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The University of Texas School of Law
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Some Remarks on the Importance of Evidence Outside of Trials

Michael S. Pardo*

INTRODUCTION

The law of evidence regulates the admissibility, the permissible uses, and (to a lesser extent) the weight of evidence in civil and criminal trials. Rules of evidence structure and guide the process of legal proof and are thus of paramount importance. This is perhaps so obvious that it does not need mentioning (unless one had some other reason for doing so). Therefore, if an academic panel of law professors explored the topic: "Does Evidence Still Matter for Trials?" I suppose it might be assumed to be a joke of some kind.[1] The critical importance of evidence for trials, however, tends to overshadow the roles that evidence plays in other litigation settings and in the law more

* Henry Upson Sims Professor of Law, University of Alabama School of Law. This article is based on my remarks at a panel titled "Does Evidence Still Matter?" hosted by the Section on Litigation at the 2016 Annual Meeting of the Association of American Law Schools. My thanks to Paul Radvany and the Executive Board of the Section on Litigation for inviting me to participant and to the co-panelists for a lively and informative discussion. My thanks also to Ron Allen for helpful comments on a previous draft and to Dean Mark Brandon and the Alabama Law School Foundation for general research support.

1. Perhaps a type of legal Sokal's hoax. ALAN D. SOKAL, THE SOKAL HOAX: THE SHAM THAT SHOOK THE ACADEMY (eds. of Lingua Franca, 2000).

generally. This overshadowing is problematic because it obscures the significance of evidence throughout the law. For this reason, an academic panel devoted to whether evidence "still matters" in a world of diminishing trials is definitely not a joke, even though the answer "yes, it still matters" is plainly correct and known to be so by all evidence professors, litigators, and judges. What is not obvious, however, are three related issues: (1) exactly what is meant by "evidence"; (2) the scope of the several different roles evidence plays outside of trials; and (3) why anyone might think that evidence no longer matters in a world of diminishing trials. This article is aimed at addressing these intertwined issues.

That evidence plays a profound role in trials does not necessarily mean that its importance is confined to this realm. Why might anyone think otherwise? It would seem to follow from a failure to notice or appreciate how evidence regulates, shapes, or otherwise influences non-trial issues in the litigation process and throughout the law. I will outline several of these functions in Part I. The starting point for this symposium, however, is not *merely* about whether the significance of evidence is confined to trials. This symposium asks whether the significance of evidence has diminished *because* trials currently form a small-and-diminishing slice of civil and criminal litigation practice. Our topic, "Does Evidence Still Matter?"—and the possible implication that it may not—follows, in other words, from two premises. The first premise is that trials are, in fact, "vanishing," or at least that trials no longer play as significant a role in the civil and criminal litigation processes as they once did. The second premise is that evidence matters primarily for what happens inside of trials *and not outside of trials*.

For the purposes of this article, I will take the first premise as a given. The idea of "vanishing" trials is a commonly held assumption in current scholarship,[2] and I do not take issue with that notion in what follows. It is worth noting, however, two difficulties underlying the concept of vanishing trials. First, even if the *relative* percentage of cases going to trial is diminishing, in absolute terms there may still be

2. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012). *See also* Ronald J. Allen & Georgia N. Alexakis, *Utility and Truth in the Scholarship of Mirjan Damaska*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMASKA 336 (John Jackson et al., eds., 2008) ("[A] veritable cottage industry of scholarship has cropped up around 'the vanishing trial.'").

a large number of trials in the United States.[3] Second, and perhaps more importantly, trials have always been the exception rather than the rule for criminal and civil litigation (when compared with pleas, settlements, and other resolutions), or at least it has been that way for a long time now.[4] If trials are indeed vanishing, they have been vanishing for a while.[5] The implications of these issues underlying the "vanishing trial" are obvious. On the one hand, if evidence *ever* mattered for trials, then evidence still does so, because we still have a lot of trials. But, on the other hand, if trials have always been the exception for resolving litigated cases, then instead of asking whether evidence *still* matters, perhaps the participants in this symposium should have been asking whether evidence *ever* mattered in the first place.

These speculations, of course, depend on the second premise—that evidence matters primarily for what happens inside of trials *and not outside of trials*—being true. This premise, however, is false. Evidence plays a number of important roles outside of trials. These roles, moreover, are so significant that evidence would continue to be an important legal subject *even if* the number of trials continues to shrink in both relative and absolute terms. One recent example supporting this claim is the United States Supreme Court's recent decision in *Tyson Foods, Inc. v. Bouaphakeo*, discussing the permissible use of statistical evidence in class-action litigation in order to demonstrate that factual issues common to a class "predominate" (a

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3. For example, in state courts (where most litigation occurs), a report by the National Center for State Courts notes over 32,000 bench and jury trials in a one-year period (July 1, 2012- June 30, 2013) in a sample of over 925,000 civil cases. National Center for State Courts, *The Landscape of Civil Litigation in the State Courts* iii, 25 (2015), available at: http://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx. Moreover, this sample comprises approximately an estimated 5 percent of state civil caseloads in the United States. Therefore, if even a roughly similar proportion of trials extends beyond this sample, then this would mean there are over half a million state civil trials in one year (32,000 x 20 = 640,000). *See also id.* at 6 n. 36 ("In 2013, litigants filed approximately 16.9 million civil cases in state courts compared to 259,489 civil cases filed in U.S. District Courts.").

4. *See* Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 691 (2004) (explaining that in some jurisdictions in the 1930s "plea bargaining accounted for over 90 percent of all convictions and that remains true today."); Allen & Alexakis, *supra* note 2, at 337 ("While the trial may be 'vanishing' today . . . trials were never the norm in our system of litigation").

