

# THE CASE FOR SELECTIVE ABOLITION OF THE RULES OF EVIDENCE

by David Crump\*

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Americans have created the most expensive litigation system in the world. We are incapable of trying medium sized lawsuits at lesser costs than the amounts in controversy.<sup>1</sup> Our system lengthens large lawsuits so that potential jurors who have businesses or professions cannot serve.<sup>2</sup> It produces results that depend upon issues unrelated to the merits.<sup>3</sup> The outcomes and even the processes are unpredictable, with adverse effects upon both adjudication and settlement.<sup>4</sup> There are many reasons for these effects, but the rules of evidence are a major contributor to them.<sup>5</sup>

Therefore, this article considers the case for selectively abolishing existing exclusionary principles in the Rules of Evidence. It is not a call for total abolition, because these principles are too firmly entrenched for that, and they have justifications that remain persuasive in some instances. Furthermore, there are some rules, particularly in the 400 series of Federal Rules and in principles governing privileges, that require retention, at least in a modified form. It is healthy, however, to consider whether some parts of the existing complex of rules may cost more than the value of any benefits they provide. It should be added that this article is not a call for reinstatement of the common law of evidence that governed before the Rules. I believe that

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<sup>1</sup> See generally, e.g., DAVID CRUMP & JEFFREY B. BERMAN, THE STORY OF A CIVIL SUIT: DOMINGUEZ V. SCOTT'S FOOD STORE (3d ed. 2001) (tracing history of slip-and-fall trial and appeal in which cumulative attorney's fees far exceeded plaintiff's modest award) [hereinafter cited as CRUMP, CIVIL CASE].

<sup>2</sup> Cf. DAVID CRUMP et al., CASES AND MATERIALS ON CIVIL PROCEDURE 556, 559 n.5 (4<sup>th</sup> ed. 2001) (excerpting and describing voir dire examination in multibillion-dollar litigation with predicted length of "many weeks" in which managerial and professional members of venire sought to be excused; showing judge's efforts to keep "responsible people" on jury).

<sup>3</sup> See, e.g., *Leake v. Hagert*, 175 N.W.2d 675 (N.D. 1970); see also *infra* Pt. IIA of this article (discussing result in *Leake*, which depended upon application of the hearsay rule, not the merits).

<sup>4</sup> For an eye-opening example of the disconnect between outcomes and merits, see Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (concluding that securities litigations settle for consistent percentages of projected damages, irrespective of their merits, apparently because parties regard outcomes at trial as unpredictable and untrustworthy).

<sup>5</sup> See *infra* Pts. IB-C, VIIB of this article (illustrating complexity and cost effects of the rules).

some of our exclusionary rules are dysfunctional irrespective of whether their development has been legislative, through Rules, or judicial, through common law.

This article begins with preliminary consideration of the reasons for my proposals, including the dwindling number of jury trials.<sup>6</sup> It then examines the hearsay rule, proceeds next to consider rules governing repetitive-behavior evidence, and also covers issues regarding opinion evidence, experts, and authentication.<sup>7</sup> These issues involve most of the common exclusionary principles. The article then considers the rest of the 400 series—relevance related rules, particularly those in Rules 401 through 403—and proposes a modified formulation of them.<sup>8</sup> Next, the article evaluates some overall issues that apply to all of these exclusionary rules, including their impact upon trials—a vanishing event, today—and including strategic responses by judges and litigants to their retrenchment. In this regard, the article considers separate rules that could be inaugurated if the existing rules were pruned as suggested, including rules designed to get lawyers and trials to the point earlier.<sup>9</sup> A final section considers the author’s conclusions, which include the proposition that although the results of this proposal for selective abolition are unpredictable, the current system is sufficiently dysfunctional to make it worthwhile to try significant revisions in the rules of evidence.

## I. PRELIMINARY OBSERVATIONS

### A. *Why Such an Outlandish Proposal?*

At the outset, let me say that I do not expect the idea of jettisoning major parts of the rules to achieve acceptance any time soon, or indeed ever. (I am not delusional, or at least not to

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<sup>6</sup> See *infra* Pt. I of this article.

<sup>7</sup> See *infra* Pts. II-V of this article.

<sup>8</sup> See *infra* Pt. VI of this article.

<sup>9</sup> See *infra* Pts. VII-VIII of this article.

that point.) This article might be considered a thought exercise, although I hope it might do more: that it might serve the useful function of inducing debate about which parts of the rules that exclude good evidence really do not serve their purposes sufficiently to justify their retention. It might even lead to a kind of “zero based budgeting” by which the retention of rules that exclude significant amounts of useful evidence might be evaluated not merely by their having been in place for a long time,<sup>10</sup> and not even by the possibility that they might in some cases be used to avoid decision by erroneous information,<sup>11</sup> but by their achievement of positive purposes that perceptibly exceed their effect in making trials more expensive, unpredictable, inaccurate, and scarce.<sup>12</sup>

Above all, this article is a plea for evidence rule writers to focus upon the phenomenon of the vanishing trial when they tinker with the rules. I do not have statistical proof of the point, but I am convinced that, among some evidence scholars, there is a bias in favor of rules that exclude evidence and against rules that admit it. To elaborate, I believe that some evidence scholars, as rules drafters, would tend to accept the following ideas in evaluating new rule proposals:<sup>13</sup>

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<sup>10</sup> For example, long existence explains the hearsay exception for excited utterances, although sound arguments show it to be unreliable. *See infra* notes 126-27 and accompanying text.

<sup>11</sup> For example, rules excluding evidence of repetitive conduct are explained, above all, by the “fear” that “a jury might overestimate the probative value of such evidence by assuming that merely because the defendant has committed crimes before, he is likely to be guilty of the offense charged.” *United States v. Colvert*, 523 F.2d 875 (8<sup>th</sup> Cir. 1975). This reasoning is singularly unpersuasive, because the “fear” that the jury might “overestimate” probative value supports the exclusion of almost any kind of evidence. In fact, this “fear” should be lesser for repetitive evidence than for other kinds of evidence that are more direct, such as eyewitness identifications or DNA analyses. *See infra* notes 182-83 and accompanying text.

<sup>12</sup> *Cf. supra* note 11. The real problem with the exclusion of repetitive-conduct evidence is that justifications usually do not consider whether it provides useful evidence or whether the jury can reasonably evaluate it. The *Calvert* justifications, for example, do not address these issues.

<sup>13</sup> For examples of recent articles advocating restricted evidence admissibility, *see, e.g.*, Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487 (2005) (advocating significant restrictions of evidence admitted under Rules 413-14); Andrew Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20 CRIM. JUSTICE 39 (Summer 2005) (advocating restriction of currently admissible hearsay); Michael S. Vitale, *Damaged Goods: Why, in Light of the Supreme Court’s Recent Punitive Damages Jurisprudence, Congress Must Amend the Federal Rules*

- (1) A rule that narrows the range of admissible evidence is more frequently a good idea than a rule that expands the available evidence;
- (2) A rule that amends an existing provision about admissibility by adding requirements to the elements already present, in the manner of ornaments on a holiday tree, is more often a good idea than a rule that reduces requirements;
- (3) A rule that makes predicate elements more difficult to prove is more often a good idea than one that makes predicates more readily demonstrable; and
- (4) A rule that conditions evidence admissibility on a notice requirement is almost always a good idea.

I could go on in developing the specifics of what I see as an evidence-narrowing tendency among some evidence scholars, but I hope that the point is sufficiently clear. And I should add that my only systematic empirical support for inferring this tendency is furnished by recent rules amendments that scholars have successfully sponsored. Their thrust has been generally in the direction of narrowing the scope of admissible evidence.<sup>14</sup> But also, to an extent, my assertion that these are the tendencies of many evidence scholars is based upon observations made during committee meetings and the like. What gets studied most thoroughly when evidence scholars look at the rules is the immediate issue in a particular rule, in isolation;<sup>15</sup> what gets emphasized is

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*of Evidence*, 58 VAND. L. REV. 1405 (2005) (advocating restrictions of evidence of similar but extraterritorial events offered to prove punitive damages).

<sup>14</sup> See, e.g., Fed. R. Evid. 702 (amended to exclude all expert opinion unless it meets three new numbered requirements); Fed. R. Evid. 703 (amended to prohibit merits use of facts or data supporting expert opinion and to limit admissibility for other purposes); Fed. R. Evid. 801(d)(2) (amended to exclude co-conspirators' statements unless predicate is proved by extrinsic evidence).

The most significant Rules that have expanded admissibility, Rules 413-15, did not originate with evidence scholars, but instead came from Congress; in fact, it was opposed, usually vehemently, by scholars. See *infra* notes 191-92 and accompanying text. There also have been amendments to Fed. R. Evid. 804(6) (forfeiture by wrongdoing) and 803(6) (business record affidavits), but they affect few cases compared to the exclusionary amendments.

<sup>15</sup> See Donald Nicolson, *Truth, Reason, and Justice: Epistemology and Politics in Evidence Discourse*, 57 Mod. L. Rev. 726, 741-2 (1994) (concluding that scholars spend their time studying admissibility, which is a small part of litigation, and that the Rules can be seen better in context).

the concerns raised by the possibility of unreliable inferences;<sup>16</sup> and what sometimes gets lost is the big picture: the cumulative effect of the rules in creating “gotcha”-type arguments,<sup>17</sup> in reducing worthwhile information,<sup>18</sup> and in making the trials of cases more complicated and difficult.<sup>19</sup> In this article, I hope to make arguments in the opposite direction.

The ultimate effect of the article, I would hope, might be that individual rules would come to be written and interpreted only after consideration of their effects on the vanishing trial. For example, there have been arguments to the effect that the residual exception to the hearsay rule is too easily invoked and that the exception should be limited to highly unusual cases.<sup>20</sup> I doubt the premise of the argument (my own guess is that the exception is too rarely invoked),<sup>21</sup> but even if the premise were granted, I believe that there would be sound reasons for broad

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<sup>16</sup> “Evidence is the limits placed on what the jury hears.” Twining, William, *Evidence As a Multi-Disciplinary Subject*, 2 Law, Probability & Risk 91, 96 (2003) ([http://www.ucl.ac.uk/laws/academics/profiles/twining/evidence\\_multi.pdf](http://www.ucl.ac.uk/laws/academics/profiles/twining/evidence_multi.pdf)).

<sup>17</sup> Notice requirements, for example, have proliferated. *See, e.g.*, Fed. R. Evid. 404(b), 412, 413-15, 609, 807. The policy is obvious and unobjectionable in every instance, but I believe the cumulative effect of these and the mass of other notice requirements is the disproportionate creation of “gotcha” arguments. In other words, the rules create ambush situations in which the proponent is in good faith and has either not known of one among the many scattered requirements or has believed the other party already has notice, and in which the opponent seeks a windfall escape from the effect of otherwise admissible evidence on the basis of violations that create little prejudice.

<sup>18</sup> *See infra* Pts. II-V of this article (discussing impact of rules excluding hearsay, repetitive conduct, expert opinion, and items not formally authenticated).

<sup>19</sup> *See infra* Pts. IB-C, VIIB, D (discussing impact of rules on strategy, complexity, and trial frequency).

<sup>20</sup> *See* Myrna S. Raeder, *The Effect of the Catch-Alls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOYOLA L. REV. 925 (1992); Myrna S. Raeder, *A Response to Professor Swift: The Hearsay Rule at Work—Has It Been Abolished DeFacto by Judicial Discretion?* 76 MINN. L. REV. 473, 507 (1992).

<sup>21</sup> The argument is often based upon comparisons of results of criminal defendant’s appeals of residual exception rulings admitting prosecution evidence and excluding defense evidence. *See* authorities cited in *supra* note 20. Although these data are easy to collect, I do not believe that they reflect the impact of the residual exception. Exclusions during trial of prosecution evidence almost never would produce appeals, and neither would a defendant’s successful invocation of the residual exception, so that the data are by definition likely to support the commentator’s arguments even if those arguments are flatly incorrect. Furthermore, appeals of residual-exception rulings are exceedingly rare in comparison to other evidentiary or procedural issues, suggesting that they argument is overstated. The “fallacy of availability” is a term used to describe inferences based on easily available data rather than those more determinative of the question. *See* DAVID CRUMP, *HOW TO REASON ABOUT THE LAW: AN INTERDISCIPLINARY APPROACH TO THE FOUNDATIONS OF PUBIC POLICY* 52-53 (2001).

A better data set might be composed by surveying District Judges or Assistant United States Attorneys. “In how many cases have you admitted/introduced evidence by using the ‘residual exception’ to the hearsay rule?” The question probably would prompt many answers of, “I’ve never heard of it.”

acceptance of the residual exception.<sup>22</sup> As another example, initial proposals for the Federal Rules featured a far more flexible hearsay rule than the relatively rigid one we actually have. It contained a broad exception admitting hearsay that had measures of trustworthiness and necessity, for which the exceptions would have served as examples, rather than as rigid categories.<sup>23</sup> The proposal was narrowed to produce the present rules because of traditional concerns about hearsay risks.<sup>24</sup> As will appear further below, I argue that more general admittance of hearsay would be a good thing, and the initial proposal contained in the House Bill was consistent with my arguments. Similarly, my arguments would support both the current rules admitting repetitive conduct in sexual assault cases and the extension of the same principle to other cases, the liberalization of expert opinion evidence,<sup>25</sup> and many other specific changes in the rules or their interpretation.

In summary, I do not hope for wholesale acceptance of my proposal here. Instead, what I hope for is recognition of the cumulative tendency of the current rules to contribute to the expense, unpredictability, inaccuracy, and evanescence of trials, and for application of this recognition to any debate about individual rules.

### ***B. The Problem of Presenting Live Witnesses (and the Insistence of the Rules upon It)***

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<sup>22</sup> See *infra* Pt. IIA of this article (costs of hearsay exclusion). Exclusion of evidence conforming to the residual exception is particularly costly because the rule requires it to be trustworthy and incapable of sound coverage by substitutes.

<sup>23</sup> See Testimony of Professor Paul F. Rothstein, Hearings on H.R. 5463 (Federal Rules of Evidence), Committee on the Judiciary, U.S. Senate, 93<sup>rd</sup> Cong., 2d Sess., at 215, 266-67, 270-75 (June 4-5, 1974). The proposal under consideration would have abolished categorical exceptions and substituted broad discretionary admissibility of hearsay that was trustworthy and needed. This proposal would have achieved the substantial equivalent of the proposals for hearsay revision in this article.

<sup>24</sup> See *Id.*; see also Fed. R. Evid. 801-07 (reflecting much narrower admissibility, with categorical exceptions). Professor Rothstein's views were, as always, well reasoned and persuasive, and I am unusual in believing that they pointed in the wrong direction.

<sup>25</sup> See *infra* Pts. II-V (continuing arguments for admissibility of these items).

I come to this problem from a background in trials, both civil and criminal. Of all the ways in which the world of trial is different from ideal of the evidence-course classroom, perhaps there is none comparable to the issue of presenting live witnesses. In my evidence courses, a common question is, “Why didn’t the plaintiff just present the live witness?” The question comes from students who, like many of their professors, have never seen a jury trial, much less had the complex responsibility of putting one together. The key point here is that the logistical problem of presenting the bodies of all of one’s witnesses in real time is a heavy burden in even a relatively short trial. Von Clausewitz is famous for the elegant metaphor, “the fog of war” (or “friction” of war,” depending upon translation), in which machinery doesn’t work and no one is exactly where he or she is supposed to be;<sup>26</sup> and the analogous metaphor, “the fog of trial,” equally fits a presentation before a jury, where a lone attorney functions without a military chain of command but faces a comparably daunting task.

Thus, the naïve question, “Why didn’t the plaintiff just present the live witness?,” implies that there is no cost or difficulty in doing so. Many of the rules are written from this perspective: that insistence upon currently-testifying, live witnesses will sacrifice nothing. That there will be no expense in bringing the witness to testify live, no likelihood of loss of the evidence, and no other disadvantages. The assumption is wildly at variance with reality. As von Clausewitz put it, because of the “fog” or friction” of the endeavor, “The simplest thing is difficult.”<sup>27</sup>

These issues can be particularly acute for the appointed criminal defense lawyer. This solitary combatant must, while multitasking, physically produce reluctant, frightened, or

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<sup>26</sup> See CRUMP, HOW TO REASON 482-86 (describing von Clausewitz’s tactical principles, including the “friction” of war, and the many ways in which these principles apply to analogous contests such as trials). See also TOM CLANCY (WITH GENERAL FRED FRANKS), INTO THE STORM 2-10 (1997) (describing Desert Storm invasion of Iraq; pointing out that the basic strategies explained by von Clausewitz are still dominant today).

<sup>27</sup> See authorities cited in *supra* note 26.

unresponsive witnesses to offer raw facts about alibi, self-defense, or lack of mens rea. Often, the barriers are insurmountable. Consider the following explanation by one defense lawyer:<sup>28</sup>

. . . And I'm bringing in witnesses to say, "No, he wasn't there." And witnesses are a problem . . . I have people I'd love to have come in, and they won't come. I can't force them. In theory there is subpoena power, but in fact if somebody said, "I'm not going to come," they're not going to come. A lot of these people are scared to death.

This excerpt describes war crimes defenses in an international tribunal, but make no mistake: analogous effects in this country can be greater rather than lesser. The description above covers witnesses fearful of political reprisals from dismantled institutions, whereas witnesses in domestic criminal trials involving, say, organized crime, must reckon with more acute threats from ongoing disciplined enterprises.<sup>29</sup>

I tried criminal cases that had been set and reset more than a dozen times, with the witnesses summoned each time, because that was necessary.<sup>30</sup> I tried civil cases that had been similarly reset multiple times.<sup>31</sup> On occasion, a reasonable, intelligent witness came to decide that, after several reschedulings, enough was enough, and he or she would not appear another time.<sup>32</sup> Usually, this decision included a perception that the American justice system was

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<sup>28</sup> 21 Tex. Lawyer, Feb. 13, 2006, at 5, 7 (quoting remarks of criminal defense lawyer Tom Moran).

<sup>29</sup> "What if a criminal defendant deliberately kills all of the witnesses against him to prevent their testimony? They may have made statements, . . . but these statements would be [excluded] by the hearsay rule." ROTHSTEIN, EVIDENCE 258. See *United States v. Houlihan*, 92 F.3d 1271 (1<sup>st</sup> Cir. 1996) (addressing numerous issues arising from evidence admitted under similar circumstances). Fed. R. Evid. 804(b)(6) (forfeiture by wrongdoing) partially addresses this issue but provides no relief when witnesses simply absent themselves because they are fearful or distrustful of the criminal justice system—as frequently happens—or when the opponent's conduct cannot be proved.

<sup>30</sup> Cf., e.g., DAVID CRUMP & WILLIAM J. MERTENS, *THE STORY OF A CRIMINAL CASE: THE STATE V. ALBERT DELMAN GREENE* 72-73 (2d ed. 2001) (tracing history of robbery case reset for trial four times before actual trial) [hereinafter cited as CRUMP, CRIMINAL CASES].

<sup>31</sup> Cf., e.g., CRUMP, CIVIL CASE 44-47 (tracing history of small-damages civil case reset for trial six times over eight months before actual trial). See also *Id.* 48-49 (depicting one of many subpoenas that solo-practitioner plaintiff's attorney had to have served for each of the repetitive resets of this case).

<sup>32</sup> See, e.g., David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 34 & n. 165 (1997) (describing one such case).

hopelessly ineffective, as well as a sensible assessment of the resulting incursions on the witness's own essential affairs. I saw instances in which courts kept working people sitting on benches just outside courtrooms for weeks on end, losing significant amounts of their wages, just to be sure they would be present in case their testimony might be needed. Judges did this for a good reason: the insistence of the rules on live testimony and the unpredictability of contacting an "on call" witness with an expectation of immediate appearance.<sup>33</sup> I saw witnesses produced at great expense to prove uncontested and tangential issues. I tried one case as an assistant district attorney that involved a complex theft from the telephone company and that required the assemblage of many witnesses from six different States. I had no hope that my county government could pay the bill to bring them all in; the expense was too great. Instead, the presentation of my case depended upon the telephone company's willingness to fund the travel of all of these witnesses. For an appointed defense attorney, this issue of interstate witnesses arises less frequently, but with more intense effects when it does arise.

Because of these kinds of considerations, when a lawyer prepares a trial notebook, the first page usually is a directory of witnesses: alternate telephone numbers, as many means of contact as possible, and notes about which live bodies are going to be difficult to produce, and why.<sup>34</sup> The party with the burden of proof really sweats the issue of physically presenting that party's witnesses. So does the defense lawyer who prepares to present an alibi or self-defense

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<sup>33</sup> *Cf. Brooks v. Brooks*, 561 S.W.2d 949 (Tex. Civ. App. 1978) (denial of continuance affirmed where lawyer arranged to call his client by telephone for trial but was unable to do so because a defect, which client promptly reported and had repaired, prevented telephone from ringing).

