals to norms not officially recognized by the law of rules, even when an imaginative advocate can articulate some tendency to increase the probability, however slight, of a material fact. In the language of Rule 403, it poses the danger of “unfair prejudice” or “misleading the jury.” A broader understanding of the moral sources we expect the jury to draw on at trial is likely to reduce the set of circumstances in which material evidence is excluded because it invokes norms that are not strictly derived from the law of rules. We should retain parliamentary rules that impose order and discipline. We should subject all exclusionary rules to significant skepticism.