5. Allen & Alexakis, *supra* note 2, at 338 ("[I]t is not even clear whether the existence of jury trial matters for maintaining the rules of evidence. The paucity of such trials throughout history suggests to the contrary, and evidence law serves additional purposes than regulating jury trials.").

requirement for class certification).[6] As the Court explained, there is no general rule either permitting or proscribing the use of statistical evidence for purposes of class certification—it will depend on the particular evidentiary context, the uses to which the evidence is being put, and the rules that regulate the relevance and reliability of such evidence.[7] The issue of class certification is distinct from the trial and yet it depends fundamentally on evidence and the rules of evidence. This is just one example; many more will be discussed below.

Because evidence plays important roles outside of trials, the answer to the question posed by this symposium—"Does Evidence Still Matter?"—is "yes, obviously." So obvious, in fact, that I doubt any evidence professors, litigators, or judges would disagree. Given this conclusion, the more interesting questions, in my opinion, underlying this symposium's provocative title concern the different possible interpretations of the question itself as well as the less appreciated (but nevertheless foundational) ways that evidence continues to matter outside of the trial context.

The following Parts of this article will address these questions. Part I will unpack what it means to say that evidence matters and will articulate several different possibilities that one might mean by "evidence." This Part then uses these differing interpretations to illustrate various roles that evidence plays outside of trials. The variety of issues outlined in Part I will provide a general framework for two examples that I will discuss in more detail in Parts II and III. These Parts will focus on motion practice in civil cases and will discuss summary judgment and pleading requirements, respectively. The aim of this discussion is to clarify some of the less noticeable—but nevertheless fundamental—ways in which evidence is important outside of the trial context. Part IV discusses the importance of evidence outside of litigation.

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6. 136 S. Ct. 1036 (2016); FED. R. CIV. P. 23(b)(3) (requiring that "questions of law or fact common to class members predominate over any questions affecting only individual members").

7. *Tyson Foods*, 136 S. Ct. at 1046. Citing to evidentiary rules on relevance, probative value, and expert testimony, the Court explained that the permissibility of using statistical evidence "turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Id.* (citing FED. R. EVID. 401, 403, 702). Rejecting a categorical rule, the Court added: "Whether and when statistical evidence can be used to establish class-wide liability will depend on the purpose for which the evidence is being introduced . . . ." *Id.*

I. EVIDENCE STILL MATTERS (AND WHAT DO YOU MEAN BY "EVIDENCE"?)

Evidence still matters to litigation even in a world with relatively few trials because evidence influences every stage of the litigation process. At the outset, evidence influences whether civil lawsuits or criminal prosecutions are initiated in the first place.[8] Once cases are selected for litigation, evidence influences how the case proceeds through the litigation process, and it influences when and how cases end in settlement and plea agreements.[9] Finally, evidence may determine whether cases are terminated pre-trial (or post-trial)[10], and it influences whether cases or issues are precluded from even being litigated.[11] Understanding the significance of evidence at these various litigation stages requires, I contend, distinguishing among (at least) seven different senses of "evidence." These include: (1) legal rules, (2) legal doctrine interpreting these rules, (3) the evidence itself (testimony and exhibits), (4) the process of proof, (5) facts, (6) evidence courses, and (7) evidence scholarship.

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8. *See, e.g.*, Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 408–10 (1973).

9. *See id.* at 417–27 (considering the economic cost of evidence production and trial preparation and its influence on settlement); George L. Priest & Benjamin Klein, *The Selection of Disputes for Resolution*, 13 J. LEGAL STUD. 1, 12–30 (1984) (quantifying the factors, including evidence costs, that contribute to settlement). *See also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (noting distortions in the plea process that may cause outcomes to be based on factors other than the quality of evidence).

10. *See* FED. R. CIV. P. 56 (regarding summary judgment), 50 (regarding judgment as a matter of law); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 252 (1986) (explaining the summary judgment standard as whether "a reasonable jury could return a verdict for the nonmoving party" and that this determination depends on the "evidentiary standard of proof" at trial); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149–50 (2000) (explaining that the standard for judgment as a matter of law "mirrors" the standard for summary judgment); FED. R. CRIM. P. 29 (allowing a judge to determine whether the evidence is insufficient to sustain a conviction); Jackson v. Virginia, 443 U.S. 307, 319 (1979) (articulating sufficiency standard in criminal cases as whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

11. *See* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234–35 (1972) (explaining that differing evidentiary rules, burdens, and standards may affect preclusion and Double Jeopardy analyses); Snider v. Consolidation Coal Co., 973 F.2d 555, 559 (7th Cir. 1992) ("[C]ollateral estoppel cannot be applied unless the party against whom it is to be applied had a 'full and fair opportunity' to litigate the issue in the prior proceeding. A party has not had the requisite full and fair opportunity if he or she was unable to present critical evidence in the initial proceeding.") (internal citations omitted).

The discussion that follows describes each of these different interpretations and illustrates why evidence *in that sense* matters outside of trials.