<sup>34</sup> *See WILLIAM V. DORSANEO, III, ET AL., TEXAS CIVIL PROCEDURE: TRIAL AND APPELLATE PRACTICE* 25-32 (4<sup>th</sup> ed. 2001) (showing difficulty of obtaining continuance for want of testimony; stating that inability to produce clients (or witnesses, by implication) at trial "is more frequent than you might suppose" and that attorney "is well advised to obtain several places through which to get in touch with" these persons). *Cf. Charles W. Schwartz, Trial Preparation, Part 1: Getting Discovery, Evidence, Pleadings, Motions, and Orders in Trial Ready Form*, in UNIVERSITY OF HOUSTON LAW FOUNDATION, *THE JURY TRIAL* 15-1 (2005) (placing issue of securing witness attendance at first page of Continuing Legal Education presentation on Trial Preparation).

claim.<sup>35</sup> A plaintiff in a middling sized personal injury case treats this as a major problem, and foresight may prompt the plaintiff's attorney to decline an otherwise viable case.<sup>36</sup> It should be obvious that for either an individual or for a business entity, the result is an enormous multiplication of the expense of litigation—an increase in cost that can make trial impractical even to preserve a thoroughly justified position.<sup>37</sup>

For some witnesses, the issue is deeper. Many witnesses find their contacts with the justice system destructive, to say the least. Some would rather go through virtually any other kind of unpleasant experience short of open heart surgery. The incidentally involved witness who is kept on the stand to be cross examined for more than a week is an example.<sup>38</sup> That experience is not merely time consuming; the attack is demeaning and debilitating, even though it is encouraged systematically by our evidentiary customs, since cross examiners are motivated to exhaust witnesses to precipitate mistakes.<sup>39</sup> The crime victim who is similarly treated is a more

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<sup>35</sup> Cf. CRUMP, CRIMINAL CASE 97-101 (showing defense attorney's presentation of four witnesses to support alibi, but including only close relatives or friends who could be expected to appear without subpoena; also showing, however, that in spite of reliance on institutional documents, defense attorney presented no witnesses from those institutions).

<sup>36</sup> Cf. CRUMP, CIVIL CASE 126 (reproducing plaintiff's attorney's explanation that he was unable to obtain substantial damages in slip-and-fall case because he did not produce plaintiff's physician, a tactic made necessary because the suit was "kind of a marginal case" and "I would have had to pay the doctor myself for his time"; adding that "if the case were taken by a [personal injury] specialist, he'd have paid to have the doctor there, but then again, he wouldn't have taken the case in the first place").

<sup>37</sup> See generally Samuel R. Gross & Kent D. Syverud, *Don't Try: Verdicts in a System Geared to Settlement*, 44 U.C.L.A. L. Rev. 1 (1996) (analyzing vanishing number of trials, including cases in which both parties lose because prevailing party expends more in trial expense than difference between other side's settlement offer and verdict) [hereinafter cited as Gross & Syverud].

<sup>38</sup> See David Crump, *supra* note 32, at 37-39 (describing the cross examination of a witness named Dennis Fung, which lasted nearly two weeks, with questions reported as "so detailed and repetitive" that he was left tired and confused, or "weary and glum"; providing other examples; analyzing the strategy that produces this result and examining its purposes).

<sup>39</sup> *Id.* at 32-39 (describing the "witness control or debilitation function" of cross examination, involving techniques enabling the examiner to "extend the examination to any desired length," so that the witness becomes "sufficiently tired, frustrated, or confused"; providing examples).

compelling case, and the child who testifies against her abuser is a more compelling example still.<sup>40</sup>

None of these issues excuses compliance with the rules. In particular, none can avoid the effect in criminal cases of the Confrontation Clause, which requires the live presence of some kinds of witnesses.<sup>41</sup> My mention of the anecdotal information above is not intended to argue to the contrary. Instead, I wish only to establish the point that our heavy insistence on live testimony is not, in fact, cost-free, although that point may not be always or even frequently considered. Furthermore, there are issues of policy underlying evidence rules or their interpretation that do not depend upon nonnegotiable requirements such as the Confrontation Clause, and I would argue for the consideration of the difficulty and expense of producing live testimony as one factor to be considered in deciding such an issue.<sup>42</sup> Throughout this article, I shall provide examples of what I am talking about.

For the moment, one good example of my point is furnished by the Federal Rules governing use of depositions at trial. The Federal Rules require live testimony rather than depositions in almost all cases, subject only to narrowly defined exceptions.<sup>43</sup> Imagine a plaintiff who has difficulty producing a particular live witness and who wishes to rely instead upon a deposition of the witness. The plaintiff can argue,<sup>44</sup>

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<sup>40</sup> See *Id.* at 34 (describing the effects). See generally David Crump, *Child Victim Testimony, Psychological Trauma, and the Confrontation Clause: What Can the Scientific Literature Tell Us?*, 8 ST. JOHN'S J. LEGAL COMM. 83 (1992) (analyzing literature; concluding that surprisingly little is predictable; explaining why a judge's determination that a particular child is "tough" and "impervious to harm" may be seriously in error because precisely such children may be "especially vulnerable to harm").

<sup>41</sup> See *infra* Pt. IID of this article.

<sup>42</sup> In addition to the example give here, see Pt. VIB of this article (describing potentially huge but hidden expense imposed by unavailability conditions upon hearsay exceptions in Rule 804).

<sup>43</sup> Fed. R. Civ. P. 32. Although it appears in the procedural rules, this Rule is really an evidence rule, describing what is in effect an unavailability exception to the hearsay rule for depositions, but one conditioned upon narrow requirements.

<sup>44</sup> See Fed. R. Civ. P. 30 (prescribing requirements for depositions).

The witness was under oath, as a deposition requires. The witness was subject to cross examination, as a deposition requires, and was, in fact, thoroughly cross examined. There was eye-to-eye confrontation, because the defendant was present across the table, as opposing parties often are at a deposition. And finally, although demeanor is a poor method of evaluating truthfulness, this deposition was videotaped, and the jury can fully evaluate the witness's demeanor.

In other words, the plaintiff can argue that all of the traditional protections thought to be safeguarded by live testimony are present.<sup>45</sup> The deposition cannot, however, be properly used under the Federal Rules under these conditions. Many States have changed this rule, to allow free use of depositions<sup>46</sup> or to provide that depositions are usable unless the opponent produces the witness.<sup>47</sup> The Supreme Court and Congress really should change the Federal Rule, too. But because rule drafters seldom evaluate the erroneous but facile assumption of easy presentation of live witnesses, the Federal Rule disallows most uses of depositions.

The decision of the First Circuit in *Frechette v. Welch*<sup>48</sup> illustrates the dismal results that this Federal Rule about depositions sometimes produces. The witness at issue was a diagnosing physician. The proponent offered the physician's testimony through a videotaped deposition. The proponent pointed out that the parties had stipulated that the deposition could be used for all purposes allowed under the laws of New Hampshire, the forum State, which permitted depositions under the circumstances.<sup>49</sup> In addition, the proponent offered evidence of an exception to the Federal Rule, in the form of a letter from the witness's own physician to the

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<sup>45</sup> See *infra* Pt. IIB of this article (describing alleged hearsay risks and protections against them).

<sup>46</sup> See DORSANEO et al, *supra* note 34, at 240 (describing free use of depositions under Texas Rules of Civil Procedure, irrespective of availability).

<sup>47</sup> Cf. *infra* notes 48-49 (describing New Hampshire rules).

<sup>48</sup> 621 F.2d 11 (1<sup>st</sup> Cir. 1980).

<sup>49</sup> *Id.* at 13.

effect that the witness had suffered a recent heart attack, and argued that this fact made the witness unavailable.<sup>50</sup>

The trial court admitted the evidence before the jury, but the First Circuit held that this receipt of the deposition was error.<sup>51</sup> The Federal Rule controlled, it said, not the parties' stipulation. The letter showed only a heart attack, and it did not contain the further statement that the witness was truly unable to appear due to illness.<sup>52</sup> Furthermore, the letter was hearsay, and it should not have been considered at all for purposes of determining unavailability.<sup>53</sup> This last conclusion was especially dubious: issues concerning the effects of evidence rules do not normally require information conforming to the rules of evidence themselves,<sup>54</sup> and the court's reasoning was tantamount to a requirement that live evidence must be produced to prove the unavailability of live evidence. The Federal Rule, therefore, required that the proponent produce the witness live rather than using his deposition. That was the Court of Appeals' holding, meaning that the use of the deposition was error. Then, however, the court concluded, against all reason, that the error was harmless,<sup>55</sup> even though it provided direct expert evidence governing the central issue in the case. This transparent judicial fudging produced a sound outcome, even though it made sense only in light of a dysfunctional rule that the court perhaps realized it had interpreted poorly.

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<sup>50</sup> *Id.*

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

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Specifically, the Federal Rules of Evidence do not apply to the determination of facts that govern evidentiary predicates. *See*, Fed. R. Evid. 1101(d)(1) (providing that the rules “do not apply to” the “determination of questions of fact preliminary to admissibility of evidence. . . .”) Strictly speaking, this Rule may not govern an issue covered by the (separate) Federal Rules of Civil Procedure, but it is anomalous to admit evidence subject to loosely proved predicates specified by hearsay exceptions containing none of the protections against recognized hearsay risks, while setting stringent and nearly unattainable requirements of proof of predicates for depositions, which usually reflect all of these protections. *See supra* notes 44-45 and accompanying text.

<sup>55</sup>

The arguments that I shall make in this article support the revision of the Federal Rule governing depositions, and they support a different interpretation of that Rule than the First Circuit's reading. My larger thesis, however, is that many exclusionary principles in the rules of evidence are so dysfunctional in general that they should be pruned severely. Still, it is not necessary for the reader to agree with me on that broad front for the point to be useful. There are many instances in which my arguments would support modest revisions of individual rules, revisions that might appeal to some readers. The difficulty for the evidence proponent posed by a rigid insistence upon live witnesses is one perspective, for me, that drives these arguments.

### ***C. The Complexity Effect in Decisionmaking under Formal Rules***

The conclusions of this article also are driven by a concern for the right amount of formalism in rules, including rules of evidence. What do I mean by "the right amount of formalism?" All that I am trying to engender is an appreciation of the possibility that the complexity of formal rules is a "Goldilocks problem." When Goldilocks tried the first bowl of porridge, it was too hot; the second was too cold; the third was just right. Similarly, some kinds of problems require solutions that avoid both not enough, at one end, and too much at the other.<sup>56</sup> There is a level that is just right, and more is not better, even though less or none at all may not be better either. Accordingly, the introduction of formal rules can enhance satisfactory decisionmaking. The concept that a decisionmaker should follow a prescribed set of steps is thought to provide better results not only in the law, but in other fields as well.<sup>57</sup> What gets lost, however, particularly in rulemaking, is the concern at the opposite end: the possibility that, if the

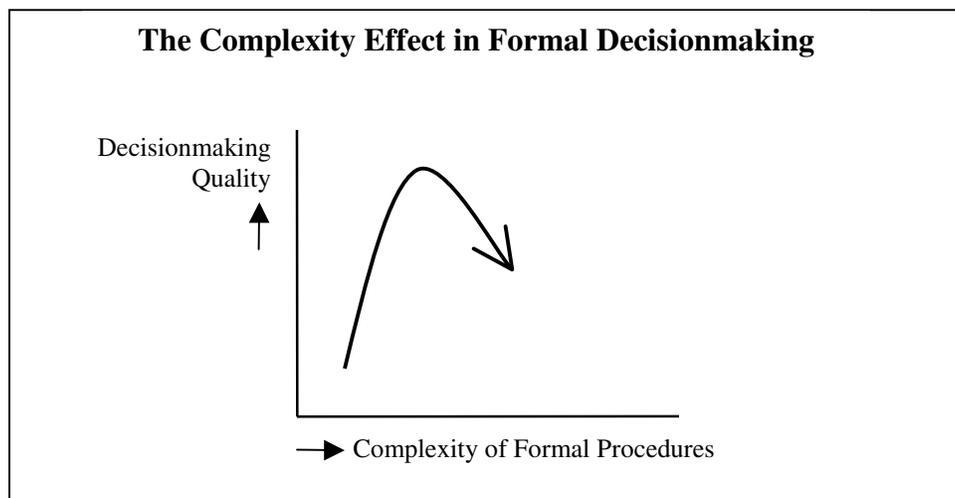
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<sup>56</sup> An analogous "right level" problem concerns the very different issue of punitive damages. Too much produces overkill, which causes producers of products and services to expend safety resources wastefully, whereas too little produces inadequate safety. See David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors Be Given to Determine the Amount of a Punitive-Damage Award?*, 57 MD. L. REV. 174, 190-201 (1998) (developing this point by economic analysis).

<sup>57</sup> See CRUMP, HOW TO REASON 182-85 (describing due diligence in business decisionmaking, consisting of prescribed formal steps).

prescribed set of steps is too expensive, abstract, or divorced from direct concerns—if it is too formal, in other words—it may begin to interfere with satisfactory decisionmaking.

The simplified figure that accompanies these words attempts to put this idea into a chart or graph.<sup>58</sup> The horizontal axis is the complexity of formal decisionmaking, and the vertical axis is the degree to which the resulting decisionmaking is satisfactory. Obviously, neither of these qualities is precisely measurable, and in fact neither is easy to define. The graph should be considered loosely, in the same way as illustrative depictions of social cost curves by economists:<sup>59</sup> as an aid to visualizing a theoretical relationship, rather than as a mathematical construct. At the left side of the curve, there are few formal procedures. A factory or firm makes a major decision, such as hiring a division head, without a checklist requiring it to generate candidates, interview them, check references, or the like; or, a monarch settles a dispute between two citizens with no rules of evidence or of substance, in the manner of King Solomon.<sup>60</sup> The



<sup>58</sup> It is believed that this simple Figure is unique with the author.

<sup>59</sup> See David Crump, *supra* note 56, at 191-94 (providing examples of cost curves).

<sup>60</sup> See 1 Kings 3:16-28 (King James version). The Bible reports that the monarch used the psychological trick of suggesting that a baby be cut in half to dispose of a maternity dispute, then awarded the baby to the contestant who was willing to surrender her son rather than see him killed. King Solomon apparently arrived at this procedure idiosyncratically, without any formal rules.

result may be a poor decision, one influenced by biases such as availability or anchoring. The addition of a few formal processes increases the quality of the decision, on average. More formalism may increase it further. A point is reached eventually, however, at which the relative complexity of formal constraints seems likely to produce the most enhanced decision, all factors considered. Beyond that point, increases in formal constraints have a negative effect. They serve to cramp decisionmaking rather than enhance it. At some point, in other words, more formality serves only to produce a worse decision.<sup>61</sup>

Again, it should be emphasized that this visualization tool is imprecise and theoretical. In a way, it depicts the clash of two jurisprudential philosophies, those of the legal realists and the process school. Justice Holmes, who was nothing if not a realist, argued that the “felt necessities of the times,” or judges’ discretionary decisions about what would be best, was a greater influence on legal decisionmaking than formal logic.<sup>62</sup> The process school, on the other hand, reacted to the perceived excesses of this viewpoint because it implied no limits upon a judge’s ability to inflict idiosyncratic or even malevolent preferences upon the citizenry. As a corrective, the process school called for formal procedures that would remain consistent from decision to decision.<sup>63</sup> The right balance between these two philosophies, which arguably are aimed at different concerns although both have appeal, is the issue that I am raising here.

When it comes to evidence rules, formal processes are appropriate, but I would argue that we sometimes neglect the upper end of the Goldilocks problem, the issue of excessive

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<sup>61</sup> Thus, this article contains examples of formal processes so costly or complex that they threatened to confuse or distort the decision. *See, e.g., supra* notes 29, 32, 35, 36 and accompanying text.

<sup>62</sup> *See* CRUMP, HOW TO REASON 325-30 (describing the legal realists). The culmination of this kind of reasoning was pervasive indeterminacy, such as the “ethical relativism” of Edward Westermarck, who argued that moral judgments could not be said to “possess objective validity,” that nothing was provably “good or bad, right or wrong,” and that moral principles could not “express anything more than the opinions of those who believe in them.” *Id.* at 234-36.

<sup>63</sup> *Id.* at 236.

formalism. A rule that has three formal elements can always be rewritten to incorporate four, or five, or six. The additional elements may be aimed at sound policy justifications, in fact. But when we increase the number of formal elements, we increase the cost and difficulty of compliance, and we may introduce distracting factual arguments, create legal ambiguities, and produce less satisfactory decisions. I would say that we have reached this point with some hearsay principles, such as the unavailability definition,<sup>64</sup> and with the long list of requirements for expert opinion evidence (some with multiple sub-requirements).<sup>65</sup> When there are as many as eight separate requirements<sup>66</sup> for the introduction of a particular kind of information before the jury, the vagueness of the criteria and the proliferation of factual issues guarantees that the determination will be exceedingly costly, and unless the standards are written with extraordinary skill, the opponent will find a promising point of attack even when policy would expeditiously admit the evidence. It might be better to guide the judge by a single standard, or two, or three, rather than eight or more. This idea, that the advantages of formal processes reach a limit with increasing complexity, is another of the concerns that drives this article. Throughout it, I shall point out examples of rules or groups of rules that I think defeat their purposes because of an excess of formal complexity.

***D. Will Elimination of Exclusionary Rules Really Increase the Frequency of Jury Trials, and Would This Really Be a Good Thing?***

**(1) The Effects of Evidentiary Rules on the Vanishing Trial**

No one can know with certainty whether the proposals I have made here will truly increase trials. Since these approaches have not been tested, there is no statistical means of

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<sup>64</sup> See *infra* Pt. VIIB of this article (analyzing cost effects of these requirements).

<sup>65</sup> See *infra* Pt. IV of this article (analyzing cost, complexity, and error-inducing aspects of law governing expert testimony).

<sup>66</sup> See *infra* notes 228-29 and accompanying text for an example.

proving or disproving the point. I believe, however, that they will. Here are some of the reasons for this belief.

First, rulings on evidence consume a large portion of the time spent in a jury trial, and these proposals probably would reduce that time, although they would not eliminate it. As a means of testing this hypothesis, I considered the record in one simple jury trial, a slip-and-fall case, a case lasting about two days.<sup>67</sup> By my estimate, evidentiary objections, arguments, compliance mechanisms, and rulings occupied about one-third of the duration of this particular trial, or in other words, they increased the length of trial by about fifty percent. In coming to this conclusion, I included the time spent hearing motions and evidentiary issues related to evidentiary rulings that occurred on the eve of trial.<sup>68</sup> In summary, eliminating this time spent on evidentiary issues would, by itself, free up an estimated 33 percent of the time now spent in trial<sup>69</sup> and would enable us to increase the percentage of trials by an analogous percentage, without any additional resources. The proposals offered here would not eliminate all of the time spent in this manner, because my suggestion is for retention of some exclusionary principles, particularly Rules 401 through 403 in a modified form,<sup>70</sup> but they would substantially decrease other evidentiary issues concerning hearsay, expert opinion, repetitive conduct, and authentication.

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<sup>67</sup> See generally CRUMP, CIVIL CASE (reproducing proceedings in a slip-and-fall case).

<sup>68</sup> See, *Id.* 47-48, 50-51 (motion in limine requiring hearing; immediate pretrial hearing considering complex issues surrounding whether medical records, as hearsay, fit business records exception).

<sup>69</sup> Generalizing this finding from a single case is, of course, debatable. One can argue, however, that complex cases can be expected to create more evidentiary issues for the time they consume than this single slip-and-fall case did. At the extreme, capital murder trials frequently last several months, during which defense counsel will have the understandable motive to raise and argue every conceivable evidentiary point. See DAVID CRUMP AND GEORGE O. JACOBS, A CAPITAL CASE IN AMERICA 29-73 (2000) (describing pretrial and trial proceedings in a capital case).

<sup>70</sup> See *infra* Pt. VI of this article.

Second, the current rules mean that the evidence appears in a disorganized order. The sequence of witnesses often is dictated by availability rather than by the logic of presentation.<sup>71</sup> This disorganization requires drawing and redrawing of the relationship among evidentiary points. When a second witness is called after a first witness whose testimony is relevant only because of the second witness, attorneys must spend large amounts of time reorienting the jury so that the connection is clear. The time spent in this manner should not be minimized; advice to lawyers about how to conduct a direct examination stresses this idea of redrawing the picture or reorienting the jury.<sup>72</sup> The proposals at issue here would decrease this effect by allowing greater use of pretrial testimony such as depositions and greater use of repeated statements of witnesses, and these proposals would shorten trials for this reason.<sup>73</sup>

Third, the revision suggested later in this article, in Rules 401 and 402, would empower and encourage the judge to eliminate evidence of very slight relevance—relevance so slight that it cannot be expected to influence a reasonable juror.<sup>74</sup> One might think that the Rules already do this. But actually, they do not. Some judges accomplish the purpose by interpretation of Rules 401 through 403 that eliminates long-string evidence, and some find other devices, such as rules limiting cross to the scope of the direct, to accomplish the same thing even more artificially; but other judges permit the development of evidence with only the slightest connection to anything in the case.<sup>75</sup> The Rules are not written, now, in a manner that expressly requires the judge to consider this issue. The materials below in part VI of this article will explain why, in greater

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<sup>71</sup> See *infra* Pt. IB of this article.

<sup>72</sup> Cf. David Crump & Joe W. Redden, *Testimony from Your Own Witnesses: Direct Examination Strategies*, in UNIVERSITY OF HOUSTON, THE JURY TRIAL Pt. 8, at 4, 5, 6 (2005) (Continuing Legal Education materials emphasizing need for frequent reorientation of jury during evidence presentation).

<sup>73</sup> See *supra* Pt. IB of this article.

<sup>74</sup> See *supra* Pt. VI of this article.

<sup>75</sup> *Id.*

depth. At the same time, attorneys have strong incentives for the use of marginally relevant evidence, often for the very purpose of lengthening examinations.<sup>76</sup> The proposals contained here would reduce this effect by giving the judge a mandatory rule requiring the elimination of evidence too attenuated to make a difference.

Finally, the rules at issue here would allow for the enforcement of relatively strict limits on the time consumed by single-witness examinations or by each side's cumulative presentations in a jury trial. These kinds of limits are difficult to impose or enforce under our current regime. But simplification of the form in which the evidence is received, better organization of witnesses, and elimination of highly marginal evidence, as proposed here, would allow us to adopt rules such as those proposed in a later section of this article, at Part VIII, requiring the judge to impose time limits in advance—generous and flexible, to be sure, but almost certainly effective to reduce waste of time, nevertheless.

## **(2) Would an Increase in Percentages of Trials (without New Resources) Be a Good or a Bad Thing?**

Then, there is the separate question: would an increase in the frequency of jury trials be a good thing? I believe it would, again for several reasons. First, the decrease in trials results, in large measure, from an increased use of judge-imposed dispositions on points of law.<sup>77</sup> There is no clear way of knowing, but I doubt that there has been an increase in percentages of cases worthy of this disposition comparable to the number of cases thus eliminated. In other words, many of the cases may reflect judicial fudging in which judges stretch to force cases into categories capable of disposition on pure points of law. Summary judgment by evidence elimination or by inferences properly left to juries, disposition by sanctions, and deadline

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<sup>76</sup> *Id.*

<sup>77</sup> See *supra* Pt. IC of this article; *infra* Pt. VIIB of this article.

enforcement seem especially suspect in this regard. This article will return to this point in Part VII, below.

Second, other dispositions are made up of settlements. It is a good thing that a very high percentage of our cases result in settlement, because we cannot afford the resources to handle every dispute by a full-blown jury trial. But when trials are reduced to a vanishing level, one begins to suspect that there are settlements that would not be reached if trials were more readily available. In fact, the prospect of the vanishing trial means that judges will manage cases with heavy-handed encouragement of settlement firmly in mind, because they simply must do so—or they will have so many cases over which to preside that they cannot do justice to any of them.<sup>78</sup> And so, as is developed in greater depth in Part VII below, the judge must adopt strategies for precipitating settlement. One of the simplest judicial strategies is to make rulings that escalate costs and risks for the party who, in the judge’s opinion, is most likely to be preventing settlement by recalcitrance.<sup>79</sup> The trial statistics suggest strongly that this party is likely to be one that is firmly convinced of the rightness of his, her, or its position, and thus the settled cases may reflect many in which the judge is forcing settlement upon a party that has strong faith in the justice of the cause. This party, then, accepts a far lesser sum, or pays a far greater sum, than is believed to be owed.<sup>80</sup>

Third and finally, the rules probably result in the settlement of cases that would better be tried. What is meant, here, by “cases that would better be tried”? I believe that the rules discourage trials of some cases in which factual issues are closely contested, and that they increase the percentage of cases in which trials occur simply because the rules create opportunity

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<sup>78</sup> See generally DAVID CRUMP et al., *supra* note 2, at 467-85 (discussing judicial case management).

<sup>79</sup> See *infra* Pt. VIIB of this article.

<sup>80</sup> See generally Gross & Syverud (concluding that there usually is a clear winner and a clear loser at trial).

for arguments about exclusion of relevant, reliable, important evidence, of a kind that would result in rational settlements if the rules made admissibility clearer. In other words, the rules distort the playing field, and they distort settlement distribution, by excluding powerful and relevant evidence from some cases or by creating the prospect that evidence admissibility can be tested only by actually going to trial.<sup>81</sup> This means that trials of cases in which there should be genuine dispute about the facts will be elbowed out by cases that would result in settlement if evidentiary rules were not so rigidly exclusionary: if they did not distort the outcomes by the reality (or the risk, which amounts to the same thing) that information useful to a rational decisionmaker will be suppressed. Again, this Article will re-evaluate these issues in Part VII, after putting forward more specific arguments about the exclusionary rules.

Unfortunately, I do not think that rule drafters consider these issues very seriously when they propose amendments. The immediate effect of a single rule becomes dominant in the debate over amendments, with consideration usually focused on the question whether the rule, in its existing form, might admit some evidence that could be unreliable. The question of costs and benefits, or the cumulative effect of the various exclusions, gets lost, and the achievement of artificial policies expressed in the existing rules becomes of overriding importance.<sup>82</sup> The question whether the cumulative effect is to decrease the percentage of trials, or whether that effect is a bad thing, seldom merits much discussion. The arguments I have made in this section are difficult to prove or disprove, but the real point is that we have constructed a set of evidence rules that have serious influence on the underlying questions about ultimate effects on trials or outcomes—and we have done so without trying to answer those questions.

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<sup>81</sup> See *infra* Pt. VIIb of this article.

<sup>82</sup> See *supra* Pt. IA of this article.

## II. THE HEARSAY RULE AS A HISTORICAL ACCIDENT: HAVE WE PUSHED IT BEYOND ITS LOGIC?

The hearsay rule is probably the most extensive of our exclusionary principles.<sup>83</sup> It provides that a statement uttered other than as current testimony is excluded if it is offered to prove the truth of the matter asserted.<sup>84</sup> The effect of the rule is to eliminate the use of a nontestifying declarant as a historical narrator. It means, in the plain English formulation that I use in introducing neophytes to the subject, that “you can’t testify about someone else’s version of the facts in court.”

The rule originated in response to historical events in England that have little to do with practice today: abuses in the Court of Star Chamber, for example, when trial was done by affidavit insulated deliberately from cross examination, with witnesses held incommunicado and tortured or threatened with torture, and with investigation of the accuracy of the resulting narratives severely restricted.<sup>85</sup> A significant inciting event was the trial of Sir Walter Raleigh for what was charged as a conspiracy against the King, in which the evidence included hearsay from an alleged coconspirator, Lord Cobham, who had retracted his declaration, as well as a narrative quoted from a declarant in another country.<sup>86</sup> Sir Walter’s objection was not directed solely at the hearsay nature of the narrative as such, but also at its flimsiness to support conviction for crime: “This is the saying of some wild Jesuit or beggarly priest; but what proof is it against me?”<sup>87</sup> The

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<sup>83</sup> Its coverage consumes more than one fourth of JON R. WALTZ & ROGER C. PARK, *EVIDENCE: CASES AND MATERIALS* (10<sup>th</sup> ed. 2004), and a comparable amount of PAUL F. ROTHSTEIN, *EVIDENCE: CASES, MATERIALS AND PROBLEMS* (2d ed. 1998), both exclusive of appendices.

<sup>84</sup> Fed. R. Evid. 801(C) (definition), 802 (exclusion).

<sup>85</sup> See JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 338 (1883; reprinted 1976).

<sup>86</sup> See JON R. WALTZ & ROGER C. PARK, *supra* note 83, at 97-98.

<sup>87</sup> *Id.* at 98. For an earlier source, see J. G. PHILLIMORE, *HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE* 157 (1850).

later reaction to these abuses assured that the hearsay rule would come to be entrenched in English, and therefore in American, jurisprudence.<sup>88</sup>

But the costs of the hearsay rule have been too infrequently considered. These costs are many, and they are large.

#### **A. *The Costs of a General Rule against Hearsay***

The hearsay rule now applies in American courts from top to bottom, with episodic exceptions for very small claims in some jurisdictions.<sup>89</sup> If a citizen sues a sloppy business for taking the citizen's money without performing properly, the hearsay rule will limit the evidence available to the citizen to prove the case. For example, a written estimate of repair costs will likely be inadmissible. Likewise, if an injured person sues another whose negligence is alleged to have caused the injury, the hearsay rule limits the evidence.<sup>90</sup> A criminal defendant who seeks to offer evidence of the commission of the crime by another will see the best available evidence excluded—the ostensibly credible confession of the alleged other perpetrator—with the court remarking, perhaps, that “the holding may seem absurd to a layman.”<sup>91</sup> The result is the removal of good evidence from the process, the lengthening of trials, and the confusion of narratives.

Consider a simple case as an example. *Leake v. Hager*<sup>92</sup> appears in at least one evidence casebook—that of Professor Paul F. Rothstein et al.—where it is used to demonstrate both the

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<sup>88</sup> See JON R. WALTZ & ROGER C. PARK, *supra* note 83, at 97.

<sup>89</sup> Cf. Fed. R. Evid. 1101(b) (declaring applicability “generally to civil actions and proceedings” and “criminal cases and proceedings,” subject to expressed exceptions).

<sup>90</sup> *E.g.*, *Rudzinski v. Warner Theatres, Inc.*, 16 Wis.2d 241, 114 N.W.2d 466 (1962) (excluding statement by usher at theatre relevant to cause of plaintiff's slip and fall). This result probably would change under Fed. R. Evid. 801(d)(1)(D).

<sup>91</sup> *E.g.*, *State v. English*, 201 N.C. 295, 195 S.E. 318 (N.C. 1931). The result would remain the same under the Federal Rules, even though Fed. R. Evid. 804(b)(3), unless there is corroboration strong enough to “clearly indicate” the trustworthiness of the confession.

<sup>92</sup> 175 N.W.2d 675 (N.D. 1970).

workings of the hearsay rule and the loss of good evidence that the rule creates.<sup>93</sup> The case was a fender-bender, in which Leake claimed that Hagert had negligently driven her automobile into the back of a plow that Leake was towing on the highway, and in which Hagert counterclaimed for her own damages, alleging that Leake had been negligent in operating his vehicle “on a public highway after sunset, without proper lights, reflectors, or other warnings.”<sup>94</sup> The contested evidence was the testimony of an insurance investigator, who repeated a statement from Leake’s son, who was said to have stated that the “red lens” on the “small rear light on the tractor” driven by Leake had been “out for some time.”<sup>95</sup> The trial court evidently considered this statement good evidence, because it admitted it. The state supreme court, however, applied the hearsay rule (correctly, according to its terms) and found reversible error. “The hearsay rule prohibits the use of a person’s assertion as equivalent to testimony of the fact asserted,” wrote the court.<sup>96</sup> It added, “Leake’s son did not testify in the present action; he was not a party to the action; . . . and he was not available as a witness because he was overseas.”<sup>97</sup> For all that appears in the opinion, it would have cost many times the amount in controversy, and many times her damages, for Hagert to have brought her opponent’s son home from “overseas” for a visit, but if Hagert wanted the evidence, this kind of wasteful expenditure was what was called for.

Imagine that Hagert had been involved in another type of activity, such as purchasing a residence, buying a business, hiring an employee, or deciding which university to attend. The amount at stake might be much greater than the dollars in controversy in her fender-bender. And

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<sup>93</sup> PAUL F. ROTHSTEIN, MYRNA S. RAEDER, & DAVID CRUMP, EVIDENCE: CASES, MATERIALS AND PROBLEMS 73-74 (2d ed. 1998).

<sup>94</sup> 175 N.W.2d at 680.

<sup>95</sup> *Id.* at 683.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

yet no one would attempt to settle these kinds of major controversies without reliance on hearsay. In fact, most of what the parties would rely upon in Hagert's hypothetical home purchase would be hearsay, in the form of engineering reports, title reports, inspection reports, appraisals, and literally dozens of other items of unvarnished hearsay.<sup>98</sup> Sensibly, we rely routinely upon these kinds of hearsay in bigger matters. But not in litigation; not even in small litigation such as *Leake v. Hagert*, and not even if the costs of exclusion transparently exceed the benefits.

The hearsay rule excludes good evidence. It did so in *Leake v. Hagert*. The declarant was, after all, the son of the party against whom it was offered. The statement used clear language that was not likely to be the subject of misunderstanding. It carried little risk of mistaken perception.<sup>99</sup> Furthermore, the hearsay rule results in inability to prove facts that are subject to investigation and clear determination. In an equivalent situation involving the purchase of a residence, for example, hearsay results of investigations would be freely relied upon to resolve conflicts between the interests of the two parties.<sup>100</sup> Even when nonhearsay evidence can be supplied, the draconian insistence of our legal system on the physical presence of each witness vastly increases the cost of trial, especially in small cases like *Leake v. Hagert*. The rule against hearsay is not applied to any other kind of important decision—only to litigation of the traditional, court-oriented variety. In fact, most alternate methods of dispute resolution, including

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<sup>98</sup> See generally DAVID CRUMP & JEROME J. CURTIS, THE ANATOMY OF A REAL PROPERTY TRANSACTION (1984) (reproducing major documents and events during typical residential purchase and sale).

<sup>99</sup> For these reasons, the recognized hearsay risks were minimized and the protections against them diminished in importance. See *infra* Pt. IIB of this article.

<sup>100</sup> For example, written reports of inspectors would enable the parties to determine whether defects would exceed the repair allowance expressed in their contract. See DAVID CRUMP et al., *supra* note 98 at 8, 25 (reproducing excerpts from repair allowance in typical contract and engineering report based on inspection).

arbitration, feature agreements that contract out of the Rules of Evidence.<sup>101</sup> In other words, parties who use common devices today to control their own processes virtually uniformly agree to abolish these complex rules that our system has contrived to exclude evidence. Even when proof is available in traditional litigation, the law's insistence upon blanket exclusion of hearsay means that evidence is presented disjointedly and wastefully. The hearsay rule is of hideous difficulty for ordinary lawyers to apply,<sup>102</sup> and when it is misapplied to receive evidence, as it was in the trial of *Leake v. Hagert*, or when it results in the erroneous exclusion of evidence, as it also does,<sup>103</sup> it leads to results at variance with the merits or to expensive relitigation.

These disadvantages would be more readily tolerable if they were offset by resulting gains. But the hearsay rule is not uniformly needed to achieve the benefits it is asserted to have. This article will turn next to that issue.

### ***B. The Purposes Assertedly Served by the Hearsay Rule***

Hearsay is said to involve a number of risks. Among these are perceptivity, qualification, sincerity, expression, and bias.<sup>104</sup> Perceptivity refers to the opportunity for observation of the phenomenon by the witness. For example, Leake's son might not have seen the lens on the small red light when the tractor was operating, or he might have seen it only from such a distance that its operation was not ambiguously known to him. Qualification refers to the ability of the witness to process, retain, and report what he allegedly observed. The son might have been functionally blind or so ignorant of the operation of lights on vehicles that his report was unreliable. Next,

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<sup>101</sup> See DAVID CRUMP et al., *supra* note 2, at 775.

<sup>102</sup> The concept of a statement not offered "for the truth of the matter stated" is such that attorneys and students often confuse it. Casebooks usually contain repeated examples for students. See authorities cited *supra* note 83. This is only one aspect of the definition of hearsay that causes confusion; there are others.

<sup>103</sup> E.g., *Contractor Utility Sales Co., Inc. v. Certain-Teed Prods. Corp.*, 683 F.2d 1061 (7<sup>th</sup> Cir. 1981).

<sup>104</sup> For slightly different formulations of these risks that overlap this description, see Lawrence Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974); JON R. WALTZ & ROGER C. PARK, *supra* note 83, at 105.

sincerity means the tendency of the witness to avoid deliberate falsehood. It is possible that the son told the insurance adjuster that the light was “out” when he knew that in fact it was in perfect working order. Then, expression refers to the semiotics of the situation: the meaning, to both the son and the jurors who would listen to his reported remark, of the symbols contained in the reference to a “small light” and a “lens” that had been “out for some time.” When the son used the words, “out for some time,” he may not have meant the same thing that most of us would understand his remark to mean; he might have meant, for example, that the light blinked or buzzed, not that it did not operate, or that it was not covered by a red lens, or that it was only partially red-covered. “Bias,” of course, refers to cognitive blockages of truth in even sincere witnesses. The son might have hated his father to such an extent that, even while attempting to tell the truth, he attributed carelessness about the light to his father that did not exist.

These risks do not sound very persuasive in the context of *Leake v. Hagert*. Furthermore, they are not risks that require sophistication to evaluate.<sup>105</sup> Jurors are not incapable of inferring and considering them. In fact, these risks are present whenever live witnesses testify, and they never can be quantified or eliminated no matter how many procedures, of however much complexity, we happen to put in place.<sup>106</sup> Nevertheless, in response to the hearsay risks, the legal system poses a number of processes that are designed to control them. In fact, psychological studies strongly indicate that observers do no better than pure chance in evaluating live witnesses,<sup>107</sup> and some studies suggest that they do better, actually, when unable to see the

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<sup>105</sup> Evaluating these risks is simple compared to, say, judging the credibility of admissible statistical, scientific, or engineering testimony from dueling expert witnesses. *See infra* Pt. IV of this article.

<sup>106</sup> *Cf., e.g.,* United States v. Smithers, 212 F.3d 306 (6<sup>th</sup> Cir. 2000) (analysis of risks inherent in eyewitness testimony, when presented live, by both majority and dissent).

<sup>107</sup> *See* Olin Guy Wellborn, *Demeanor*, 76 CORNELL L. REV. 1075, 1078-88 (1991) (discussing studies).

speaker;<sup>108</sup> these considerations forcefully undermine some of the arguments for excluding hearsay. In any event, the four processes that most often are mentioned are demeanor, eye-to-eye confrontation, the oath, and cross-examination.<sup>109</sup> As we shall see, these processes are not the only ways to enable the jury to exercise the judgment that will reduce hearsay risks, and several of them are of doubtful efficacy.

Demeanor refers to the physical appearance of the witness while testifying, which the jury can observe as a purported aid to the detection of falsehood. Did the witness wipe his hands? Hesitate? Look down at the floor? Do these behaviors indicate probable falsehood, uncertainty, or bias? Actually, no. They do not. The psychological experiments thoroughly debunk the theory that these behaviors are sound inputs for detection of falsehood.<sup>110</sup> In fact, the psychology of demeanor tends to support the concept that people are better judges of truth if they cannot observe the speaker.<sup>111</sup> It seems that people are about as good (or bad) at appearing to tell the truth when they are not, or at accidentally creating the appearance of falsehood when testifying truthfully, as they are in lie detection by demeanor. In fact, the acting abilities of good liars probably outstrip the ability of observers to catch them. Arguably, people are not incapable of detecting falsehood, but they do so better by textual or content analysis of the communication.<sup>112</sup> Demeanor is not a good reason for the hearsay rule, but rather a distractant.

There may be something more to the idea of physical confrontation, but not much more. Psychological experiments show that physical proximity is a factor in people's ability to

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<sup>108</sup> See *Id.* 1088.

<sup>109</sup> See PAUL F. ROTHSTEIN et al., *supra* note 93, at 73.

<sup>110</sup> See generally Olin Guy Wellborn, *supra* note 93, at 1075-76, 1078-88 (discussing “mounting experimental evidence against the utility of demeanor” in assessing credibility; noting, however, that this proposition “contradicts orthodox legal assumptions”).

<sup>111</sup> See *Id.* at 1088.

<sup>112</sup> See *Id.* at 1104-05.

disadvantage others. There is some evidence, in other words, that facial confrontation in which the speaker or subject is not anonymous makes the speaker less capable of adverse action against the subject.<sup>113</sup> But the fact that a witness may be more hesitant to say something adverse to a litigant who is present hardly means that we are more likely to get the truth as a result of eye-to-eye confrontation. We don't enhance the quality of information that we collect by confronting the reporter with all of the adverse consequences that might flow from a truthful answer, and in fact we often enhance it, instead, by removing disincentives to truth-telling.<sup>114</sup>

As for the oath, it seems likely that it has something to do with enhancing truth, but again, not as much as one might like to hope.<sup>115</sup> In the first place, the oath influences only the so-called sincerity risk. It does not counteract defects in perceptivity, qualification, expression, or bias, except to the extent that it may suppress less-than-perfect-certainty altogether—and then, it seems as likely to suppress truth as falsehood. Although the oath probably does have something to do with counteracting the sincerity risk in some witnesses, it does so imperfectly, and it may result in an imbalance that leads to poor truth detection. If a witness impressed by the oath confesses diligently to all uncertainties, while an opposing witness who takes his swearing more casually expresses a false but convincing certainty to the contrary, the so-called “Othello effect” causes errors in third-party evaluations—and the oath does not help us much.<sup>116</sup>

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<sup>113</sup> Stanley Milgram's experiments showed this effect in a disturbing way. A phony “experimenter” (who actually was a stooge) persuaded experimental subjects to impose what they thought were painful electric shocks on another person who made mistakes in what was falsely presented as a learning experiment. The willingness of subjects to impose these “shocks” was enhanced by physical factors, such as close proximity of the authority and distance of the person harmed (e.g., by walling the learner off in another room). CRUMP, HOW TO REASON 385-86.