A. Legal Rules

The rules of evidence matter outside of trials. Evidentiary rules may fall into two general categories. Some evidentiary rules apply to individual items of evidence and regulate the admissibility, exclusion, and permissible uses of types of evidence.[12] The Federal Rules of Evidence (and similar state codes) that regulate relevance, hearsay, impeachment, and so on, are examples. Other evidentiary rules apply to evidence as a whole (*i.e.*, on a particular issue). For example, there are rules categorically regulating burdens and standards of proof.[13] Standards of proof such as "preponderance of the evidence" and "beyond a reasonable doubt" instruct judges and juries on when to conclude, based on the admissible evidence as a whole, whether a contested issue has been sufficiently proven as a matter of law.[14] Both types of rules influence whether cases are litigated in the first place (as well as subsequent civil settlement or criminal pleas) because these decisions consider the likely outcomes *if cases proceed to trial*, which is a function of the *admissible* evidence available and the relative burdens of proof *at trial*.[15] These rules also govern much of the pre-trial litigation process, including the discovery process (both what to look for and what to produce),[16] whether cases have sufficient

12. In previous work, I refer to these as "micro-level" rules. Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 562 (2013).

13. *See, e.g.*, FED. R. EVID. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally"). I refer to these as "macro-level" rules. Pardo, *supra* note 12, at 565.

14. Evidentiary presumptions may be either micro-level or macro-level rules, depending on whether the presumption is triggered by a particular item of evidence (micro) or whether a party's evidence as a whole proves a particular fact. For a general overview of evidentiary presumptions, see RONALD J. ALLEN ET AL., AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS & CASES 821–35 (6th ed. 2016).

15. *See* sources cited *supra* notes 8–9; Laird C. Kirkpatrick, *Evidence Law in the Next Millennium*, 49 HASTINGS L.J. 363, 365–66 (1998) (noting how civil settlement and criminal plea bargaining depend on the admissibility of evidence).

16. For example, FED. R. CIV. P 26 discusses discovery obligations and refers to several evidentiary issues: relevance ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ."); the requirements for expert witnesses (expert witnesses must be designated and disclosed on a specific timeline, may be deposed,

evidence to proceed,[17] and whether to certify a class,[18] as well as how to structure other multi-party cases.[19]

B. Legal Doctrine

The legal doctrine interpreting the rules of evidence matters outside of trials. Legal doctrine interpreting rules serves the same predictive and regulative functions as the rules themselves. Doctrinal interpretations of evidence rules may affect litigation prior to trial in other ways as well. For example, differing judicial interpretations of a rule may affect where a plaintiff chooses to file a complaint or whether a defendant chooses to remove a case from state to federal court.[20] Further, gaps in certain legal doctrines may inject more uncertainty into the litigation process pre-trial, which may affect litigation behavior. For example, applying the "abuse of discretion" review standard on appeal limits the input of the circuit courts, and allows for more variance in rulings among lower courts.[21] Similarly, limits on

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and might be required to produce a report); evidentiary privileges ("When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must (i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed . . . ."); and impeachment ("[A] party must provide to the other parties and promptly file [particular] information about the evidence that it may present at trial other than solely for impeachment . . . .").

17. *See infra* Part II.

18. *See supra* notes 6–7 and accompanying text.

19. As with class actions, common evidence in cases involving multiple parties may be relevant for multi-district litigation as well as for joinder. 28 U.S.C § 1407 (multi-district litigation); *see, e.g.*, In re National Football League's "Sunday Ticket" Antitrust Litigation, United States Judicial Panel on Multidistrict Litigation, 148 F. Supp. 3d 1358, 1359–60 (J.P.M.L. 2015) ("We conclude that the Central District of California is an appropriate transferee district for this litigation. Fifteen actions, including potential tag-along actions, are pending in this district before Judge Beverly Reid O'Connell. DIRECTV has its headquarters in this district, and thus common evidence likely will be located there"); United States v. Cardwell, 433 F.3d 378, 385 (4th Cir. 2005) (looking to evidence produced at trial to evaluate whether joinder was proper).

20. *See* Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 483 (2005) ("[I]n cases that involve scientific evidence, the governing standard is likely to play a major role in defendants' decisions to remain in state court or remove to federal court.").

21. *See* Kumho Tire v. Carmichael, 526 U.S. 137, 153 (1999) ("Thus, whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine."). By granting district courts such deference, admissibility decisions

when the government can appeal evidentiary rulings in criminal cases limits the published appellate case law on evidentiary issues; accordingly, the existing case law may not accurately reflect how likely courts are to actually admit or exclude evidence.[22] The additional unpredictability created by the legal doctrines surrounding evidence may therefore influence pre-trial decisions of parties.

C. Evidence

The evidence itself—*i.e.*, physical evidence, witness testimony, and other exhibits of various sorts—matters outside of trials. For the reasons discussed *supra*, the quality and quantity of available evidence, along with the costs of producing evidence, influence pre-trial behavior. The available—and admissible—evidence affects whether to initiate litigation in the first place, whether to settle (or plead) before trial, and the overarching litigation strategy (for example, what evidence to look for and gather, what to highlight or diminish, and what to defend against).[23] The available evidence may also affect how courts structure cases. For example, some cases require class certification[24] or joinder of claims and parties.[25] The available evidence may preclude litigation altogether, due to collateral estoppel (issue preclusion) or res judicata (claim preclusion).[26] The available evidence also determines whether cases should proceed to trial or whether they can be terminated as a matter of law, without the need for trial.[27] Finally, it also may determine whether a court has jurisdiction.[28]

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become harder to predict, depending to a large extent on the particular judge in a case.

22. The Double Jeopardy Clause limits the circuits from opining on evidentiary issues in a case that the government loses. *See* Ann Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. CIN. L. REV. 1, 34–37 (2008) ("When the trial court rules before trial, the government can appeal an adverse determination. Mid-trial evidentiary rulings are generally not subject to appeal by the government."). Thus, the circuits are sometimes prevented from clarifying evidentiary issues, and practitioners may be left to guess whether a particular decision is an outlier or the norm.