<sup>114</sup> This, in fact, is one reason for reposing more faith in double-blind experiments, in which neither the subject nor the observer is biased by knowing whether the subject is part of the experimental group or the control group. CRUMP, HOW TO REASON 449.

<sup>115</sup> See Olin Guy Wellborn, *supra* note 107, at 1078-91.

<sup>116</sup> This effect is so well recognized in the literature that it has a name: the “Othello error,” because it is illustrated by Othello's mistaken interpretation of Desdemona's reaction to Othello's inaccurate accusation of infidelity. See William Shakespeare, *Othello*, act V; scene ii; PAUL EKMAN, TELLING LIES 170 (1985); Charles F. Bond &

Finally, there is cross examination, which is indeed a valuable tool for discovery of truth, if a potentially overrated one. Cross examination gives us text and context. A disinterested observer comes away with more parts of the story to compare to others. Furthermore, cross examination may uncover defects in perceptivity, qualification, sincerity, expression, and bias. “When you use the word ‘red,’ Leake’s son, you really don’t know what it means, do you?” “No, I don’t; I don’t speak English very well, and I get ‘red’ mixed up with ‘green’.” “And before the accident, Leake’s son, it had been months since you’d seen the light?” “That’s correct. My observations were from another time altogether, and I have no idea whether my father fixed the light after I saw it, but before the accident.” If this is not enough, we can elicit evidence of bias from the witness: “Yes, it’s true, I hate my father and I’d like to see him lose this case.”

This hypothetical dialogue, of course, is wildly improbable, and hence my assertion that cross examination is overrated. The psychological studies, in fact, strongly support the inference that cross-examination can sometimes interfere with, rather than enhance, accurate credibility determinations.<sup>117</sup> One striking experiment, for example, showed that experienced cross-examiners were no better than amateurs in questioning identification eyewitnesses to produce accurate evaluations of their testimony by neutral decisionmakers—and, in fact, neither did better than chance(!)<sup>118</sup> This study paints a dismal picture of the efficacy of cross examination, if not of our entire system of justice.

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William E. Fahey, *False Suspicion and the Misperception of Deceit*, 26 BRIT. J. SOC. PSYCHOLOGY 41 (1987), cited in Olin Guy Wellborn, *supra* note 107, at 1081.

<sup>117</sup> See PAUL EKMAN, *supra* note 116, at 162-89; Charles F. Bond et al., *supra* note 116, at 41. In fact, Professor McCormick suggested that “it is . . . the honest but weak or timid witness, rather than the rogue, who most often goes down under the fire of cross-examination.” CHARLES T. MCCORMICK, EVIDENCE § 31 (3<sup>rd</sup> ed. 1984).

<sup>118</sup> See R.C.L. Lindsay, Gary L. Wells, and Fergus J. O’Connor, *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses*, 13 LAW & HUM. BEHAV. 333, 336-38 (1989).

In any event, there are several responses to the assertion that a uniform exclusion of hearsay evidence is preferable to evidence without cross examination. I conclude that cross examination is far more valuable in some situations than in others, that it can be substituted for by available means short of throwing out all hearsay, and that the existing rules themselves demonstrate this point—but they achieve results that are random and arbitrary rather than principled.

***C. The Case against Solving These Problems by Blanket Exclusion***

The question is not whether cross examination of nearly every hearsay declarant would be potentially valuable. The answer to that question is, “It potentially would be.” Instead, the question is whether cross examination is so uniformly valuable and so impervious to substitutes that it should be regarded as essential in all cases, so that information that itself may be valuable, such as the son’s statement in *Leake v. Hagert*, should be flatly excluded. I do not think so.

In the first place, as I have asserted above, jurors are not incapable of perceiving the risks that the law has identified as inherent in hearsay evidence (and that in fact are inherent in all evidence, including testimony from live witnesses). We do not know from systematic means just how likely jurors are to perceive all of these risks on their own, unaided; but that is not the point either, because the opponent of the evidence can debunk the value of a given piece of hearsay evidence, just as the opponent can debunk the veracity of a witness. “The son of my client, Leake, wasn’t here. Hagert’s lawyer could have brought him here if she wanted. The son may not have seen the light recently, may have been incapable of telling whether it was out, may have been lying when he talked to the insurance investigator, and may hate his father. And what did he mean by the phrase, ‘out for some time?’ It proves nothing, ladies and gentlemen of the jury.”

I have only anecdotal evidence to offer about this question of jury awareness of hearsay risks, and I don't know that we have anything better, pro or con. But my experience was striking. Back in the days when I regularly tried criminal cases, the law of my State provided that only a jury could acquit an indicted defendant on grounds of insanity.<sup>119</sup> There were some cases in which the prosecutor and defense lawyer agreed that the defendant was insane and merited acquittal; in fact, although there were many cases where this agreement did not result, cases of agreement about insanity were common. Neither side in such a case wanted to waste a full-blown jury trial to resolve the non-issue that each side had agreed to, and certainly the judge did not. Jury trials are precious; it is astonishing how few we can afford.<sup>120</sup> Additionally, the prosecutors wanted to avoid bringing in the diagnosing psychiatrist, who had already logged several 400-dollar hours, to charge travel time to and from the courtroom, sit there several hours with the meter running, and spend fifteen minutes on the witness stand opining orally about what was fully expressed in the psychiatrist's report. In the view of the county government, the cost of this use of the psychiatrist was astronomical, and the practice was roundly discouraged. The parties' natural tendency, then, was to accept the first twelve potential jurors without any voir dire examination and to stipulate to the admissibility of the psychiatrist's report without his being present. Then, both parties would present the jurors with their agreed request for acquittal.

The reactions of the resulting juries were extraordinary. Many of them balked at acquitting defendants on this basis, even when urged to do so by prosecutors. "Why couldn't the psychiatrist be here?" "Okay, so it may cost some money, even a lot of money, but the psychiatrist should be here." The jurors were unwilling to accept hearsay from the psychiatrist.

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<sup>119</sup> Tex. Code Crim. Proc. Art. 46.03 (1975).

<sup>120</sup> *See generally* Gross & Syverud (discussing reasons for the vanishing trial); *see also infra* Pt. VII of this article (same).

They feared a conspiracy against the public—the acquittal of a guilty individual whom the prosecutor wanted falsely to exonerate, with the connivance of the defense lawyer. The jurors had seen evidence presented on television in such programs as Perry Mason and Matlock and Boston Legal, and they concluded that this wasn't the way it was supposed to be done. The United States Supreme Court said much the same thing in *Old Chief v. United States*,<sup>121</sup> in which the Court recognized the need for “evidentiary depth” on the part of a litigant with the burden of proof. The jury has expectations, and those expectations are disappointed in some instances if jurors are provided only indirect statements.<sup>122</sup> Some kinds of hearsay evidence violate the jury's sense of proper epistemology. And so, my first point is that the stifling paternalism of the hearsay rule may not always be needed, because the jury is at least as capable of evaluating the potential defects in hearsay evidence as it is in inferring defects in the testimony of a witness.<sup>123</sup> My experience leads me, in fact, to conclude that jurors will be suspicious of hearsay in situations when attorneys and courts would accept it. In my mind, jurors often have a stronger bias against hearsay than lawyers do.

Which leads to a second point: the hearsay rule is actually a rule of partial admissibility. It admits a great deal of hearsay through exceptions and exemptions, as well as by defining evidence as non-hearsay even though it is the equivalent of hearsay and carries similar risks. The results are arbitrary, however, because the exceptions are the product of historical accident, not of policy.<sup>124</sup> For example, the exception for an “excited utterance” admits hearsay if it is spoken

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<sup>121</sup> 519 U.S. 172, 190 (1997).

<sup>122</sup> *Id.* at 188-90.

<sup>123</sup> *See supra* notes 106-18 and accompanying text.

<sup>124</sup> *See* John E.B. Myers, Ingrid Condon, Simona Ghetti & Gail S. Goodman, Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science, 65 *LAW & CONTEMP. PROB.* 3 (2002)

while under the stress of an exciting event.<sup>125</sup> The theory is that the required element of stress reduces the sincerity risk, because a person under stress does not have the time or presence of mind to make up a false story. In the first place, we do not know whether this is so, or whether it is true to some degree only.<sup>126</sup> In the second place, and more importantly, stress does not guarantee against defects in perceptivity, qualification, expression, or bias. In fact, the psychology of perception under conditions of stress points in precisely the opposite direction from this exception, indicating that hearsay of this kind is distinctly unreliable. The experiments show that stress results in distorted perception and reporting—it produces lesser accuracy, not greater.<sup>127</sup> The ironic result of this exception for excited utterances, however, is that a court would be much more likely to admit evidence of Leake’s son’s hearsay statement if he had made it under stress—if it had been uttered right after the accident, for example, or in response to a shocking revelation by the insurance investigator—even though we would then have less reason to credit the statement, and even though the statement as actually uttered, which the rules excluded, had greater indicia of truth.

The same criticisms can be made of other exceptions or exemptions. Dying declarations, for example, have been the subject of clearly expressed skepticism founded in their asserted lack of value as evidence.<sup>128</sup> So have statements against interest.<sup>129</sup> And arguments of a similar nature could be constructed about other rules, ranging from admissions<sup>130</sup> to public records.<sup>131</sup>

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<sup>125</sup> Fed. R. Evid. 803(2).

<sup>126</sup> See John E.B. Myers et al., *supra* note 124, at 3-8.

<sup>127</sup> “It has often been demonstrated that performance suffers if individuals are exposed to stressful conditions.” *Id.* at 6.

<sup>128</sup> SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883), *excepted in* JON R. WALTZ & ROGER C. PARK, *supra* note 83, at 138-39 (stating that dying declaration rule functions poorly in India, apparently because of a belief that dying persons have no motive for truth telling—e.g., they may make deathbed accusations to hurt enemies).

If the general admittance of hearsay encounters further objections on grounds of jury credulity, we could provide an instruction to the jury suggesting that hearsay should be viewed with skepticism. We could even provide a statement of the reasons:<sup>132</sup>

Ladies and gentlemen, the statement of Declarant X was of a character that the law regards as “hearsay.” It was the repetition of a statement as evidence of what the statement says, without the speaker present. You should consider whether this evidence was subject to defects because the opposing parties were unable to explore Declarant X’s ability to perceive the subject, qualifications for making the statement, accuracy of expression, adherence to sincerely telling the truth, or bias. With live witnesses, the law has ways of exploring these matters, including cross-examination. Different hearsay statements have different probabilities of stating the truth, and it is up to you to evaluate the statement of Declarant X with these possible defects in mind.

This kind of instruction seems unnecessary to me, because I believe that juries are perfectly capable of reaching these conclusions on their own, or more likely, as aided by the adversary guidance of attorneys in opening statements and final argument. But if it is thought that jurors need help in generating skepticism about hearsay, this kind of instruction—which the opponent of the evidence probably would emphasize as a matter of strategy in opening statements and final argument—would supply encouragement of that skepticism.

There are still other alternatives to a blanket exclusion of hearsay. The judge has authority, under Rule 403 (which I would retain; see below)<sup>133</sup> to exclude particularly weak or

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<sup>129</sup> See *Williamson v. United States*, 512 U.S. 594 (1994) (expressing skepticism about such statements; producing three-way split of the Court, leaving no clear way of resolving serious admissibility issues remaining under the governing rule).

<sup>130</sup> This is particularly true of vicarious admissions attributed to business entities, made without investigation for one purpose but offered for another. Cf. *Susemihl v. Red River Lumber Co.*, 306 Ill. App. 430, 28 N.E.2d 743 (1940) (admitting statement by corporation’s manager that employee was acting in scope of employment, made in connection with employee’s worker’s compensation claim, but used to prove claim by third party against corporation; overruling argument that the statement had been made without personal knowledge, presumably on the basis of representations by the same employee who made the compensation claim).

<sup>131</sup> Fed. R. Evid. 803(8) contains complex restrictions that eliminate most uses in criminal cases, although not in civil cases.

<sup>132</sup> This instruction would compare favorably in comprehensibility to other kinds of credibility-related instructions. Cf. e.g., *United States v. Telfaire*, 469 F.2d 522 (D.C. Cir. 1972) (suggesting, in an appendix, a lengthy and complex model instruction about eyewitness testimony).

unnecessary hearsay as cumulative, misleading, or confusing. Also, the common law rule that hearsay is no evidence, invoked for purposes of a directed verdict (or a judgment as a matter of law, in federal courts)<sup>134</sup> could be reinstated. The result would be that the jury hears all of the evidence, but a litigant cannot carry the burden of production without non-hearsay evidence. This rule would reverse the result in Sir Walter Raleigh’s case.<sup>135</sup> Yet another means of dealing with the asserted problem is to require the proponent of the evidence to produce a live witness who can be cross-examined about the making, meaning, and context of the questioned statement, without requiring that this witness be the person who uttered the statement.

This last proposal—requiring a live witness who can be cross-examined by the opponent, and who can put the statement in context—is a potentially powerful response to the criticisms of hearsay. Through such a witness, even if he or she is someone other than the declarant, the asserted defects of any item of hearsay evidence could be explored in front of the jury. An amended rule might say, then, that “hearsay is admissible if authenticated by a sponsoring witness who knows of the circumstances of its utterance and who is subject to cross examination about the evidentiary risks it may involve.” In fact, the opponent may be able in many cases to cross examine this witness more effectively than she would a declarant who was present. In *Leake v. Hagert*,<sup>136</sup> for example, the witness presumably would be the insurance investigator who reported having heard the statement. “You don’t know, Mr. Adjuster, whether Leake’s son saw the light recently, or whether he only saw it years before the accident?” “No, I don’t.” “You don’t know whether he ever saw it, do you?” “No.” “You don’t know of your own personal

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<sup>133</sup> See *infra* Pt. VI of this article.

<sup>134</sup> Cf. *Natural Gas Clearinghouse v. Midgard Energy Co.*, 23 S.W.3d 372, 388 (Tex. App. 1999) (observing that hearsay statements are not evidence and as such may not be used as the basis for judgment.)

<sup>135</sup> See *supra* notes 86-87 and accompanying text.

<sup>136</sup> See *supra* notes 92-102 and accompanying text.

knowledge whether he was telling the truth, do you?” “I have no way of knowing.” “You don’t know what he meant by the phrase, ‘out for some time,’ do you? For example, mightn’t he have meant that part of the lens was out, or that it earlier had been out but was repaired at the time?” “I don’t know, of course. For all I know, his father had fixed it by the time of the accident.” “And in fact, a lot of kids these days dislike their parents and find ways to get back at them. You don’t know whether Leake’s son fits in that group, do you?” “For all I know, he may have hated his father.” Cross-examining a witness who knows the context of the statement, even if the witness is not the declarant, is relatively easy and can be entirely effective in getting the point across to the jury.

In fact, prosecutors and defense lawyers in my jurisdiction ultimately used this solution to address their agreed-insanity problem, which I have described above. The defense attorney could call himself as a witness. “My client is unable to separate reality from delusion. He tells elaborate stories about his ‘children,’ but I have learned that he has no children.” The defense lawyer then would mark the psychiatrist’s report as Defense Exhibit 1, have it received by stipulation, and explain its contents. The prosecutor then would cross-examine the defense lawyer about the psychiatrist’s report. The result was juries who understood the evidence and who did not have concerns about being fooled.

And lest I be misunderstood, I have no doubt that, even if the process were adversary—if the defense lawyer sought acquittal on insanity grounds but the prosecution opposed it—the prosecutor would have been entirely effective at cross-examining a substitute expert about the psychiatrist’s report, just as the defense lawyer would have been effective at cross-examining a substitute about an opposing expert’s report. The question is academic, because in an adversary

situation, both would likely choose to present their experts live, for reasons of jury persuasion.<sup>137</sup> The point, however, is that effective cross examination can be supplied in many cases by the presence of a witness other than the declarant, and in most such cases, the cross will actually be more effective rather than less so. The concern for cross examination, in other words, does not justify a blanket exclusion of hearsay.

#### ***D. Criminal Cases: The Right of Confrontation***

Criminal cases present certain additional issues. One of the most significant is the Confrontation Clause. After *Crawford v. Washington*<sup>138</sup> the effect of the Clause, as interpreted, is to exclude hearsay that is “testimonial” in character, unless the declarant is unavailable and has been cross examined. I see the *Crawford* decision as dubious on its merits, because I do not agree with the Court’s single-focus rationale depending upon the historical distinction between testimonial and non-testimonial hearsay.<sup>139</sup> I believe instead that reliability, the consideration upon which prior cases had been based<sup>140</sup> but that the Court rejected, also was an important historical factor,<sup>141</sup> and I do not think the Court dealt consistently with counterexamples such as dying declarations, statements against interest, and admissions, which admit testimonial hearsay because of reliability-related factors.<sup>142</sup> Furthermore, I see the Court’s own declarations of

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<sup>137</sup> See *infra* Pt. VIIC of this article (explaining forensic strategies favoring live witnesses); see also *supra* notes 21-22 and accompanying text (reporting Supreme Court’s expression of the same theory).

<sup>138</sup> 541 U.S. 36 (2004).

<sup>139</sup> *Id.* at 43-57.

<sup>140</sup> *Crawford* overruled a line of cases that emphasized reliability, including *Ohio v. Roberts*, 448 U.S. 56 (1980).

<sup>141</sup> The Court relied heavily in its recounting of history upon Sir Walter Raleigh’s case as supporting its testimonial-nontestimonial distinction. See 541 U.S. at 44, 51-52 & n.3 (relying “especially” on that case). The trouble with this reliance, however, is that Raleigh emphatically argued lack of reliability, the very rationale that the *Crawford* Court rejected. See *supra* note 87 and accompanying text.

<sup>142</sup> The Court described dying declarations as “[t]he one deviation we have found” and as “sui generis,” and it relegated this observation to a footnote. 541 U.S. at 56 & n.6. Just as persuasively, however, the dying declaration exception could be offered as a clear counterexample to the Court’s conclusion, showing that reliability is, indeed, an important rationale for admitting testimonial hearsay. Furthermore, the Court’s reference to this “one exception we have found” shows that its search was inadequate. Statements against interest have long been admissible on

factors supporting stare decisis<sup>143</sup> as supporting retention of the existing line of cases, from which the Court in *Crawford* abruptly departed.<sup>144</sup> But that issue, concerning whether *Washington v. Crawford* is incorrectly decided, would require another article by itself, and here, I shall take the *Crawford* decision as correct. The Constitution limits both our rules of evidence and our repeal of them, and whatever happens to the hearsay rule, it is necessary for trial evidence to conform to the Supreme Court's requirements. In other words, because of *Crawford*, rightly or wrongly, any modification of the hearsay rule must still result in the exclusion from criminal trials of testimonial hearsay if the declarant is not unavailable or was not cross examined.

But this limitation, though it must be strictly observed, does not mandate the exclusion of any other kind of hearsay. In particular, civil trials are not affected by the Confrontation Clause, and neither are issues in criminal cases where the Clause does not require exclusion. Therefore, these constitutional considerations furnish no reason, for example, for the exclusion of the good evidence that resulted in *Leake v. Hagert*.<sup>145</sup> And for reasons that I will develop later in this article, as long as the Compulsory Process Clause is meaningful, the natural strategies of the opposing parties furnish a counteractant to hearsay risks in criminal cases as well.<sup>146</sup> In

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reliability grounds even if testimonial, as is shown by *Williamson v. United States*, 512 U.S. 594 (1994). Another example concerns admissions, which were an exception to the hearsay rule at common law even if testimonial in nature, on grounds involving reliability.

<sup>143</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (articulating factors favoring stare decisis); *Payne v. Tennessee*, 501 U.S. 808 (1991) (same).

<sup>144</sup> The Court in *Crawford* made no effort to justify its departure from *Roberts* by reference to the factors in *Casey* and *Payne*, but decided to abandon stare decisis because *Roberts*'s "unpardonable vice" was that it admitted evidence that the Founders "plainly meant to exclude," 541 U.S. at 63. In other words, the departure from stare decisis was based on disagreement about this issue, not on factors that excuse compliance with stare decisis. The Court referred to "confusion" created by the reliability standard in *Roberts*, 541 U.S. at 62-63, but it did not and could not predict that its new standard would reduce that confusion.

<sup>145</sup> See *supra* notes 92-103 and accompanying text.

<sup>146</sup> See *infra* Pt. VIIC of this article.

summary, I believe that, even in criminal cases, the jury's ability to evaluate hearsay risks, the interest of adversary counsel in pointing them out, jury instructions describing hearsay and encouraging suspicion, rules requiring non-hearsay evidence for sufficiency purposes, and the natural strategies of counsel that I shall describe in Part VII, would provide powerful tools to limit concerns about hearsay, so that a blanket rule excluding constitutionally admissible hearsay results in an excess of disadvantages over advantages.

### ***E. Selective Retrenchment of the Hearsay Rule***

So far, the arguments that I have made would support the complete elimination of the hearsay rule, except to the extent that exclusion is required by the Confrontation Clause. I believe that that outcome might well be preferable to the regime we have now, in which the rule excludes good evidence along with bad, on the basis of considerations that frequently have little to do with the difference.<sup>147</sup> This belief is strengthened by the availability of alternate protections against the hearsay risks, as well as by the weakness of the existing protections.<sup>148</sup> In particular, outside the purview of the Confrontation Clause, concerns about demeanor, the oath, and eye-to-eye presence seem unlikely to exclude bad evidence any more than they exclude good evidence, and unfortunately, the jury's ability to detect falsehood in witnesses, even after cross examination, is likely to prove no better than its ability to perceive the risks inherent in hearsay.<sup>149</sup>

Nevertheless, cross examination provides a rationale for retention of the hearsay rule in some cases. This rationale is partially undercut when the witness is available to the opposing party, who can use compulsory process to exercise the right to cross-examine unless to do so is

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<sup>147</sup> Cf. *supra* notes 124-31 and accompanying text (examining instances in which rules produce admissibility results arguably inconsistent with policy).

<sup>148</sup> See *supra* Pt. IB of this article.

<sup>149</sup> See *supra* Pt. IB of this article.

unreasonably difficult.<sup>150</sup> But there could be cases of spoliation and of arranged hearsay: that is, a party with a motive to do so might cause a witness to create oral or written hearsay deliberately for use at trial and then procure the absence of that witness. In a later section, I shall develop reasons why this practice is likely to be unusual, but the possibility exists.<sup>151</sup> Then, too, retention of the hearsay rule is supported by its entrenched position in Anglo-American jurisprudence. Its complete abolition is a political impossibility. But the reasons for retention of this exclusionary principle do not furnish an argument against cutting it back selectively. What, then, are some partial reforms, short of abolishing the hearsay rule, that might limit its effect in excluding good evidence?

First, as a small step, consider unavailability. Other than as mandated by the Confrontation Clause, unavailability of the witness should be abolished as a requirement for any hearsay exception. This article has already examined the negative effects that the unavailability requirement imposes, particularly in small cases in which hearsay exceptions could furnish important, reliable information.<sup>152</sup> The former testimony exception, for example, admits evidence that has been subjected to the oath and to cross examination, and usually to eye-to-eye confrontation as well; accordingly, proof of unavailability, which may drive up expenses inordinately, should not be required.<sup>153</sup> Furthermore, if the opponent wants live testimony from the witness, the opponent can produce the witness if the witness is available;<sup>154</sup> the opponent's failure to do so, coupled with dog-in-the-manger arguments for exclusion, is the best indicator

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<sup>150</sup> See *infra* Pt. VIIC of this article.

<sup>151</sup> See *infra* Pt. VIIC of this article.

<sup>152</sup> See *supra* Pt. IB of this article; see *infra* Pt. VIIB of this article.

<sup>153</sup> Fed. R. Evid. 804(b)(1) requires not only unavailability, but also the oath and cross examination. It also requires a "proceeding" or deposition, at which the opponent usually will have the opportunity to be present.

<sup>154</sup> See *infra* Pt. VIIB of this article.

that either unavailability exists or that the opponent does not really want the witness. Other exceptions requiring unavailability do not mirror the protections against hearsay risks so completely, but they do admit of the possibility that the opponent could call an available witness if desired rather than seek exclusion altogether, and they are based upon considerations having to do with the trustworthiness and reliability of the evidence.<sup>155</sup> Eliminating the unavailability requirement for nontestimonial evidence and in civil trials, therefore, would minimize both the additional admittance of bad evidence and the exclusion of good evidence—which ought to be the objective.

Second, for similar reasons, the exclusion in civil cases of deposition evidence without unavailability should be reversed.<sup>156</sup> This, too, is a modest step. A deposition supplies the most important protections against hearsay risks—oath and cross-examination—and it makes likely the existence of eye-to-eye confrontation, since the opposing party often is present, and it even supplies demeanor evidence if the deposition has been videotaped.<sup>157</sup> If the opponent wants the presence of an available witness, the opponent can supply it, and again, the opponent's efforts at exclusion, without producing the witness itself, is a strong indicator that obtaining the witness live is impractical or that the opponent's strategy is better served by foregoing the protections against hearsay risks. The costs and unpredictability created by the exclusionary principle are significant, as is shown by the discussion of *Frechette v. Welch*, above. The Federal Rules should be revised to admit depositions without consideration of unavailability.

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<sup>155</sup> See Fed. R. Evid. 804(b)(2)-(4) (creating exceptions for statements under belief of impending death, statements against interest, and statements of personal or family history). Rule 804(b)(6), "Forfeiture by wrongdoing," is based upon separate policies, but may also reflect concerns about trustworthiness and necessity.

<sup>156</sup> See *supra* notes 43-55 and accompanying text. The exclusion is mandated by Fed. R. Civ. P. 32, which actually is a rule of evidence.

<sup>157</sup> See Fed. R. Civ. P. 28-32.

Third, the residual exception to the hearsay rule<sup>158</sup> should be broadened. In particular, the requirement that the proponent show that the evidence in question is better than any other reasonably available evidence should be removed.<sup>159</sup> The existence of other, available evidence does not measure the value of the excluded information, because the particular piece of evidence may dovetail with other evidence in the case to produce a preponderance that otherwise would be absent. In other words, the persuasiveness of the evidence may be significant even if there is other evidence on point; it may tip the scale. The rule, as thus amended, would admit hearsay that has particularized guarantees of reliability,<sup>160</sup> the admittance of which is consistent with the policies of the rules and the interests of justice.<sup>161</sup> The use of the no-better-evidence factor in addition to these requirements, to exclude tip-the-scales evidence merely because there is other evidence of the fact at issue, disserves the search for truth to no sound purpose. In *Leake v. Hagert*, for example, the important evidence furnished by the son's definitive statement against his father's case probably would be excluded under the current residual exception, simply because Hagert was present and Hagert also was an eyewitness.<sup>162</sup> The proposed elimination of the no-better-evidence criterion would make the son's statement admissible to tip the scales, precisely because it is good evidence that cannot be supplied otherwise as a practical matter. It would even defeat the possibility of spoliation by the father, in the form of possible procurement of the unavailability of the witness.<sup>163</sup> This reconfiguration of the residual exception would go

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<sup>158</sup> Fed. R. Evid. 807.

<sup>159</sup> The current Rule requires that the evidence be shown to be "more probative on the point for which it is offered than any other evidence which the opponent can procure through reasonable efforts." Fed. R. 807(B). This requirement can exclude highly reliable evidence that would tip the scales.

<sup>160</sup> Fed. R. Evid. 807 (requiring "equivalent circumstantial guarantees of trustworthiness).

<sup>161</sup> Fed. R. Evid. 807(C).

<sup>162</sup> See *supra* Pt. IIA of this article.

<sup>163</sup> See *infra* notes 271-72 and accompanying text for discussion of this possibility.

far to remedy injustices created by witness unavailability, while doing little violence to the purposes of the rules of evidence. An expanded residual exception would not operate in criminal cases, under the assumptions of this article, if the witness were available or the evidence testimonial; but it could operate soundly in civil cases and in criminal cases in which there is a trustworthy, non-testimonial statement from an unavailable witness.

Fourth, the current regime could be replaced by the original House of Representatives version of the hearsay rule. That version, as I have observed above,<sup>164</sup> would have admitted hearsay evidence that was trustworthy and reliable, with the existing hearsay exceptions listed as nonexclusive examples. The result would be tantamount to an exception admitting hearsay on the basis of two criteria: necessity and trustworthiness. The courts presumably would create new categories of recognizably admissible evidence, much in the manner of common law evolution. This kind of evidence could not be admitted in criminal cases if it were testimonial or if the declarant were available, but it would build flexibility that would help to reverse the exclusion of good evidence that now is mandated categorically by the hearsay rule. In *Leake v. Hagert*, for example, this non-categorical, trustworthiness-and-necessity approach would provide for admissibility of the son's evidence in a systematic way, without the strictures of the residual exception.

I would go farther than these changes, myself. In particular, I would prefer to see principles allowing the admittance of evidence regardless of the hearsay rule under circumstances in which the jury can soundly evaluate the supposed risks of hearsay.<sup>165</sup> This approach, similarly, would invite the courts to create a kind of common law of broader admissibility than exists today. In addition to requiring consideration of the jury's ability to

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<sup>164</sup> See *supra* note 23 and accompanying text.

<sup>165</sup> See *supra* Pt. IIC of this article.

evaluate the risks in and of itself, I would condition admissibility upon an instruction of the kind sketched above,<sup>166</sup> upon the ability of counsel to explain the risks in opening statement and argument, upon the unlikelihood of spoliation by deliberate creation of the evidence coupled with procurement of unavailability,<sup>167</sup> and upon production of a witness able to testify about the circumstances of the statement and about the possibility that the hearsay risks taint the statement.<sup>168</sup> I believe that the strategies of counsel, the relative abilities of juries to evaluate statements and live testimony, and the need for less technical rules of exclusion, all support this approach,<sup>169</sup> although I recognize that, unlike the smaller steps sketched above, it has little chance of immediate acceptance.

### **III. REPETITIVE-BEHAVIOR<sup>170</sup> EVIDENCE: SHOULD SIMILAR EPISODES OF MISCONDUCT BE ADMISSIBLE?**

Success in navigating everyday challenges requires us to make judgments about the actions of other individuals from their repetitive behaviors. A law professor knows that a certain student is likely to be ready to answer questions, while another is not. She knows that her husband is thoughtful, or not, and that her dean is a willing fundraiser, or not. People are probably as skilled at making these kinds of judgments as they are about evidentiary matters that routinely are admitted in lawsuits: e.g., does flight provide evidence of guilt?<sup>171</sup> Furthermore,

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<sup>166</sup> See *supra* note 132 and accompanying text.

<sup>167</sup> See *supra* note 151 and accompanying text.

<sup>168</sup> See *supra* note 136 and accompanying text.

<sup>169</sup> See *infra* Pt. VIIC of this article; see *supra* Pts. IC, IIB of this article.

<sup>170</sup> This kind of evidence often is referred to, vaguely, as “character” evidence. It is very different, however, from the kind of evidence provided by general “character witnesses,” which is treated by the rules as dubious and therefore generally excluded, although tolerable in narrow instances. See Fed. R. Evid. 404(a). I view concrete instances of repetitive behavior as presenting a distinct problem, and therefore, rather than the pejorative label of “character” evidence, I prefer the term “repetitive behavior” evidence.

<sup>171</sup> Flight often involves the commission of separate crimes that create a greater balance of prejudice over probativity because they do not support even an inference of repetitive conduct, and they may involve violence. See, e.g.,

some of those routinely admitted kinds of evidence involve prejudice as severe as or more severe than, repetitive-behavior evidence.<sup>172</sup>

Of course, inductive reasoning, which is how we make these judgments about repetitive behavior, is fallible. Bertrand Russell tells the sad story of a chicken who runs each day to greet the farmer, who feeds the chicken, but one day, the farmer wrings the chicken's neck, which, after all, is the purpose of chickens. Russell's blunt conclusion is that it would be better for the chicken if its inductive processes were "less crude."<sup>173</sup> As human beings, we must develop the ability to make both reasonably accurate conclusions that we can draw from induction about other human beings and a sense of the limits or fallacies inherent in that reasoning. A person may be surprised to see his friend John, who "always is late," arrive right on time, explaining that "I've made a New Year's resolution to be punctual." The fact is, we make attribution errors, as the psychologists would label them, about human behavior.<sup>174</sup> We may also be uneducated about those situations in which past behavior is a guide to the future and those in which it is not, but is merely situational.<sup>175</sup> There is no reason to conclude otherwise, however, than that we are as

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United States v. Jackson, 405 F.Supp. 938 (E.D.N.Y. 1975) (Weinstein, J.). The inference is composed of a chain of sub-inferences about human behavior, each link of which is debatable.

<sup>172</sup> Cf. *Id.* (announcing complex and debatable discretionary ruling that admitted flight and falsehood evidence but eliminated arguable high-probability facts because of concerns about asserted prejudice); United States v. Peltier, 585 F.2d 314 (8<sup>th</sup> Cir. 1978) (upholding admittance of flight evidence that included multiple crimes of violence, multiple weapons crimes, and "traveling arsenals linked by communications devices and code words").

<sup>173</sup> See CRUMP, HOW TO REASON 8-9.

<sup>174</sup> *Id.* 379-80. This is an insidious error, and the general prohibition on vague character-witness evidence (although not the prohibition on repetitive-conduct evidence) arguably can be justified by it. The "fundamental attribution error," strikingly illustrated in the Napolitan-Goethals experiment, is the excessive attribution of friendliness or aloofness to "dispositional" factors (the actor) rather than "situational" factors (transitory events). *Id.* A rude and abrupt colleague, in other words, may exhibit this behavior because she is tired or in a hurry, but we tend to attribute it to her personality. This kind of attribution experiment shows little, however, about whether we are justified in inferring that a repetitive burglar is less or more likely to be guilty of a burglary proved by additional evidence.

<sup>175</sup> Cf. David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence, 58 U. COLO. L. REV. 1 (1986) (proposing admittance of specific-acts evidence by defendants and including analysis of psychological literature showing conditions under which it is persuasive, including repetitive behavior with respect to violation or non-violation of societal norms); David Crump, *How Should We Treat Character Evidence Offered to Prove Conduct?*, 58 U. COLO. L. REV. 279 (1987) (responding to Leonard).

good with these kinds of judgments about human behavior as we are about many other kinds of information that would be allowed freely into evidence in a trial.<sup>176</sup> Furthermore, the inference, that persons who have engaged in particular kinds of highly improper behavior in the past, are likely as a group to correlate with the group of people who will engage in similar kinds of behavior in the future, is a better inference than those that psychologists find to be subject most often to error.<sup>177</sup>

In other words, evidence of repetition of behavior, or propensity, can be good evidence. People who commit armed robberies on particular occasions are more likely to commit them on other occasions. For other kinds of crimes, such as child molestation or heroin possession, the inference of repetition is even stronger; in fact, it is powerful.<sup>178</sup> Evidence of commission of a particular kind of crime on one occasion does not furnish proof beyond a reasonable doubt of commission of another particular crime by itself, but then neither does flight. If we truly needed to hide the facts from jurors to prevent erroneous inferences from this kind of information, then I would argue that we would be forced to conclude that our entire jury trial system would be suspect: too unreliable to trust.

The existing general rule about repetitive behavior evidence begins with the proposition that evidence of similar crimes is inadmissible to prove propensity.<sup>179</sup> There are said to be several reasons. First, the defendant, it is asserted, should be held responsible only for the offense of indictment; second, the jury should not have the opportunity to overvalue the

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<sup>176</sup> See *supra* notes 171-72 and accompanying text.

<sup>177</sup> See *supra* notes 174-75 and accompanying text.

<sup>178</sup> See Jennifer B. Siverts, *Punishing Thoughts Too Close To Reality: A New Solution to Protect Children from Pedophiles*, 27 T. JEFFERSON L. REV. 393, 395 (2005) (quoting recidivism rates as high as 95%); Sana Lowe, *The Criminalization of the Addictions: Toward a Unified Approach*, 24 J. LEGAL MED. 281, 316 (2003) (explaining high rate of crime repetition for crimes involving dependency-inducing drugs).

<sup>179</sup> Fed. R. Evid. 404(b) (excluding evidence offered to prove “action in conformity”).

inference to be drawn from other offenses; and third, similar-crimes evidence can create unfair surprise.<sup>180</sup> None of these arguments, however, is persuasive. It is extremely unlikely that very many juries, after repeatedly being told the opposite during voir dire, opening statement, jury instructions, and final argument, will believe that they lawfully can simply substitute another crime that is not in the indictment for the charges before them.<sup>181</sup> As for the second rationale, it is entirely plausible that a jury could overvalue evidence of similar crimes, but no more so than it could overvalue any other kind of obviously admissible evidence, from DNA to eyewitness identification.<sup>182</sup> If we excluded everything a jury might overvalue, nothing would be left. In fact, the distinctness of other-crimes evidence—the obviousness of the proposition that evidence about a totally separate event does not allow conviction by mere deductive processes—makes other-crimes evidence far less subject to overvaluation than eyewitness or DNA evidence. Those are more direct proofs of guilt, with lesser chains of inference and with their defects often hidden;<sup>183</sup> other-crimes evidence, by way of contrast, is (by definition) about crimes distinct from the one on trial, a fact that is unlikely to be lost to any juror. Finally, the proposition that other-crimes evidence will result in unfair surprise is singularly unpersuasive. Even if notice rules were not in place, I would venture to say that virtually one hundred percent of the time, the defense knows about allegations of other similar crimes that are known to the prosecution.

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<sup>180</sup> See, e.g., *United States v. Calvert*, 523 F.2d 895 (8<sup>th</sup> Cir. 1975).

<sup>181</sup> The trial of entertainers Michael Jackson is a forceful example of the jury's ability. It involved proof of several other crimes involving sexual improprieties with children, some of them involving disgusting facts, but the primary charge was vulnerable to witness impeachment, and the jury acquitted him of this single charge although the evidence supported a strong inference that he must have been guilty of some crime or crimes. See [newspaper or news magazine stories covering several instances, and the outcome.]

<sup>182</sup> Cf. DAVID CRUMP et al., *CRIMINAL LAW: CASES, STATUTES AND LAWYERING STRATEGIES* 223-33 (2005) (exploring force and fallacies of these kinds of evidence).

<sup>183</sup> See authority cited in *supra* note 182.

Actually, however, this rationale is unnecessary, because notice requirements in the Federal Rules<sup>184</sup> effectively negate the surprise theory.

But this is not all of the character-evidence rule. Our principles suffer from multiple-personality disorder, because the rule goes on to provide that evidence of other, similar crimes is not excluded for the purpose of demonstrating intent, identity, or other non-propensity purposes.<sup>185</sup> The result is that other crimes are excluded if they are similar—but not if they are closely similar! The prosecution, then, approaches the trial with a chart of similarities: the robber in another crime, who is identified as this defendant, used a gun, threats, and a mask similar to the ones in this trial. The defense prepares a chart to the opposite effect, emphasizing the differences: witnesses' height descriptions, escape vehicles, and clothing of the persons in the two robberies were different.<sup>186</sup> The judge then has the task of deciding whether the differences are such that the main thrust of the evidence is propensity or whether the similarities support inferences of intent or identity that are not overwhelmed by the differences.<sup>187</sup>

The trouble is, this abstraction may interfere with sound reasoning about guilt or innocence. In the first place, the distinction between “propensity” and “intent or identity” as the object of proof here is unclear; in fact, it is a metaphysical conundrum.<sup>188</sup> Inferences of intent or identity, in such a case, are founded on inferences about propensity to commit similar acts. Inferences of intent or identity *are* inferences about propensity. In the second place, and more importantly, the admissibility judgment required of the court is so imprecise that it necessarily

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<sup>184</sup> Fed. R. Evid. 404(b).

<sup>185</sup> *Id.*

<sup>186</sup> *Cf.* Lane v. State, 933 S.W.2d 504 (Tex. Crim. 1996) (reproducing exactly such data, in chart form).

<sup>187</sup> This balancing is required by Fed. R. Evid. 403. *See* Huddleston v. United States, 485 U.S. 681 (1988).

<sup>188</sup> *Cf.* PAUL F. ROTHSTEIN et al., *supra* note 83, at 345 (posing problem about Munchausen-by-proxy syndrome in which parent is motivated to injure child repeatedly, in order to gain sympathy from later caring for child; suggesting that “propensity” and “motive” are inseparable, although the latter admits the evidence while the former excludes it).

will be determined more by the judge's idiosyncratic preferences than by the underlying rules. Decisions about how strong the intent-identity inference is, how strong the propensity inference is (to the extent it is even possible to separate propensity from intent or identity), and whether the latter substantially outweighs the former,<sup>189</sup> are so indeterminate that the elaborate decision structure mandated by the rules hardly controls them.