23. *See supra* notes 8–9, 15–16 and accompanying text.

24. *See supra* notes 6–7 and accompanying text.

25. *See supra* note 19.

26. *See supra* notes 11 and 19, and accompanying text.

27. *See supra* note 10.

28. Clapper v. Amnesty International USA, 133 S.Ct.1138, 1148–49 (2013) ("The party invoking federal jurisdiction bears the burden of establishing standing—and, at the summary judgment stage, such a party can no longer rest on . . . mere

D. The Process of Proof

The process by which judges and juries respond to and reason with evidence matters outside of trials. Juries interpret evidence, and the days of formal, self-proving evidence are mostly a thing of the past.[29] Legal proof proceeds based on a combination of admissible evidence and the minds of fact-finders (who must draw inferences from that evidence).[30] If the evidence by itself determined outcomes, then trials would indeed be unnecessary. Input from legal fact-finders is necessary precisely because more than one reasonable inference may be drawn from the evidence (in light of the burden and standard of proof).[31] Accordingly, knowledge about how juries (and judges) are

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allegations, but must set forth by affidavit or other evidence specific facts.") (internal quotation marks and citations omitted).

29. Under such a system, types of evidence may be taken as conclusive proof regardless of the evidence that supports the opposing party. *See* John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA L. REV. 1569, 1576 (2015) ("A number of older legal systems have avoided stating a standard for comparing the evidence that supports opposing parties in civil litigation because they avoid the comparison altogether. If one side presents the appropriate proof, it prevails regardless of what the opposing side might be prepared to show.").

30. Evidence is not self-interpreting and jurors must rely on their own background beliefs and assumptions to draw inferences from the evidence. *See* Ronald J. Allen, *Rationality and the Taming of Complexity*, 62 ALA L. REV. 1047, 1054–55 (2011) (discussing the complex inferential process).

> Suppose a witness begins testifying, and thus a fact finder must decide what to make of the testimony. What are some of the relevant variables? First, there are all the normal credibility issues, but consider how complicated they are. Demeanor is not just demeanor; it is instead a complex set of variables. Is the witness sweating or twitching, and if so is it through innocent nerves, the pressure of prevarication, a medical problem, or simply a distasteful habit picked up during a regrettable childhood? Does body language suggest truthfulness or evasion; is slouching evidence of lying or comfort in telling a straightforward story? Does the witness look the examiner straight in the eye, and if so is it evidence of commendable character or the confidence of an accomplished snake oil salesman? Does the voice inflection suggest the rectitude of the righteous or is it strained, and does a strained voice indicate fabrication or concern over the outcome of the case?

Id. (quoting Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 Nw. U. L. Rev. 604, 625–26 (1994)).

31. *See supra* note 10 (discussing the role of "reasonable" or "rational" factfinders).

likely to respond to individual items of evidence,[32] process evidence as a whole,[33] or use instructions[34] serves some of the same predictive and regulative functions as the evidence itself.[35] In short, as with the evidence itself, the process by which fact-finders process evidence informs litigation decisions outside of the trial.

E. Facts

The facts matter outside of trials. This is perhaps obvious, but making explicit some of the distinct reasons *why* they matter will help to further illustrate the importance of evidence outside of trials. The facts—*i.e.*, the true state of affairs—play several important roles and are distinct from the claims and allegations of the parties, as well as from the evidence itself and what may be proven. In one sense, the facts are more fundamental than the law—the legal rights, duties, and obligations that underlie legal cases are meaningless if not applied to the correctly found facts.[36] The facts provide the target for successful litigation outcomes and the vindication of legal rights. The facts play several other roles in litigation as well. Importantly, the facts play an important role in determining the evidence that will be available and

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32. Michael J. Saks & Barbara A. Spellman, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW 142–231 (2016) (discussing the persuasiveness of, and psychological responses to, character evidence, hearsay, and expert evidence).

33. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) (concluding that presenting evidence in the context of a story helps jurors to process evidence).

34. Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, And Next Steps*, 106 NW. U. L. REV. 1537 (2012) (discussing the gap between the standard view on jury instructions—that they are "window dressing," easily ignored or indecipherable by jurors—and the legal system's assumption that jurors understand and apply the instructions). While juries do struggle with understanding or interpreting some instructions, it seems clear that juries do deliberate and evaluate evidence based upon their interpretation of the instructions. Thus, the specific wording of instructions, and whether or not juries are permitted to ask questions regarding the application of the law, is critical to how juries evaluate evidence.

35. *See supra* notes 8–9, 15.

36. *See* Ronald J. Allen, *From the Enlightenment to Crawford and Holmes*, 39 SETON HALL L. REV. 1, 7 (2009) ("Rights and obligations of any sort whatsoever are meaningless without accurate fact finding. It doesn't matter whether the question is the age of the President, the powers distributed to different branches of government, the right to be free from torture, or your rights to possess, consume, and dispose of your clothes. It is the attachment of rights and obligations to the bedrock of facts—to how the universe actually was at a particular moment in time—that gives them substance.").

thus play important predictive and regulative roles. Moreover, the facts structure various aspects of the litigation process, including whether cases may proceed at all. Examples of the latter include issues of evidential sufficiency,[37] jurisdiction,[38] and preclusion.[39] The facts matter for another fundamental reason: questions of law and legal reasoning also depend to a large extent on factual issues.[40] Determining the "law" is epistemically and analytically similar to determining the "facts" in that each involves inferences from relevant evidence and they involve similar reasoning processes.[41] In other words, the facts matter outside of trials because the law matters outside of trials.

F. Evidence Courses

Law school courses on evidence matter outside of trials. Evidence courses (and related trial-practice courses) obviously matter for students whose career interests include trials. For the reasons discussed above, they also matter for any students interested in any type of litigation-related practice, because of the effects that evidence exerts throughout the litigation process. Taking and defending a deposition, for example, require a sufficient understanding of evidence (in all the senses discussed above). Evidence courses also matter for students interested in transactional work and other, non-litigation focused legal work because this work will take place in the "shadow" of potential litigation. More generally, evidence courses matter for all law students because the topics in evidence law require sustained focus on—and analytical skills for addressing—many epistemological issues that arise throughout the law, including reasoning about facts, evidence, and inference; decision-making under uncertainty; attention to types of decision-making errors; allocating the risk of error; reasoning with burdens and standards of proof; and the operation of various types of presumptions.[42]

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37. FED. R. CIV. P. 56. *See infra* Part II.

38. *See supra* note 28 and accompanying text. *See also* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973 (2006) (discussing the various factual showings and standards of proof required to establish jurisdiction).

39. *See supra* note 11.

40. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003) (discussing the epistemological aspects of legal issues).

41. *Id.*

42. *See* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 203–33 (2012) (discussing these issues in the context of legal reasoning).

G. *Evidence Scholarship*

Finally, evidence scholarship (theoretical, empirical, or doctrinal) matters outside of trials to the extent it can explain, critique, or prescribe changes regarding any of the issues discussed in above categories.

In the next two Parts, I will illustrate some underappreciated connections between theoretical discussions in evidence scholarship and important, highly contested non-trial procedural issues. Part II discusses summary judgment, where the connections to evidence are more visible (although the connections to evidence scholarship may not be). Part III discusses pleading requirements and motions to dismiss, an area conventionally thought to be far-removed from evidentiary considerations and related scholarship.

II. SUMMARY JUDGMENT

Summary judgment plays an important role in modern civil litigation.[43] The standard courts employ in deciding motions for summary judgment, moreover, depends heavily on evidence and evidentiary considerations. Under this standard, parties may move for summary judgment on any claim or defense by showing that there "is no genuine dispute as to any material fact" and that they are "entitled to judgment as a matter of law."[44] The process of determining whether a dispute is "material" or "genuine," or, alternatively, whether a party is entitled to judgment as a matter of law depends on evidentiary rules of two different types. As noted above, some evidentiary rules regulate the admissibility and exclusion of individual items of evidence, and other evidentiary rules regulate evidence as a whole (e.g., standards of proof).[45] Both types of rules play important roles in the summary-judgment process.

A party is entitled to summary judgment only when a reasonable jury must find for the moving party at trial.[46] Rule 56 of

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43. For a critical discussion, *see generally* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1134 (2003) (arguing that courts have expanded the use of summary judgment and motions to dismiss to resolve disputes better left to jury trials).

44. FED. R. CIV. P. 56(a).

45. *See supra* notes 12–13 and accompanying text.

46. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("[T]he requirement is that there be no *genuine* issue of material fact . . . [As to materiality, o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . . [A]

the Federal Rules of Civil Procedure, along with a number of prominent opinions from the U.S. Supreme Court interpreting Rule 56, spell out the requirements for applying this standard.[47] Each of these requirements depends on available evidence and underlying evidentiary rules. The information on which courts may rely in deciding motions will depend on evidence in the record and the admissibility rules at trial. First, parties must support their argument as to why there is (or is not) a genuine issue of material fact by pointing to evidence in the record.[48] Second, a party can show there is no genuine dispute as to a material fact by showing that the other party "cannot produce admissible evidence to support the fact."[49] Third, a party may object that the opposing party's evidence "cannot be presented in a form that would be admissible in evidence."[50] Finally, the trial admissibility rules also regulate the use of affidavits or declarations to support or oppose a motion for summary judgment: assertions must be based on "personal knowledge,"[51] and they must "set out facts that would be admissible in evidence, and show that the affiant or declarant is competent"[52] "to testify on the matters stated."[53] These requirements—which depend on available evidence and the rules that would regulate the admissibility of this evidence at trial—

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material fact is genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

47. FED. R. CIV. P. 56; *Anderson*, 477 U.S. 242; Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

48. FED. R. CIV. P. 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials . . . .").

49. FED. R. CIV. P. 56(c)(1)(B) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.").

50. FED. R. CIV. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.").

51. *See* FED. R. EVID. 602 (requiring that non-expert witness testimony must be based on personal knowledge).

52. *See* FED. R. EVID. 601 (discussing the standard for witness competency).

53. FED. R. CIV. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."). Understanding witness competence, another matter of evidence law, is therefore vital to summary judgment practice.

determine the information on which courts may decide motions for summary judgment and, thus, whether parties may proceed to trial or their cases will terminate pre-trial.

As a conceptual matter, however, admissibility is only half of the picture. The other half concerns what do with the admissible evidence: in other words, when is it sufficient to raise a "genuine dispute"[54] or when, based on the evidence, is a party entitled to judgment as a matter of law? These determinations depend on what "reasonable" juries *could* conclude at trial based on the admissible evidence[55]—which in turn will depend on the macro-level evidentiary rules that regulate the sufficiency of evidence to prove disputed facts. Most importantly, these rules include the applicable burdens and standards of proof at trial. As the Supreme Court has explained, the standard for assessing what a "reasonable jury" could conclude for purposes of summary judgment depends on the applicable burdens of proof at trial and evidentiary proof standards at trial.[56] Therefore, whether a party has sufficient evidence at the summary judgment stage may depend on whether that party would have the burden of proof at trial[57] and what the applicable standard would be (e.g., "preponderance of the evidence" or "clear and convincing evidence").[58] This standard sets forth the evidentiary obligations of the parties for purposes of summary judgment.[59] Parties *without* the burden of proof at trial (typically, defendants) do not need evidence disproving the non-moving party's (typically, the plaintiff's) allegations—parties without the burden of proof can succeed at the summary judgment stage by showing that no reasonable jury could

54. FED. R. CIV. P. 56(a).

55. *Anderson*, 477 U.S. at 248 (articulating the standard as whether "a reasonable jury could return a verdict for the nonmoving party").