And then, there are Rules 413 through 415. In sexual assault cases, similar crimes are more readily admissible, even if they are not precisely similar. A defendant accused of rape or of sexual abuse of a child cannot use the usual exclusionary principle of Rule 404(b) to prevent the jury from hearing evidence that he committed another crime of rape or sexual abuse.<sup>190</sup> The ironic result is illustrated by considering the trials of a robbery case in courtroom A and a rape case in courtroom B, next door. For each defendant, let us imagine, there is evidence of the commission of six other crimes of similar nature, although not similar enough to support sufficient inferences of intent or identity. The robbery case in courtroom A will feature evidence only of the single robbery in the indictment. All evidence about similar conduct by the defendant will be suppressed in courtroom A. But in courtroom B, the evidence will not be so confined. The jury will hear about the crime on trial in courtroom B, and also, entirely differently from the jury in courtroom A, the jury in courtroom B will freely hear evidence of the six other rapes.

The difference in these sexual assault rules is sometimes traced to the so-called "lustful disposition theory": the inference that, when there is evidence of multiple rapes, one can detect evidence of a motive, or a lustful disposition, which assertedly is distinct from propensity. There

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<sup>189</sup> See *supra* note 187.

<sup>190</sup> Fed. R. Evid. 413-15.

are common law cases to this effect.<sup>191</sup> The theory arguably has appeal to the extent that repeated crimes of any kind can be said to reveal a motive, but labeling such a “motive” as “lust” hardly distinguishes it from “propensity.” One might just as accurately say that repeated drug possession offenses show a motive of drug dependency (in fact, that seems a better inference), or that serial murderers or repeat robbers exhibit a “disposition’ toward their respective crimes. A slightly better argument for the different treatment of sexual assaults, but one that still does not support the conclusion, is that rape is a particularly malignant and grossly under-reported crime. Yes, it is malignant and under-reported, but there are other under-reported and malignant crimes that do not feature this evidentiary approach. Finally, there is another explanation: the lobbying efforts of feminists, who particularly targeted rape, coincided with the inclinations of a Senate Judiciary Committee that favored broad admissibility of evidence in criminal cases. In other words, the difference between the usual character rules and Rules 413 through 415 is the product of political forces.<sup>192</sup>

Fine, a critic of the sexual-assault rules might say; the solution is to repeal the rules that admit other-rape evidence. Then, if we exclude repetitive behavior evidence in all cases, the critic would argue, the anomaly disappears. Yes, it does, but one should question whether the resulting regime would be more productive of justice. Consider two high-profile rape cases from real life, one brought against William Kennedy Smith, the well-financed nephew of President John F. and Senator Ted Kennedy,<sup>193</sup> and the other brought against sports announcer Marvin

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<sup>191</sup> See *Hodge v. United States*, 126 F.2d 849 (D.C. Cir. 1942). For a case rejecting this theory but discussing both sides, see *Lannan v. State*, 600 N.W.2d 1334 (Ind. 1992).

<sup>192</sup> See R. Wade King, *Federal Rules of Evidence 413 and 414: By Answering the Public’s Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather than Guilt?*, TEX. TECH L. REV. 1167, 1169 (2002).

<sup>193</sup> See Mark Hansen, *Experts Expected Smith Verdict: Even a Perfect Prosecutor Can Lose Date Rape Cases, Pundits Say*, ABA J., Feb. 1992, at 18, excerpted in PAUL F. ROTHSTEIN, *supra* note 83, at 279; David Margolick, *Why Jury in Smith Case Never Heard from 3 Other Women*, N.Y. Times, Dec. 13, 1991, at B14.

Albert.<sup>194</sup> The two cases were strikingly similar, down to the existence of evidence of at least two parallel rapes committed by each defendant, each with significant similarities to the offenses on trial. Each was defended by Roy Black, a skillful and nationally known Florida lawyer. Smith was tried in Florida, which features particularly strict exclusion of similar-crimes evidence in rape cases as well as other trials. Some of the Florida precedents would be amusing if not so grimly serious: in one case, for example, Florida mandated exclusion of a crime of violence similar to the one on trial with the observation that the victim's hands had been tied in back in both cases, but not with the same implements.<sup>195</sup> The trial court in Smith's case excluded all evidence of the other offenses committed by Smith, even though they featured very similar modus operandi. He was acquitted.<sup>196</sup> Albert, on the other hand, faced trial in the District of Columbia, where the Federal Rules allowed similar-crimes evidence in rape cases. The admissibility of two other offenses, which featured behavior in biting the victims similar to that in the case in chief, persuaded Black and Albert to offer a plea of guilty.<sup>197</sup>

I would argue that it is poor epistemology to isolate the one victim of William Kennedy Smith over which Florida had jurisdiction, to force the jury to consider her evidence alone, and to suppress the evidence of two other independent reporters who were victims of a similar modus operandi. I would like to see cases of this kind handled as Marvin Albert's was. There would be objectants who would vaguely assert, "That's not fair," by which they would mean that it is not proper to deprive the defendant of the defense of consent by disproving it with what a jury may regard as strong evidence of his guilt, but that custom has not credited. I do not accept this

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<sup>194</sup> John Leo, *The Recycling of Reputations*, 135 U.S. News & World Rep. 56, Oct. 20, 2003, available at <http://www.usnews.com/usnews/opinion/articles/031020/20john.htm>.

<sup>195</sup> *Drake v. State*, 400 So.2d 1217 (Fla. 1981). Florida's *Williams* rule excluded the evidence unless the similarities were highly particularized, like a signature. *Williams v. State*, 110 So.2d 654 (Fla. 1959).

<sup>196</sup> See authorities cited in *supra* note 196.

<sup>197</sup> See authorities cited in *supra* note 197.

objection, and I would support admitting all of the evidence that is relevant, as this other-acts evidence is. If strong evidence of guilt, as seen from a juror's position, is available, it should be shared with the jury. The jury would be required to find the defendant's guilt beyond a reasonable doubt, of course, and it would be repeatedly told that it must find that guilt, if at all, with respect to the crime charged in the indictment.<sup>198</sup> But the jury would be playing with a full deck, with all of the relevant information, and not with a major fact suppressed, one that any sane person would consider important. And furthermore, I can see no justification for excluding evidence of a similar kind in a robbery, drug sale, or murder case.<sup>199</sup>

One recent phenomenon that all lawyers should fear is the unwillingness of citizens to serve on juries,<sup>200</sup> an unwillingness that probably proceeds, at least in part, from many citizens' concerns that the truth will be hidden from them by irrational rules. Jurors hate to be fooled, and when it comes to character evidence, citizens are right to feel this concern. The character evidence rules exclude evidence that ordinary people would recognize immediately as meaningful, even as they would recognize that the evidence is not alone determinative, and that it does not address the issue directly—it is circumstantial only. Rule 404(b), the principal repetitive-behavior rule, should be revised along the lines of Rules 413 through 415. As is true in the case of those rules, evidence of significantly dissimilar crimes should be excluded on the basis of the Rule 403 calculus.<sup>201</sup> In other words, evidence of a completely different kind of

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<sup>198</sup> See CRUMP, CRIMINAL CASE 79, 85, 108-09, 111-12, 115 (reflecting instructions from both prosecutor and defense during voir dire to this effect, jury argument by defense referring to explicit instructions by court, and court's own instructions).

<sup>199</sup> There is, in fact, wide agreement among scholars that recidivism data support making the repetitive behavior inference more strongly in other kinds of cases than those involving sexual assaults. See authorities cited in *infra* note 204.

<sup>200</sup> Cf. David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 39-42 (1997) (giving examples).

<sup>201</sup> *United States v. Guardia*, 955 F.Supp. 115 (D. N.M. 1997) (holding that Rule 403 applies to evidence admissible under Rules 413-15 and can exclude it).

crime should be excluded on the ground that the prejudice it creates in the form of general dislike of the defendant substantially outweighs the probative value inherent in the inference of repetitive conduct. Likewise, diffuse character attacks, of the kind that sometimes have been reported in the judge-only trials of civil law countries,<sup>202</sup> would be prohibited by application of Rule 403, and defensive character witnesses offering general good-character evidence should continue to be governed by Rule 405.<sup>203</sup> But inferences of repetitive conduct founded on offenses similar in kind and rare in the general population are sufficiently within the competence of juries to support admissibility of this evidence. As Professor Park puts it (although I have no reason to believe that he supports the proposal I am making here),<sup>204</sup>

[A]n assessment of the probative value of other-crime character evidence requires a comparison of the criminal propensity of prior offenders with the criminal propensity of other persons [as well as consideration of recidivism data]. When a given crime has a low incidence in the general population, the probative value of evidence of another instance of the same crime will be greater than would have been the case had the crime been more common . . . .

The current rules, which hide this kind of sensible inference from those it conscripts as decisionmakers, are unfair to citizens who serve as jurors as well as to the cause of justice.

#### **IV. EXPERTS AND OPINION EVIDENCE: THE SUPREME COURT'S UNSATISFACTORY JURISPRUDENCE**

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<sup>202</sup> See JON R. WALTZ & ROGER C. PARK, *supra* note 83, at 396-97 (excerpting from pp. 79-81 of Albert Camus, *The Stranger*, suggesting that defendant's alleged lack of visible emotion at his mother's funeral would be admissible as character evidence in prosecution for an unrelated alleged murder of a third person). Rule 403 excludes such evidence in American criminal trials.

<sup>203</sup> Fed. R. Evid. 405 (allowing reputation or opinion evidence).

<sup>204</sup> Roger C. Park, *Character at the Crossroads*, 49 *HASTINGS L.J.* 717, 762-64 (1998). For other views of this issue, see Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 *FORDHAM URB. L.J.* 285, 287 (1995) (suggesting, contrary to Park, that high-recidivism crimes are more appropriate candidates for treatment by admitting repetitive behavior evidence); Katherine K. Baker, *Once a Rapist? Motivation and Relevancy in Rape Law*, 110 *HARV. L. REV.* 563, 578-79 (1997) (making the same point about sexual assaults but generally opposing the evidence).

Next, let us consider rules that exclude expert opinion. The Supreme Court has left the law of expert witnesses hopelessly confused. I have written about the subject elsewhere, and there is no reason to repeat everything said there, as opposed to referring the reader to that article.<sup>205</sup> A brief synopsis, I hope, will be enough. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>206</sup> our most egocentric Justice, Justice Blackmun,<sup>207</sup> ignored the dissenting advice of Chief Justice Rehnquist,<sup>208</sup> who argued that the Court had insufficiently grasped the problem to provide a definitive test for science. Justice Blackmun went on to attempt just that, by providing a confused version of the philosophy of science of Sir Robert Popper.<sup>209</sup> There are other philosophies of science, with Popper's being a relatively narrow one;<sup>210</sup> the Supreme Court not only misunderstood it, but also chose it to the exclusion of theories that would fit better in some

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<sup>205</sup> David Crump, *The Trouble with Daubert-Kumho: Reconsidering the Supreme Court's Philosophy of Science*, 68 MO. L. REV. 1 (2003) [hereinafter cited as Crump, *Daubert*]. For commentary on this article, see Edward J. Imwinkelried, *Peer "Dialogue: The How and What of "Appropriate Validation under Daubert: Reconsidering the Treatment of Einstein & Freud*, 68 MO. L. REV. 43 (2003); Paul R. Rice, *Peer Dialogue: The Quagmire of Scientific Expert Testimony: Crimping the Supreme Court's Style*, 68 MO. L. REV. 53 (2003).

<sup>206</sup> 509 U.S. 579 (1993).

<sup>207</sup> For sheer self-absorption, Justice Blackmun's separate opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 922-43 (1992), has to be read to be believed. After comparing his own opinions to a "flickering candle" that "has grown bright" because of the concurrence of other judges in that belief in this particular case, and after expressing his "fear for the darkness" represented by the beliefs of the other "four Justices" who disagreed with him, Justice Blackmun added, "I am 83 years old. I cannot remain on this court forever . . .," as if the fate of civilization depended on his beliefs alone. The same egocentrism, although not as transparent, may have caused this Justice to venture farther into conjecture in *Daubert* than a more restrained jurist would have thought prudent.

<sup>208</sup> 509 U.S. at 598-600.

<sup>209</sup> *Id.* at 594. For example, the Court seems to have confused the work of Popper with that of Hempel, whom the Court cited for related propositions, *Id.*, but whose philosophy is very different. See Susan Haack, *Trial and Error: The Supreme Court's Philosophy of Science*, 95 AM. J. PUB. HEALTH, Supp. 1, Public Health Matters, 566-68 (2005). Thus, it confused "scientific" with "reliable" when it created its falsifiability criterion. *Id.* Beyond that, the Court confuses "testable" with "has been tested"; the former (testable) would apply even to an assertion that not only has *not* been tested, but that we don't know yet how to test.

<sup>210</sup> See, *Id.*; KARL R. POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH 18, 22 (1972) (asserting that scientific confirmation, as opposed to falsification, is impossible, and that failure to falsify "says nothing whatever . . . about the 'reliability' of a theory"); CARL G. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE 3-46, 47-51 (1965) (allowing for possibility of confirmation; asserting that Popper's view "involves a very severe restriction of the possible forms of scientific hypothesis").

contexts.<sup>211</sup> The Court purported, then, to identify four factors indicative of reliability that the Court said were nonexclusive.<sup>212</sup> As the Court should have recognized would happen, these have become the “*Daubert* factors,” often relied on as an exclusive list, despite the Court’s insistence that they were nonexclusive.<sup>213</sup> The Court also created a requirement of evidentiary “fit” or relevance but gave an example of evidentiary fit or relevance that was not a very good example of evidentiary fit or relevance.<sup>214</sup> Worse yet, in *Kumho Tire Co. v. Carmichael*,<sup>215</sup> the Court extended *Daubert* to nonscientific witnesses. The *Daubert* criteria, it said, were to be consulted for all expert opinions, nonscientific as well as scientific, although only to the extent that they might be helpful,<sup>216</sup> and with “leeway”<sup>217</sup>—a direction to the lower courts to apply *Daubert* to all scientific witnesses, followed by a direction not to do so.

All applications of scientific theory to concrete historical questions require a degree of judgment, and that judgment is often the essence of the question of reliability. Does experience about throat cancer provide evidence that can be helpful in answering a question about stomach

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<sup>211</sup> See Crump, *Daubert* 32-39 (proposing other factors, with reference to other philosophies of science).

<sup>212</sup> 509 at 594-95.

<sup>213</sup> See Crump, *Daubert* 40.

<sup>214</sup> The Court observed that while information about phases of the moon might “fit” the question of the relative darkness of a certain night, it would not “fit” the question whether an individual “was unusually likely to have behaved irrationally on that night.” But the later conjecture (which might be called the “werewolf inference”) is excludable not because it does not “fit,” but because it thoroughly flunks the Court’s separate concept of “reliability.” If the werewolf inference could be established as a “reliable” scientific principle, then ironically, it probably *would* “fit,” because it predicts an outcome that precisely answers the assumed issue; but this is like asking, “If planets were bigger than stars, how far away would they be?,” because the werewolf inference is not “reliable.”

A better example might be given by stating that Boyle’s Law (a “reliable” principle, presumably, within limits) “fits” for approximating the relationship between pressures, volumes, and temperature of ideal gases. It does not, however, “fit” the calculation of momentum of vehicles involved in an automobile accident.

<sup>215</sup> 526 U.S. 137, 149 (1999).

<sup>216</sup> See Crump, *Daubert* 10-13.

<sup>217</sup> 526 U.S. at 149-152.

cancer?<sup>218</sup> Is evidence about a new type of DNA analysis, with higher error rates than earlier types, sufficiently reliable to tell a jury something of value about a question for which an imprecise answer is still helpful? *Daubert* provided no answer to the first question and supported multiple conflicting answers, without any indication of proper resolution, for the second. Under this sloppy influence, one trial court even decided that fingerprint identifications were inadmissible, by conscientiously applying the *Daubert* factors (although the court later retracted this strange holding).<sup>219</sup> The worst thing about the exclusionary opinion in the fingerprint case was that the court’s analysis faithfully followed *Daubert* and applied it honestly to the situation before it. The flaw was not in the court’s decision, but in the *Daubert* decision itself.

The four *Daubert* factors of falsifiability (or actual testing, which the court confused with falsifiability, although it is quite different),<sup>220</sup> peer review, error rate, and breadth of acceptance, which produced that strange result in the fingerprint identification case, are to be applied, *Kumho* says, to all expert witnesses<sup>221</sup>—meaning, to financial witnesses, economists, accident reconstructionists, and gang terminology experts. Against all reason, the Supreme Court insisted that these criteria could even apply to some degree to an expert perfume sniffer, one who is able to identify any of hundreds of ingredients in a scent.<sup>222</sup> The question, “Has anyone tested the principles by which you claim to detect this ingredient in this perfume mixture?” or, “What are your error rates?” seem poor indicators of proper admissibility in such a case, but the Supreme Court left us in a position where those are the relevant questions. The factors apply even more

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<sup>218</sup> *Cf.* *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (considering evidence presenting a similar kind of “fit” question).

<sup>219</sup> *United States v. Llera Plaza*, 179 F. Supp.2d 492 (E.D. Pa. 2002) (excluding identification), *vacated by* 188 F. Supp.2d 549 (E.D. Pa. 2002) (reversing exclusion).

<sup>220</sup> *Daubert*, 509 U.S. at 593. *But see supra* note 209.

<sup>221</sup> *Kumho*, 526 U.S. at 149-50.

<sup>222</sup> *Id.* at 151.

poorly to a gang-terminology expert. “So, you claim that the phrase ‘sleeping with the fishes’ means ‘dead.’ Are there any principles that you used to determine that this conclusion is ‘falsifiable’?” (The response is likely to be, “Huh?”) Then: “Have those principles, governing ‘sleeping with the fishes,’ been peer-reviewed or made the subject of publication?” (“I have no idea.”) “What error rates attach to the principles that you allegedly used?” (“Well, none.”) “Are your principles generally accepted by other gang-terminology experts?” (“No, only by those who regularly watch *The Sopranos*.”) A lower court ought to be able to apply an opinion of the Supreme Court according to its terms, but if the Court’s opinion in *Kumho* is read according to its terms, this is the kind of nonsense that results.

It might be objected, “But the gang terminology expert doesn’t purport to use ‘principles.’ The expert is just testifying from experience, almost as a percipient witness would, to the effect that he has often heard the phrase, ‘sleeping with the fishes,’ always in a context where its connotation was equivalent to ‘dead.’ He’s not trying to say that there are any underlying ‘principles.’” Precisely. But the Court and rulemakers have made such a mess out of things in this area that “principles,” according to the law, must underlie the gang terminologist’s translations. The governing Rule requires a threshold showing, for every expert witness, that the witness has used reliable “principles,” has considered appropriate facts and data, and has reliably applied the “principles” to the facts and data.<sup>223</sup> In other words, the perfume sniffer and the gang terminologist must identify reliable “principles” that they have used, and they must show that they have applied these asserted “principles” reliably to certain “facts” that they have isolated. This is a silly idea, of course; it cannot be done, because the perfume sniffer’s honest answer has

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<sup>223</sup> Fed. R. Evid. 702.

to be, “I didn’t use principles; I just sniffed it.”<sup>224</sup> And yet, principles are what amended Rule 702 and 703 require. The rule drafters would have done better to leave the Rule alone and to recognize the limits of their understanding, emulating the modesty of Chief Justice Rehnquist.

On the other hand, it is entirely possible for a trial judge to recognize a purported expert opinion that is so misleading that it should not be admitted. As the Fifth Circuit explained in a pre-*Daubert* case called *United States v. Johnson*,<sup>225</sup> a trial judge would be on sound ground in excluding the opinion of an identification expert to the effect that he could discern the hair color of a subject from the subject’s fingerprints. The *Johnson* court, however, upheld the admittance of evidence that a certain substance was imported marijuana, offered by a government expert named de Pianelli, who testified that he could determine this fact from “the experience of being around a great deal [of marijuana] and smoking it.” De Pianelli did not use “principles,” but rather applied his (apparently extensive) experience to the case facts. The court held that the opinion of an expert should be excluded if it was “inherently implausible,” a label that could be applied, it said, to the hair-color-from-fingerprints opinion, but not to de Pianelli’s opinion about imported marijuana.<sup>226</sup> I do not think that the trial judge in *Kumho*, who excluded the opinion of a tire-defect technologist about accident causation, rendered a decision that improved on this “inherently implausible” standard, nor did the Supreme Court with its follow-*Daubert*-but-not-really approach in its *Kumho* opinion.

*Daubert* purported to liberalize the admissibility of expert opinion evidence. It emphasized the tendency of the Federal Rules to admit contested evidence, so as to allow the

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<sup>224</sup> See Crump, *Daubert* 15-16.

<sup>225</sup> 575 F.2d 1347 (5<sup>th</sup> Cir. 1978).