56. *Id.* at 252.

57. In other words, a party with the burden of proof at trial on an issue may need evidence to survive summary judgment that they would not need if they did not have the burden of proof at trial.

58. In other words, a nonmoving party may have sufficient evidence such that a reasonable jury could find in its favor by a "preponderance of the evidence" but not by "clear and convincing" evidence. Thus, the applicable evidentiary standard at trial would determine the summary judgment issue. Similarly, a moving party may have evidence that is strong enough such that a reasonable jury must find in its favor by a preponderance of the evidence but not by clear and convincing evidence. Again, the applicable evidentiary standard would determine whether summary judgment is warranted.

59. The Court explained that, at the summary-judgment stage, courts must draw "legitimate" and "justifiable" inferences in favor of the nonmoving party and must not weigh the credibility of witnesses. *Id.* at 255.

find for the non-moving party based on the evidentiary record.[60] This can include evidence disproving the non-moving party's allegations, but it may also consist of pointing out the non-moving party's own lack of evidence regarding a material fact. On the flipside, parties with the burden of proof at trial must do more than simply offer *some* favorable evidence; they must offer enough evidence such that a reasonable jury could find for them by the applicable standard (e.g., a preponderance of the evidence).[61]

These doctrinal requirements make sense given the goal of summary judgment to eliminate cases without genuine disputes and to align outcomes with what would be the required outcome at trial.[62] To perform this function outside of trial, the procedure depends heavily on the evidentiary proof process.[63] As explained above, any determination of what a reasonable jury could conclude based on the evidence incorporates the underlying evidentiary standard of proof. In other words, the operative question is whether, based on the evidence in the record, a reasonable jury could find for the plaintiff by, for example, a "preponderance of the evidence."[64] To determine what is reasonable or not depends, therefore, on what the preponderance standard means and requires in a given case. To put it another way, any time a judge concludes that a reasonable jury could or could not, based on the evidence, find some fact by a preponderance of the evidence, the judge is relying (typically implicitly) on some conception of the preponderance standard—what it means, what it requires, and the criteria to employ in determining whether it has been met.

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60. Celotex Corp. v. Catrett, 477 U.S. 317, 324–25 (1986) ("Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. . . . [T]he burden on the moving party may be discharged by showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.") (internal marks and citations omitted).

61. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986) (remanding to the court of appeals with instructions to consider evidence that was "sufficiently unambiguous to permit a trier of fact to find [for petitioners]" or issue summary judgment).

62. For a discussion of this alignment function, see Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1476–77 (2010).

63. *See id.* at 1475–79.

64. Moreover, the answer to this question may differ from whether a reasonable jury could (or must) make the same finding by clear and convincing evidence. *See supra* note 58.

The preponderance standard, however, is not self-interpreting. It is subject to competing conceptions, and its scope and contours are neither clear nor obvious.[65] As with other standards of proof, the preponderance standard has been a topic of intense investigation and debate within evidence scholarship.[66] The important pre-trial issue of summary judgment, in other words, depends fundamentally on an evidentiary standard, which itself depends on one of several underlying conceptions,[67]which theoretical debates in evidence scholarship have been making explicit. In sum, this important pre-trial issue in civil procedure depends fundamentally on theoretical debates in evidence scholarship (and, in particular, on evidence theory).

I do not have space to trace out all of the contours of these debates, nor to argue for my preferred conception.[68] Rather, my aim is to connect the non-trial issue of summary judgment to the theoretical debates. Within these debates, two distinct issues stand out. First, to what extent is the preponderance standard *comparative*?[69] That is, in determining whether the party has proven a fact by a preponderance of the evidence, to what extent does this depend on the strength of the evidence or explanations supporting the opposing party? This distinction will make a difference in cases in which, for example, a plaintiff's case does not by itself appear to be strong, but it does appear to be stronger than the defendant's alternative case.[70] Second, what inferential criteria should be used to evaluate the strength of a party's

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65. In an excellent discussion of the history of the preponderance standard, Professor Leubsdorf also documents several different conceptions of the standard currently employed in modern jury instructions. *See* Leubsdorf, *supra* note 29, at 1571–76. These variations among "greater weight of the evidence," "more likely than not," "actual belief," and "balance of probabilities," each imply different outcomes from the others. *Id.*

66. For an overview of these debates, see Pardo, *supra* note 12, at 565–68, 590–94, 603–10.

67. *See* Leubsdorf, *supra* note 65 and accompanying text.

68. *See* Pardo, *supra* note 12; Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223 (2008); Michael S. Pardo, *Group Agency and Legal Proof; or, Why the Jury is an "It,"* 56 WM & MARY L. REV. 1793 (2015).

69. Some jury instructions appear to invite a comparison with the strength of the opposing party's case (e.g., "greater weight of the evidence" and "balance of probabilities") while others may appear not to (e.g., "more likely than not" and "actual belief"). *See* Leubsdorf, *supra* note 65 and accompanying text.

70. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141–49 (2000) (comparing alternative explanations of evidence); Anderson v. Griffin, 397 F.3d 515, 521 (7th Cir. 2005) ("[I]f in a particular case all the alternatives are ruled out, we can be confident that the case presents one of those rare instances in which [a] rare event did occur.").

evidence: probabilistic, explanatory, or something else?[71] This question concerns exactly what criteria a fact-finder uses to assess inferences from evidence, as well as what criteria a reviewing court uses to determine which jury inferences are "reasonable" and which are "unreasonable."[72] Under one conception, fact-finder attaches subjective probabilistic values to their beliefs; under another conception, fact-finders examine how well a party's explanation fits with the evidence.[73] However one answers these two theoretical questions, it will affect one's conception of the preponderance standard, which in turn will affect how the standard for summary judgment ought to be applied. Therefore, summary judgment provides a prominent example where not only evidence, but evidence theory, matters outside of trials.

III. PLEADINGS AND MOTIONS TO DISMISS

While summary judgment provides a prominent non-trial issue in which evidence matters, the pleading stage provides a less prominent example where evidence also plays important roles. Because motions to dismiss based on the pleadings typically occur prior to discovery, it might be thought that evidence has little or nothing to do with this important stage of litigation. For the reasons

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71. The issue of which inferential criteria to employ concerns two different accounts of how to reason from evidence (based on explanatory or probabilistic criteria). For an overview of these conceptions, see Pardo, *supra* note 12, at 574–612. Both conceptions involve inductive reasoning under conditions of uncertainty and both involve attempts to measure the strength of factual conclusions based on the evidence supporting it. *Id.* They differ in the criteria used to evaluate inferences: subjective beliefs based on the evidence (*i.e.*, the stronger subjective belief, the more likely true) versus how well an explanation explains the evidence and events (*i.e.*, the better the explanation, the more likely true). *See id.* This question about inferential criteria is distinct from the question of whether the standard of proof is comparative. *See supra* note 69 and accompanying text. *See also* Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE. L.J. 1254 (2013) (arguing for a comparative, probabilistic conception of proof standards).

72. For critiques of court determinations on this issue, see Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 769 (2009) (arguing that courts have "little guidance on how . . . to decide whether a reasonable jury could find for the plaintiff."); Michael W. Pfautz, *Note, What Would a Reasonable Jury Do? Jury Verdicts Following Summary Judgment Reversals*, 115 COLUM. L. REV. 1255 (2015) (documenting divergences between verdicts and reasonableness determinations). For discussions of how the explanatory conception of proof provides guidance and constraint on reasonableness determinations, see Pardo, *supra* note 12, at 605–610; Pardo, *supra* note 62, at 1498–1508.

73. *See supra* note 71; Pardo, *supra* note 12, at 574–612 (discussing the similarities and differences between these two conceptions).

discussed below, however, this view is mistaken—evidence and evidentiary rules play important roles even at this early litigation stage.

It is not an overstatement to assert that the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[74] and *Ashcroft v. Iqbal*[75] injected a considerable amount of uncertainty into modern civil litigation.[76] These two decisions—interpreting the general pleading requirements under Rule 8 of the Federal Rules of Civil Procedure[77]—imposed a "plausibility" threshold for pleadings, without articulating exactly what this threshold means or requires. Scholars continue to vigorously debate the doctrinal[78] and normative[79] significance of these decisions, as well the empirical effects they have had on motions to dismiss at the district court level.[80]

To survive a motion to dismiss, the plaintiff's complaint must surpass a "plausibility" threshold. In *Twombly*, the Court explained that this threshold requires that the plaintiff's allegations must be something more than merely (1) "consistent with liability,"[81] (2)

74. 550 U.S. 544 (2007).

75. 556 U.S. 662 (2009).

76. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (asserting that *Bell Atlantic* and *Iqbal* "have destabilized the entire system of civil litigation"); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1293 (2010) (noting that *Twombly* and *Iqbal* "have the potential to upend civil litigation as we know it").

77. FED. R. CIV. P. 8(a)(2) (requiring that pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief"). The cases also centered around FED. R. CIV. P. 12(b)(6), which authorizes courts to dismiss complaints for "failure to state a claim on which relief can be granted."

78. *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333 (2016) (questioning the doctrinal significance of *Iqbal* and *Twombly* for general pleading requirements).

79. *See* Pardo, *supra* note 62, at 1467–79, 1492–97 (discussing the procedural values underlying the normative debates).

80. *See* Jonah B. Gelbach, *Material Facts in the Debate Over Twombly and Iqbal*, 68 STAN. L. REV. 369, 377 (2016) (questioning the inferences to be drawn from extant empirical work and concluding "that data are unlikely to settle the debate over the case-quality effects of the new pleading regime ushered in by *Twombly* and *Iqbal*.").

81. Bell Atlantic Corp. v Twombly, 550 U.S. 544, 557 (2007) ("The need at the pleading stage for allegations plausibly suggesting *(not merely consistent with)* agreement reflects the threshold requirement of Rule 8(a)(2) that the plain statement possess enough heft to show that the pleader is entitled to relief.") (emphasis added) (internal quotations omitted).