<sup>226</sup> *Id.* at 1362.

jury to decide in cases of doubt.<sup>227</sup> Perhaps the greatest irony of the *Daubert* decision, however, is that Justice Blackmun's elaborate structure of nonexhaustive exhaustive criteria, and his examples about fit that were not examples about fit, have produced exactly the opposite result. *Daubert* and *Kumho* have made the admissibility of expert evidence much more difficult. Every case of significance, today, requires *Daubert* hearings. These hearings are expensive; prior to *Daubert*, they rarely were necessary at the pretrial stage.<sup>228</sup> The criteria for expert witnesses involve multiple hoops to jump through, as is evidenced by an article by a scholarly judge, Judge Harvey Brown, titled *Eight Gates for Expert Witnesses*.<sup>229</sup> The evidence must pass by St. Peter at the pearly entrance<sup>230</sup> eight separate times. Although this is certainly not Judge Brown's intention, it is the necessary implication, in an adversary system where lawyers properly use every available tool not only to prove their own cases but also to destroy their opponents'. By the end of a *Daubert* hearing, in fact, it is not uncommon for even an intelligent judge to have lost his or her way in the resulting maze. I recall one case involving a financial expert—a forensic accountant—in which the judge became concerned with the question whether the underlying principles had been peer reviewed and ultimately ruled that the opinion should be excluded because the proponent's *legal theory*—not anything about the financial opinion at issue, but the legal theory to which it assertedly was relevant—had not been peer reviewed(!)

In comparison to this sort of practice, the simpler but more precise test that the Fifth Circuit applied to de Pianelli's marijuana opinion in *United States v. Johnson*, depending upon whether the opinion is inherently implausible, sounds more on target. Better yet, the test might

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<sup>227</sup> *Daubert*, 509 U.S. at 588-89.

<sup>228</sup> See Crump, *Daubert* 1.

<sup>229</sup> Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743 (1999).

<sup>230</sup> See *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124 (2d Cir. 1995) (holding that gatekeeper role should not be restrictive like "St. Peter at the gates of heaven.")

depend upon an application of Rule 403: admit the evidence unless its probative value is substantially outweighed by counterweights such as its tendency to mislead, confuse, or consume undue time. A judge who does not aspire to become an amateur scientist cannot hope to do better in difficult cases.

Beyond this, *Daubert* itself proposed some good solutions to the problem of unreliable expert evidence, solutions that did not require exclusion.<sup>231</sup> The jury has the ability to reject evidence, including expert opinions. Jurors in many cases are more suspicious of experts than lawyers are. Also, cross examination of an expert expressing an unreliable opinion helps to expose it as such. The opponent can offer opposing experts, too, to debunk the offending opinion. Furthermore, grant of a directed verdict or judgment as a matter of law is also a way for the judge to control the result. And finally, a Rule-403-based decision to exclude the evidence can be made if it is so discernibly unreliable that its probative value is outweighed by confusion, tendency to mislead, or undue consumption of time. This kind of judgment can be made at the pretrial stage in an appropriate case, through a motion in limine or for summary judgment. But the pretensions of judges to an understanding of intricate questions about the philosophy of science, such as their attempts to apply the abstruse and shifting concept of falsifiability that Popper advocated (which the Supreme Court transmogrified), and the efforts of judges to be smarter than experts at their own expertise, are so dysfunctional that the Rules requiring these standards should be abolished in favor of simpler substitutes.

#### **V. AUTHENTICATION: SHOULD THE DOCUMENT OR OBJECT ITSELF SUFFICE?**

Authentication requirements are another set of rules that sometimes increase the cost of trial for dubious purposes. Recently (and quietly), Arizona relaxed certain authentication

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<sup>231</sup> *Daubert*, 509 U.S. at 596.

requirements in divorce cases.<sup>232</sup> The decision was based upon a perception that litigants who appeared in court carrying report cards or medical records were unlikely to do so fraudulently.<sup>233</sup> Many of these litigants act pro se, it appears, and even in cases with counsel, the waste associated with the need to produce live authenticating witnesses from schools and doctor's offices probably outweighs the value of the authentication requirement. I would have asserted that this kind of authenticating witness was not necessary to begin with and that the litigant herself could supply the predicate,<sup>234</sup> but it is the nature of rules of evidence to be confusing, to produce unpredictable exclusions of good evidence, and to invite judges to impose requirements beyond those that the rules call for.<sup>235</sup> A competent attorney would naturally feel this concern and would bring in the outside authenticator whenever possible. Arizona's decision, to recognize that this cautious (and wasteful) approach usually is unnecessary, is a step in the right direction.

The basic authentication rule is that real or documentary evidence is admissible if supported by evidence "sufficient to support a finding" that it is "what its proponent claims."<sup>236</sup> The requirement does little to protect much of anything. It is among the lowest proof burdens known to the law. If any reasonable juror could believe that the item is likely authentic, the judge must admit it.<sup>237</sup> Evidence to the effect that "It looks like it" or "I just recognize it from its

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<sup>232</sup> See *Arizona Makes Family Courts More User-Friendly*, ABA J., Jan. 2006, at 38. The change is conditional: "Either party can invoke the full rules at any time, but unless parties object, the looser rules will apply." *Id.*

<sup>233</sup> "Most of these things are unlikely to be tampered documents." *Id.* at 39.

<sup>234</sup> Fed. R. Evid. 901(a) says that authentication consists of "evidence sufficient to support a finding that the matter in question is what its proponent claims." A parent who has received a report card in regular form at about the right time can meet this minimal standard. See *infra* notes 237-38 and accompanying text.

<sup>235</sup> Cf., e.g., *supra* notes 48-55 (discussing decision in *Frechette v. Welsh*).

<sup>236</sup> See *supra* note 234.

<sup>237</sup> "Once a prima facie case [of authenticity] is made, the evidence goes to the jury, and it is the jury who will ultimately determine the authenticity of the evidence, not the court." *United States v. Carriger*, 592 F.2d 312 (6<sup>th</sup> Cir. 1979). This conclusion follows from the nature of the jury's role.

overall appearance” is enough for admissibility<sup>238</sup> or, at least, according to the rule it should be. But the low standard in the authentication rules does not keep them from imposing costs that outweigh their value. Authentication requires a witness: for each document source one more individual whose bodily presence the lawyer or litigant must produce.

Again, the law in this area is at variance with every other method of careful decisionmaking. If a law school considers the application of a prospective student, it does not require the student to bodily present an employee of the student’s undergraduate college to vouch for the authenticity of the student’s transcript and withstand cross examination about it. Similarly, the admissions committee would accept a letter of recommendation from a justice of the state supreme court because of its regularity of appearance, without summoning the justice to appear personally before it and swear that, yes, this is indeed the judge’s letterhead. It is not that fraud is impossible in such circumstances, and surely there have been cases of doctored transcripts or recommendation letters. Instead, the decision not to insist on personal authentication reflects a judgment that its marginal contribution to fraud prevention would be insignificant while the costs would be unreasonably cumbersome. This reasoning is similar to the thought process that led Arizona to eliminate some court-imposed authentication requirements.<sup>239</sup> Subject always to the judge’s exclusionary authority under Rule 403, I would advocate the repeal of the authentication requirement in other contexts as well.

## **VI. THE REMAINING RULES IN THE 400 SERIES: RELEVANCE AND COUNTERWEIGHTS**

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<sup>238</sup> Cf. *United States v. Thomas*, 38 M.J. 614 (U.S.A.F. Ct. Mil. Rev. 1993) (holding that witness’s recognition of general appearance of exhibit, consisting of paper bag containing drug paraphernalia, was sufficient authentication; further, holding that failure to object did not render counsel ineffective because authentication was sufficiently clear).

<sup>239</sup> See *supra* note 233.

The 400 series is one place where I would retain many of the rules intact. The 400 series concerns relevance issues, or the probative value of evidence balanced against counterweights that serve other policies. (The repetitive-behavior evidence rules are different in nature because they involve the treatment of what I believe is a proper inference, the human tendency to repeat, as inherently improper, and so I do not treat them here even though those rules appear in the 400 series, but rather I have discussed them in a previous section.) The remaining rules in the 400 series, then, include Rules 401 through 403, which provide for a general balancing of relevancy versus counterweights,<sup>240</sup> and Rules 408 through 412, which sacrifice relatively small amounts of probative value to serve extrinsic policies including encouragement of settlement, protection of remedial measures, safeguarding of generosity in paying medical expenses, the insurance relationship, and the privacy interests of a sexual assault victim.<sup>241</sup> These rules operate almost in the manner of privilege principles.<sup>242</sup> They are debatable in the same way that every rule is, but my arguments for abolition would not apply to them. For purposes of this article, then, I shall treat Rules 408 through 412 as being retained in substantially their existing forms, as well as the cores of most privilege rules.

Rules 401 through 403 are the heart of the relevance-counterweights balance, and I would retain these in modified form. What would the modifications be? Well, first, I believe that the definition of relevant evidence is too indiscriminate. Elsewhere, in another article, I have argued that the definition of relevant evidence in Rule 401, which includes any information that has “any” tendency to nudge the outcome either way, provides no standard.<sup>243</sup> Taken literally, it

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<sup>240</sup> Fed. R. Evid. 401-03.

<sup>241</sup> Fed. R. Evid. 408-12.

<sup>242</sup> They rest on “social policy considerations akin to privileges, that is, to encourage certain conduct regardless of whether the excluded evidence is ‘good’ evidence or not.” PAUL F. ROTHSTEIN et al., *supra* note 83, at 345-46.

<sup>243</sup> David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1 (1997).

means that all information of any kind whatsoever is “relevant” to any issue anyone can name,<sup>244</sup> although it is not usually applied in this manner, of course.<sup>245</sup> In some instances the “tendency” will be uncertain and infinitesimal, but even an uncertain and infinitesimal influence qualifies as “any” influence. The result is that the Rule defines relevance so that there is no such thing as irrelevant evidence. This is why Rule 401 contains no standard. Rule 402 provides that irrelevant evidence is inadmissible, and thus the drafters must have intended for there to be such a thing as irrelevant evidence, but the definition that they provided gives us no way to recognize it.

The drafters of these Rules considered two models of relevance before deciding. The Wigmorean concept required at least some minimum degree of probativity as a condition of relevance.<sup>246</sup> If the inference depended upon indefinite, multiple chains of reasoning, and if it was so slight that no reasonable juror could have used it in making a decision, the evidence was not relevant, according to Wigmore. The drafters rejected this definition and instead opted for the Thayerian model of relevance. Thayer defined relevant evidence by the “any tendency” approach, with no minimum degree of probativity required.<sup>247</sup>

The result is that Rules 401 and 402 are non-rules when taken at face value, insofar as exclusion is concerned. Instead, the more meaningful business of exclusion is done by Rule 403. For many kinds of evidence, this approach is satisfactory. Rule 403 tells the court to balance the probativity of the evidence against counterweights that include prejudice, confusion, misleading,

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<sup>244</sup> See *Id.* at 9-14 (arguing that “literally irrelevant” evidence is impossible under the Rule 401 formulation).

<sup>245</sup> See *Id.* at 14-19 (arguing that judges exclude what they call “irrelevant” evidence without focusing on the Rule).

<sup>246</sup> See 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AND AT COMMON LAW § 28, at 969 (Peter Tillers ed. 1983).

<sup>247</sup> JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 530 (1989); see also Fed. R. Evid. 401 Advisory Committee’s note (explaining the adoption of the logical relevance standard).

cumulative evidence, and undue consumption of time.<sup>248</sup> Rule 403 contains an unevenly weighted scale, however; exclusion results only if the counterweights “substantially outweigh” the probative value.<sup>249</sup> This part of the Rule, too, functions appropriately, because it admits the evidence and trusts the jury if the probativity is significant and if the question of its relative value compared to prejudice or other counterweights is close. Rule 403 is an appropriately designed instrument to exclude truly bad evidence while preserving a policy of liberal admissibility of useful information.

But there is one important instance in which Rule 403 does not, by its terms, perform its function, and it is here that the non-standard of Rules 401 and 402 matters. Specifically, Rule 403 does not exclude evidence of very small, tangential relevance, if the counterweights are also small. If, for example, the evidence is so remote that its influence on the issues is low, then it has low probative value, but for the same reason, it probably has low prejudice and other counterweights too. We cannot use Rule 403, as written, to exclude evidence that has little connection to the issues, because although its probativity is low, so are the counterweights—and it is the counterweights that exclude, according to 403.<sup>250</sup>

There is one further factor that is important here, and that is the strategic importance that the use of low-relevance evidence may have to lawyers.<sup>251</sup> Particularly if a lawyer has a bad case, the skillful use of low-relevance evidence can enable the lawyer to distract the jury from the issues, to exhaust witnesses so that cross examination will make them appear less credible than

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<sup>248</sup> Fed. R. Evid. 403.

<sup>249</sup> *Id.*

<sup>250</sup> *See* David Crump, *supra* note 243, at 19-20 (explaining this result with examples).

<sup>251</sup> *See Id.* at 20-25 (arguing that, contrary to the obvious conclusion, lawyers feel powerful motivations toward offering irrelevant evidence).

they are, and to pursue other strategies that are at variance with the cause of justice.<sup>252</sup> Although it is no longer recent enough to make its details leap immediately to mind, the criminal trial of O.J. Simpson is an example. The defense cross-examined some witnesses over periods that lasted more than nine days each.<sup>253</sup> No witness can undergo this kind of adversary process without exhaustion and without making unintended statements that derogate unfairly from credibility, and no jury can retain the issues over the resulting length of trial. The use of low-relevance evidence, gnawed at as a dog gnaws at a bone, is a tactic for carrying out this strategy.

My solution, then, would be to modify Rule 401 to insert a Wigmorean threshold as a condition of relevance. I would advocate a low standard, to preserve the policy of liberal admissibility, but not so low as to enable attorneys to produce a year-long trial that should have been a fraction of that duration, as the Simpson lawyers did. To the “any tendency” language, then, I would add a qualifier: the tendency must be “sufficiently significant, when combined with other evidence, to have the potential to affect the decision of a reasonable juror.” If any reasonable juror could combine the evidence at issue with other evidence to make a difference, the evidence is admissible, but not otherwise. This is a change from the current regime, which sets no minimum standard for relevant evidence. In other words, I believe Wigmore was right, Thayer was wrong, and the Advisory Committee was wrong in following Thayer.<sup>254</sup> At the same time, the proposal of a low standard means that the judge must defer to the jury, and indeed to the most credulous possible juror who can be labeled “reasonable.” This proposal is not likely to exclude evidence that is meaningful. What it will do, however, is provide the court with a better basis than currently exists for eliminating delay and distraction from the trial.

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<sup>252</sup> See *Id.* at 26-46 (explaining these uses of irrelevant evidence).

<sup>253</sup> See *Id.* at 32-39 & n. 185 (analyzing the “witness control or debilitation function”; describing lengthy cross examinations).

<sup>254</sup> See *supra* notes 246-47 and accompanying text.

At the same time, I would amplify Rule 403—amplify, rather than modify. The Rule should explicitly state that the reference to a tendency to confuse, to mislead, to produce cumulative evidence, and to cause undue delay, empowers the court to exclude any kind of evidence so unreliable that its probative value is substantially exceeded by these counterweights. This power should explicitly extend to unreliable hearsay, expert opinion, character evidence, and object authentication, as well as to all other evidentiary issues. The abolition of categorical rules against these kinds of evidence, then, would not mean that thoroughly unreliable evidence would be indiscriminately admissible. The difference would be that the mechanism of exclusion would depend upon a decision by the court that a piece of hearsay evidence is so bad that its relevance is substantially outweighed by counterweights, rather than upon a blanket rule such as the rule against hearsay. Rule 403 should be clarified, then, to refer explicitly to particularly bad hearsay, and also, to unreliable expert opinion, overly prejudicial character evidence, and highly dubious authentication, and to explicitly authorize their exclusion.

## **VII. GENERAL CONCERNS: STRATEGIC BEHAVIOR, OPPONENTS' POWERS, AND THE SCARCITY OF JURY TRIALS**

### **A. “Don’t Try”: *The Elimination of Jury Trials as a Result of Our Rules***

Why, then, should we remove so many of the Rules of Evidence? The decline of the jury trial has become well publicized—and to some, is alarming. Professor Gross and Dean Syverud have documented the phenomenon in their article titled, “*Don’t Try*.”<sup>255</sup> Their message is that although we revere jury trial, we do not act upon that attitude. Instead, our policies silently tell litigants, “Don’t try your lawsuit,” because we create heavy incentives to prevent them from doing so. Since Gross and Syverud’s study, the phenomenon has progressed to the point that, in

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<sup>255</sup> Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Verdicts in a System Geared to Settlement*, 44 U.C.L.A. L. Rev. 1 (1996).

2002, only 1.5 percent of civil cases in federal courts were resolved by jury trial. This tiny figure represents a nearly two-thirds reduction from 4.3 percent during the 1970's.<sup>256</sup>

What is most alarming about these figures is the question that they do not answer. That question is, “What has happened to the cases that once were resolved by jury trial, but now are not?” It seems clear that a larger proportion of cases than ever before are resolved by judges in matter-of-law rulings: by summary judgments, dismissals, or sanctions, for example.<sup>257</sup> Do we really want judges wedging more cases into judge-controlled matter-of-law dispositions, rather than by decisions that take the facts into account? If not, we should take a hard look at our Rules of Evidence, which are one mechanism that drives the length and expense of trials and therefore increases the judge's need to be disposition-minded. At the same time, some of the disputes that would have resulted in trials during the 1970's probably are settled instead. The mechanism by which this result occurs is more mysterious than that for dispositions by judges. But a fair inference, and a disturbing one, is that some of the increase in settlements may be judge-driven too. It seems probable that judges, whose dockets have forced them to become more disposition-minded today than ever before, have taken to inferring which party has prevented a negotiated resolution and to promulgating strategic pretrial rulings designed to induce that party to act reasonably—by settling.

Most of the rules of evidence are aimed at protecting valid policy goals. Resistance to abolishing the rules would sensibly focus upon those effects, and support for abolition must deal with that argument. The issue that most often is overlooked, however, is the phenomenon of the vanishing trial. Rules of evidence make the process unpredictable, and certainly they make it

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<sup>256</sup> See Hope Viner Samborn, *The Vanishing Trial*, 88 ABA J. 24, 27 (2002).

<sup>257</sup> It seems likely, for example, that adjudications for missing time deadlines may have increased. Cf. DAVID CRUMP et al., *supra* note 2, at 484 (containing notes about this method of disposition).

longer and more expensive. The proposal for abolition proceeds not only from a judgment that the rules cost more in lost accuracy than they provide in putative benefits, but also from the strong possibility that they are a significant cause of the reduction of trials and the increase in their cost.

***B. Strategic Behavior by the Judge: Does It Include Imposing Disadvantages upon Recalcitrant Parties?***

The issue of expense is rarely explored in Evidence courses. Some hearsay exceptions, for example, require unavailability,<sup>258</sup> which is defined in such a way as to drive up costs grossly disproportionately to any conceivable gains.<sup>259</sup> Students, or for that matter rule drafters, rarely perceive these effects from study of the text of the rules themselves. Of even greater concern is the possibility that the judge's rulings (or refusal to make them) can balloon these costs. Judicial rulings can even confront recalcitrant parties with evidentiary costs as a means of precipitating settlement. This possibility is even further removed from the imaginations of evidence students, and possibly from those of policymakers as well.

In an effort to get the point across in my evidence course, I use a series of images. Following coverage of the hearsay exceptions that require unavailability, I invite students to consider what their effect might be. My first image excerpts the definition of that term, "unavailability."<sup>260</sup> I then offer a not-so-hypothetical situation. A lawyer representing a witness informs the judge that the witness plans to rely on the privilege against self-incrimination and to refuse to testify. Is the witness "unavailable"? Imagine that we have former testimony from this witness, which is usable only if the witness is "unavailable" by reason of privilege,<sup>261</sup> is the

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<sup>258</sup> See Fed. R. Evid. 804.

<sup>259</sup> See *infra* notes 260-63 and accompanying text.

<sup>260</sup> Fed. R. Evid. 804(a).

<sup>261</sup> Fed. R. Evid. 804(b)(1).

witness unavailable because of the witness's lawyer's representation to the court? "Yes," say the students without hesitation—erroneously. "No," is my immediate response. What else does the rule say must happen? Usually, even as they stare at the rule, most students miss the point. I project the image of an unfriendly looking judge. At length someone recognizes that in addition to other requirements, the *judge must rule* on the claim of privilege before unavailability results.<sup>262</sup> That is difficult for the judge to do without context, at the pretrial stage, and without the witness present.

My next image is that of a stack of \$20 bills. Money. "What does this slide have to do with it?" More blank looks from my students. "Well, okay; here's the next image." I project a subtraction on the screen: "\$20,000 - \$30,000 = -\$10,000," and I explain that in our hypothetical case, the amount in controversy, which represents a loss due to forgery, is \$20,000, but bringing the witness to trial will cost an estimated \$30,000, because the witness is incarcerated in Idaho. The light begins to dawn. It may be that the only way to use the witness's hearsay, even though it is former testimony that was fully cross-examined by the opponent, is to bring the witness to the courtroom: a step that will produce a \$10,000 loss even if we win the verdict and recover 100% of our damages! Viewing the unavailability requirement this way highlights the argument that the rule is of doubtful wisdom.

"No problem!," most students still happily maintain. In law school, the judge is the hero. The judge of law student imagination always makes enlightened rulings. So: "Won't the judge recognize the problem and provide a pretrial ruling?" Not necessarily, is the answer; just getting the court coordinator on the telephone and attempting to persuade him or her to give you a hearing may be impractical for a question of this kind, in some quarters. Besides, the judge may

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<sup>262</sup> Fed. R. Evid. 804 (a)(1).

deliberately decide not to issue any ruling before trial. Why? I return to the image of the unfriendly judge. And then, the next image is a dialogue. YOU: “Your honor, will you give me a pretrial ruling recognizing the witness’s privilege?” THE JUDGE: “No.” The students now face a decision: bring the witness, guaranteeing a \$10,000 loss, or run the risk that key evidence will not be admissible. Some students remain convinced that this cannot be the effect of any rule anywhere. But it is precisely the effect of this rule, in this situation.

Why would a judge rule this way? Decisionmaking capacity is a limited resource. Judges develop a facility for concentrating their rulings on issues that advance their cases toward resolution. They simply must exercise this facility, or they will be unable to do justice at all. Sensible judges attempt to ration decisions about discovery, for example, and they try not to consume unnecessary time with pretrial rulings about evidence. If that is not enough to explain the refusal, some judges are meticulous. They want everything assembled before they make rulings. This kind of judge may want the witness brought in as a means of “being sure I’m doing it right.” In insisting on this wasteful procedure, the meticulous judge is not responsible for doing the math that leads to a  $\$20,000 - \$30,000 = \$10,000$  loss. And finally, it may be that the judge has already decided that the proponent of this evidence should settle this case. The judge thinks that, rather than being greedy, the proponent should accept \$5,000 instead of full damages of \$20,000. Therefore, without articulating this rationale, the judge refuses to rule—as a subterranean strategy for forcing the plaintiff to deal. The complexity of the rule, and its insistency on unnecessary multiple criteria as a condition for allowing former testimony, create the mechanism.

***C. Strategic Behavior by Litigants: The Proponent’s General Preference for Live Testimony and the Opponent’s Power of Compulsory Process***

Strategic behavior by litigants is another factor that counteracts the risks that underlie some exclusionary rules. What would evidence proponents do, if they knew they could use hearsay statements instead of live witnesses? What would their opponents then do? Consideration of these questions illuminates some of the issues surrounding rule abolition, especially in the area of hearsay. Analysis will show that strategic behavior by litigants will result in reduction of some of the risks that underlie the hearsay rule.<sup>263</sup> In other words, inferences about strategic behavior by litigants will generally support the argument for abolition of the hearsay principle.

First, it should be obvious that a party entitled to rely upon hearsay will not necessarily omit to call live witnesses. Reading hearsay to the jury is boring and not very impressive. Almost always, the proponent of the evidence foregoes some of the impact of the evidence by doing this, as well as some of its credibility.<sup>264</sup> Therefore, even if hearsay were freely allowable, we should expect litigants to present live testimony from witnesses with crucial information that requires full absorption by the jury, as well as witnesses whose credibility is crucial, unless there is an overriding strategic reason to the contrary.<sup>265</sup>

The assumption must be, however, that sometimes the proponent will choose for forensic reasons to forego live testimony in favor of purely hearsay presentation, if allowed to do so. The proponent will have decided that strategic concerns make the use of hearsay, in this case, more persuasive than a present witness. In this situation, however, the opponent is not without remedy. If the opponent wants the witness, the opponent has the same power of compulsory process that

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<sup>263</sup> Cf. *supra* Pt. IIB of this Article (discussing hearsay risks).

<sup>264</sup> See *supra* notes 121-22 and accompanying text.

<sup>265</sup> “Many declarants will be subpoenaed by the prosecution or defense, regardless of any Confrontation Clause requirement.” *White v. Illinois*, 502 U.S. 346, 355 (1992).

the proponent does.<sup>266</sup> If, for example, the proponent presents hearsay that is a dubious representation of the witness's testimony, the opponent can call the witness live, to put the evidence in context or even to contradict it. If the witness is not credible—if the witness cannot present a coherent story in response to questions—the opponent likewise can bring the witness in by the power of compulsory process to demonstrate this lack of credibility. In fact, the Supreme Court has relied upon this right to compulsory process as an important corrective to the risks inherent in admitting hearsay. In other words, the Court's decisions are premised in part on the conclusion that hearsay evidence is more readily acceptable, and carries fewer disadvantages, in light of the opponent's ability to present the witness live if the opponent does not.<sup>267</sup>

In fact, one can argue that the real abuses that led to the hearsay rule, such as the trial of Sir Walter Raleigh, did not reflect misuse of hearsay nearly so much as denial of compulsory process. When the Crown used the affidavit of his alleged coconspirator Lord Cobham instead of Cobham's live testimony, Raleigh's objection was based not so much on the offensiveness of the affidavit as upon the refusal of the court to allow Cobham to be produced at Raleigh's request. Thus, Raleigh pleaded with the court, "But it is strange to see how you press me still with my Lord Cobham, and yet will not produce him." Cobham, he pointed out, was present "in the house hard by, and may soon be brought hither; let him be produced, and if he yet will accuse me or avow this confession of his, it shall convict me and ease you of further proof."<sup>268</sup> The court refused Raleigh's request for compulsory process on multiple grounds: Cobham's confession was firm, the circumstances supported it, and a retraction might result in falsehood, which would be prejudicial to the King. The court explained, in a passage that sounds strange to modern ears,

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<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> See JON R. WALTZ & ROGER C. PARK, *supra* note 83, at 97.

“. . . for, having first confessed against himself, and so charged another person, if we shall now hear him [Cobham] again in person, he may, for favour or fear, retract what formerly he hath said, and the jury may, by that means, be inveigled.”<sup>269</sup>

The most serious error of the court in Raleigh’s case, then, concerned the absence of compulsory process. The message is simple. When the declarant is available, the real issue concerns, not the risks of hearsay, but rather, the risks of suppressing the ability of the opponent to call the witness. That, and not the hearsay problem itself, was the issue of deepest concern in the case of Sir Walter Raleigh.

The dueling strategies of opposing lawyers in this situation, then, can be summarized as follows.<sup>270</sup> The proponent will likely prefer to call the witness live in many if not most instances even if the prospect of using hearsay is available. The exceptions to this preference will fall into at least three categories. First, presenting the live witness may be expensive in comparison to the value of the case. Second, the witness’s testimony may concern an issue that is tangential, that is unlikely to be contested, or that is merely cumulative. Or, third, presenting the live witness may produce unwelcome or even contradictory testimony, or it may destroy the witness’s own credibility. In the first two instances, it seems likely that the opponent will decide not to use compulsory process to produce the witness. But if preventing the live witness is impractical because of considerations of cost, tangential importance, or lack of genuine controversy, it is hard to see what is lost by the incurring of the asserted hearsay risks. In the third case, in which the live witness will contradict the evidence or appear noncredible, the power of the opponent to produce the witness by compulsory process would come into play. If cost considerations are not prohibitive, the issue is significant, and the opponent could reduce the impact of the evidence

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<sup>269</sup> *Id.*

<sup>270</sup> *See supra* notes 265-67 and accompanying text.

meaningfully by having the live witness present, the opponent would be expected to call the witness. Thus, the rational strategies of the parties, by themselves, will mitigate the hearsay risks when they are significant, even without a rule against hearsay.

There are remaining problems, however. One of the most significant is the possibility of spoliation. The proponent of the evidence may be motivated to secure the absence of a noncredible or inconsistently helpful witness in favor of using hearsay from the witness instead. This is a valid concern, but it already exists with respect to all litigation. In fact, isn't it entirely possible that, in *Leake v. Hagert*, the father encouraged the unavailability of the son, or even arranged it?<sup>271</sup> This kind of spoliation, in fact, is probably one of the unseen costs of the hearsay rule: the possibility that, with the rules as they are, a party can prevent the opponent's use of good evidence such as that in *Leake v. Hagert* by arranging unavailability. The hearsay rule, in other words, itself encourages a mirror-image kind of spoliation. In any event, spoliation is a self-limiting strategy, because spoliation authorizes an inference against the spoiler.<sup>272</sup> We probably do not catch every instance, but the party who uses it risks the loss of everything, and this possibility provides an important countervailing motivation. In addition, there are the other protections we have analyzed earlier in this article, which already exist or could be put into place: the jury has an innate sense of suspicion about hearsay; we can enhance that suspicion if we desire, by an instruction; we can require a knowledgeable witness who can discuss the hearsay risks to be presented live for cross examination; and we can even, if we want to be

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<sup>271</sup> See *supra* Pt. IIA of this article (summarizing this case).

<sup>272</sup> "Spoliation of evidence . . . is admissible to show consciousness of guilt." *United States v. Mendez-Ortiz*, 810 F.2d 76, 78-79 (6th Cir. 1986); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 4.4 at 162-63 (3d ed. 2003).

particularly careful about hearsay-based results, reinstate the common law rule providing that hearsay is insufficient to support a verdict.<sup>273</sup>

### **VIII. ALTERNATIVE PRINCIPLES: PRESERVING THE RIGHT TO TRIAL BY JURY BY SETTING REASONABLE LENGTHS FOR TRIALS**

So far we have considered existing rules. Changing existing rules, however, would allow us to have new and different principles. If we limited the adverse impact of the rules, for example, we could do more to ensure that trials were not so scarce and expensive. Professors Arthur R. Miller and Geoffrey Hazard once participated in a report that suggested that a rule could be adopted so as to limit the longest trials to no more than ten days.<sup>274</sup> These two gentlemen are heavyweights, but the proposal radically departs from our traditions in the United States. On the other hand, it has been reported that in Great Britain, the birthplace of our right to jury trial, a murder case can ordinarily be concluded in a day.<sup>275</sup> Have the British adopted rules that shortchange accuracy for expeditiousness? It seems doubtful; England is a sophisticated democracy, one that values individual rights, although not precisely according to American standards. If Britain can do that, it ought to be possible, in America, to try a jury trial for almost any case in less than ten days—if, that is, we revise our rules of evidence to eliminate the waste that they now produce. In fact, there are indications that American lawyers might support serious restrictions on trial lengths. At a symposium sponsored by the ABA Litigation Section's Vanishing Trials Project, "some participants suggested an ABA resolution recommending time

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<sup>273</sup> See *supra* Pt. IIE of this article.

<sup>274</sup> See SOUTHWESTERN LEGAL FOUNDATION & THE SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW, CONFERENCE ON THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT 2 (1995) (Arthur C. Miller, discussion leader, and Geoffrey C. Hazard, Jr., reporter).

<sup>275</sup> Shepton Mallet Prison in Somerset, <http://www.richard.clark32.btinternet.co.uk/sheptonm.html>.

limits on trials,” and there was “a remarkable consensus with regard to the need to create efficiencies in the trial process.”<sup>276</sup>

In other words, one of the pleasant results of abolishing the rules of evidence would be that we could take seriously the limit on jury trial length that Professors Miller and Hazard participated in proposing. Then, we could expect people who now cannot serve on lengthy cases to be available for jury service. We could try big cases in a period that would let the jury focus on the issues. We could adjust the lengths of smaller cases accordingly, with the hope that a small case—by which, regrettably, I mean one with less than \$ 100,000 in controversy—could be tried at a cost that would not exceed what is at stake.

A rule to effectuate this policy might be difficult to draft, but here is an effort. Rule 609 now provides, “The court shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for ascertainment of truth, (2) avoid undue consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”<sup>277</sup> That is the present rule. An additional sentence at the end of Rule 609 could provide, “For a very complex case, the court shall exercise this control by the imposition of time limits on witness or overall presentation by each party so that the expected or anticipated overall length of evidence presentations does not exceed ten [or twenty-one, or thirty] days, and for cases of lesser complexity, the court shall exercise this control to produce trials of reasonably proportional lengths.”

I have no pride of authorship in the specific length of ten days. I took this figure from the proposal participated in by Professors Miller and Hazard, although they too seem to be flexible

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<sup>276</sup> See Stephanie Francis Ward, “*Vanishing Trials*” *Issue Won’t Go Away*, ABA J. E-Report December 19, 2003 (publication pages unavailable for this publication).

<sup>277</sup> Fed. R. Evid. 609.

about the exact time length to be called for. The limit could be twenty-one days, or one month, and it still would produce the desired result, albeit to a lesser degree. The rule could also build in greater flexibility for cases in which it is needed: “At the conclusion of the time planned for any given witness or for overall presentation, the court shall grant an appropriate extension upon a showing that the ascertainment of truth will thereby materially be enhanced.” Also, “In deciding upon any request for extension, the court shall take into account, among other relevant factors, the time consumed by objections or argument interposed by the opponent.” And if that is not enough, the rule can add: “In an unusual case, upon a finding that the ascertainment of truth may be impaired in a complex trial by a time limit of ten [or twenty-one, or thirty] days, the court may excuse the parties from a time limit of ten [or twenty-one, or thirty] days and set a longer time that it considers necessary.” Courts have on occasion imposed time limits.<sup>278</sup> The only real innovation in the proposals offered here is the requirement that it be done generally and that a specific target length be considered.

## CONCLUSION

Why is it necessary to consider these issues? Because, in a nation that purports to revere jury trial, a result in which only 1.5 percent of civil cases are resolved by juries<sup>279</sup> is an embarrassment. Because rule drafters have so often and so thoroughly ignored this issue.<sup>280</sup> Because the resulting trials are wasteful. Because a judge who allows a straightforward murder case to occupy a full year in trial is not following the requirements of rule 609 as presently

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<sup>278</sup> *Cf.* Blumenthal v. Superior Court, 40 Cal. Rptr. 509, 515-17 (Cal. App. 2006) (holding that mistrial based on two-day limit for trial of marriage dissolution case was an abuse of discretion; discussing propriety of time limits, including five-hour limit for a “short cause” in California). The court added, however, that it was unaware of any local rule of court either placing maximum time limits on any trial or empowering the judge to impose such a limit. *Id.* at 517.

<sup>279</sup> *See supra* note 256 and accompanying text.

<sup>280</sup> *See supra* notes 57-58 and accompanying text.

written, with its injunction against undue consumption of time, and because a judge who allows a witness to be cross-examined for nine days (or for that matter, even for a considerably shorter period) has forgotten the requirement that harassment of witnesses should be prevented.<sup>281</sup> Because trials are too long for most people with responsibilities to serve as jurors, because they cost too much for most people with modest disputes to be able to try economically, and because a jury cannot be expected to focus the case reasonably after a trial has dragged on for month after month.<sup>282</sup>

The reform of the vanishing trial will not be possible, however, with our current rules of evidence. The rules make it difficult for counsel to convey background material effectively. They make some kinds of issues impossible of proof with reasonable expense.<sup>283</sup> In fact, the cumulative time that evidentiary objections and arguments consume is itself so lengthy in an average trial that even if the rules did not have the effect that they now have upon the availability of information to the jury, the length of trial would still be greatly expanded by the processes for rule enforcement.<sup>284</sup>

The current rules are arbitrary. The hearsay principles are a clear example,<sup>285</sup> although the same criticism applies to rules excluding repetitive behavior evidence, expert opinions, and objects depending on authentication.<sup>286</sup> The hearsay exceptions, as well as the definition of hearsay, are full of irrationalities. For example, imagine a hearsay statement that meets all of the requirements for a dying declaration (or “statement under belief in impending death”). If the

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<sup>281</sup> See *supra* note 253 and authority therein cited.

<sup>282</sup> See *supra* notes 1-5 and accompanying text.

<sup>283</sup> See *supra* Pt.IIB of this article (discussing proof issues in *Leake v. Hagert*).

<sup>284</sup> See *supra* notes 67-70 and accompanying text.

<sup>285</sup> Cf. *supra* notes 125-27 and accompanying text (arguing that excited utterance exception admits evidence precisely because it fits criteria that make it less reliable).

<sup>286</sup> See *supra* Pt. III-V of this article.

victim dies, and the charge is murder, the Federal Rules admit the hearsay pursuant to this exception.<sup>287</sup> If the victim merely lapses into a vegetative state, however, so that the charge is aggravated assault or attempted murder, the technical aspects of the exception are not satisfied, and the evidence must be excluded.<sup>288</sup> There is no difference in the rationales for admissibility, and this result is nonsense.

Each of these exclusionary rules purports to prevent some disadvantage associated with perceived unreliability. The rules do so inconsistently, however; and more importantly, they are unnecessary to achieve their purposes. Again, the hearsay rule is an example. Arbitrary rules exclude good evidence, as the dying-declaration example above shows. Furthermore, the purposes of the rule in protecting against the hearsay risks of perceptivity, qualification, sincerity, expression, and bias would be better served by other means. First, there is no reason to assume that jurors will be any less capable of evaluating these risks than they will be in the case of live witnesses. In fact, it seems more probable that jurors are properly skeptical of hearsay generally.<sup>289</sup> Second, if we are concerned about that issue, we can require a jury instruction pinpointing the risks and telling jurors to evaluate the evidence accordingly. Third, if that is not enough, we can require the proponent to produce a witness who can be cross examined so as to expose the precise hearsay risks. Fourth, we can provide that hearsay is insufficient to support a verdict and thereby require a substantial component of live-witness evidence.<sup>290</sup> Fifth, we can rely on the strategic interests of the adversary attorneys: the proponent will not generally rely

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<sup>287</sup> Fed. R. Evid. 804 (b)(2).

<sup>288</sup> The evidence is admissible only in a civil case or a criminal homicide case. *Id.*

<sup>289</sup> *See supra* Pt. IIC of this article.

<sup>290</sup> *See supra* Pt. IIE of this article.

upon hearsay alone for important points but will produce live witnesses for forensic reasons, and if the proponent does not, and if it is strategic to do so, the opponent can.<sup>291</sup>

A blanket rule of this kind is anomalous, furthermore, because no one would make a major decision in any other field without substantial reliance on hearsay. No one would make a major purchase or sale, employ a key employee, or admit or become a law student by refusing to rely upon written statements made by absent third parties. To the extent that the Constitution requires exclusion of certain kinds of evidence, particularly through the Confrontation Clause, its restraints must be strictly observed; but even in criminal cases, a blanket exclusion that affects even reliable, non-testimonial hearsay is unjustified. The dying declaration exception above is illustrative of how irrational, and how full of arbitrary requirements, our rules have become.

The same can be said of other exclusionary rules. In the area of expert opinion, for example, the Supreme Court and the rule drafters have made a pluperfect mess.<sup>292</sup> The character evidence rules that eliminate propensity evidence, and that eliminate references to repetitive conduct, actually exclude good evidence that jurors are perfectly as capable as lawyers to evaluate. Worse yet, by purporting to distinguish proof of action in conformity from inferences of intent or identity and by admitting the latter, the rules are internally inconsistent and produce arbitrary results.<sup>293</sup> Even requirements of authentication are so costly despite their adoption of one of the lowest standards known to the law (and therefore, their failure to provide much protection against unreliable evidence), that at least one jurisdiction has partially eliminated them.<sup>294</sup>

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<sup>291</sup> See *supra* Pt. VIIC of this article.

<sup>292</sup> See *supra* Pt. IV of this article.

<sup>293</sup> See *supra* Pt. III of this article.

<sup>294</sup> See *supra* Pt. V of this article.

Rules 401 through 403 are a sound basis for eliminating evidence whose probativity is greatly exceeded by counterweights. The modifications suggested here would also eliminate relatively inconsequential inferences, and they would expressly require the court to exclude evidence so unreliable that it should not be admitted.<sup>295</sup> This kind of calculus is a more reliable guide to the achievement of the purposes of the rules than the current regime, with its impenetrable thicket of hearsay rules and exceptions, our internally inconsistent and irrational principles governing repeated behavior, and the shifting complex of confusing criteria that the Court has mandated for expert opinion. A standard that depends upon an excess of unreliability over probative value would be simpler and more precise than our existing rules. It would function less frequently to exclude good evidence on bases unrelated to its merits. It could be applied expeditiously. It would result in more trials of more manageable lengths, or, more to the point, it would enable us to adopt rules requiring the advocates to get to the point.<sup>296</sup>

As Americans, we frequently want everything both ways. We want government that provides extensive social services, but at a reduced cost in taxes. We want terrorism eliminated, but we respond to the fulminations of politicians against practical means of detection by the National Security Agency of terrorist communications. Similarly, we also want to eliminate all possible risks of unreliability from trial evidence, while hoping that juries can decide cases accurately and expeditiously with whatever happens to be left. And we expect that we can preserve the right to jury trial while adopting procedures so cumbersome that they reduce the proportion of jury trials to unacceptable levels. It is time for us to stop pretending about these last two issues. We cannot ignore the disadvantages created by cumbersome procedures,

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<sup>295</sup> *See supra* Pt. VI of this article.

<sup>296</sup> *See supra* Pt. VIII of this article.

including our rules of evidence, and at the same time hope that we can achieve consistent results while reversing the trend toward the vanishing trial.