"speculative,"[82] or (3) "possible."[83] To be plausible, the allegations must "suggest" liability.[84] On the other hand, the Court clarified that the plausibility threshold is not a probability requirement[85] and that courts must continue to accept factual allegations as true and draw all reasonable inferences in the plaintiff's favor.[86] Applying this standard to the complaint at issue—a class action antitrust claim alleging that four companies conspired to retrain trade by inhibiting competition—the Court held that the complaint failed the plausibility requirement because the plaintiffs' factual allegations were equally consistent with independent, parallel conduct (which would not give rise to liability).[87]

In *Iqbal*, the Court again asserted that "plausibility" requires something more of pleadings than either consistency with liability or the possibility of liability.[88] Moreover, the Court further clarified that courts applying the plausibility standard need not accept "legal conclusions" as true.[89] Applying the plausibility standard to the complaint at issue—a former prison inmate detained following the September 11 attacks alleged that he was subjected to unconstitutional prison conditions—the Court held that the complaint failed to cross the plausibility threshold.[90] As with the *Twombly* complaint, the complaint in *Iqbal*, the Court explained, alleged facts that were consistent with liability but that were also consistent with other explanations that would not give rise to liability.[91] Either more factual details suggesting liability were needed, or else some explanation was needed of how discovery will reveal evidence that shows liability.[92]

Evidence and evidentiary rules play important roles in implementing the plausibility pleadings requirement. As with summary judgment, the evidentiary roles at the pleadings stage include issues pertaining to both individual items of evidence and cases as a whole. With regard to individual factual allegations, Federal

82. *Id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.") (internal citations omitted).

83. *Id.* at 557 (noting the difference between "plausibility" and "possibility").

84. *Id.* at 556 ("[W]e hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.").

85. *Id.* (noting the standard does "not impose a probability requirement at the pleading stage.").

86. *Id.*

87. *Id.* at 564–68.

88. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

89. *Id.* at 678

90. *Id.* at 680.

91. *Id.* at 681–82.

92. *Id.* at 683.

Rule of Evidence (FRE) 201, which regulates judicial notice, plays an important role in motions to dismiss.[93] Courts may take judicial notice of facts at any point during the litigation process,[94] and parties and courts may use judicial notice as part of the process of assessing the plausibility of a plaintiff's allegations under Rule 12(b)(6).

For a recent example, consider *Milo & Gabby, LLC v. Amazon.com, Inc.*, involving a claim of trademark counterfeiting.[95] Noting that courts may take judicial notice of documents outside of the pleadings (so long as the requirements of FRE 201 are satisfied), the district court took judicial notice of documents displaying plaintiff's design mark and concluded that the plaintiff's complaint did not meet *Twombly*'s plausibility requirement.[96] Judicial notice regarding evidentiary matters, as regulated by FRE 201, thus plays an important role in regulating the information base on which courts may make plausibility determinations. The requirements of FRE 201 play a critical role at this stage because if the court were to rely on evidence that did not fit the dictates of FRE 201 this would, in effect, convert the motion to dismiss into a motion for summary judgment, for which the plaintiff would then be entitled to notice and the possibility of discovery.[97] Remaining within the confines of FRE 201, on the other hand, keeps the judicial determination properly within the motion-to-dismiss realm. Thus, another important pre-trial issue—motions to dismiss—depends on evidence, and particularly the Rules of Evidence.[98]

Evidentiary considerations may also help to clarify the plausibility requirement itself. This requirement, as articulated by

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93. FED. R. EVID. 201(b)(2) (authorizing courts to take notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

94. FED. R. EVID. 201(d) ("The court may take judicial notice at any stage of the proceeding.").

95. 12 F. Supp. 3d 1341 (W.D. Wash. 2014).

96. *Id.* at 1350–53.

97. FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); *see also* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

98. Interestingly, courts often use judicial notice in the context of internet mapping technology to take notice of facts pertaining to distance and geography. *See* Rindfleisch v. Gentiva Health Sys., Inc., 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010) ("Courts commonly use internet mapping tools to take judicial notice of distance and geography."). This can further impact pre-trial issues such as personal jurisdiction and venue.

Twombly and *Iqbal*, focuses on the quality of plaintiff's allegations as a whole in suggesting liability. The same evidentiary considerations discussed in the previous Part regarding standards of proof[99] may also shed light on what makes a complaint plausible (as opposed to merely possible).[100] Two considerations regarding standards of proof also have relevance for plausibility determinations. The first consideration concerns the *inferential criteria* employed in assessing whether a standard has been met: probabilistic, explanatory, or something else?[101] The second issue concerns the extent to which the process is *comparative* (*i.e.*, depending on the strength of a defendant's alternative case).[102] If the process of proof at trial is comparative, and it involves a comparison of the competing *explanations* of the evidence and disputed events that support each side, then this suggests related plausibility considerations at the pleading stage.[103]

I will explain. If assessing plausibility functions to screen out cases that could not succeed at trial (or even summary judgment),[104] then it would make sense to align the plausibility assessment with similar criteria that will apply at the proof stage. Both *Twombly* and *Iqbal* fit this approach. In each case, a key reason for concluding the complaints were not plausible was because of an alternative explanation of the same alleged events (pointing to no liability) that was at least as plausible as the plaintiffs' explanations.[105] Given this state of affairs, the plaintiffs could not have succeeded at trial or summary judgment, subject to one important caveat. Discovery might

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99. *See supra* notes 66–71 and accompanying text.

100. *See supra* Part I.D.

101. *See supra* note 71.

102. *See supra* notes 69–70.

103. For a detailed development of this argument, see Pardo, *supra* note 62, at 1470–96.

104. *See id.* at 1484 (discussing this interpretation of the plausibility standard); *see also* Gelbach, *supra* note 80, at 382 ("Even though it is true that *Twombly* and *Iqbal* are directed at early termination of cases based on a judge's *prediscovery* assessment, the object of that assessment is whether, *after* discovery, there is likely to be any evidence of entitlement to relief.").

105. *See* Bell Atlantic Corp. v Twombly, 550 U.S. 544, 567–68 (2007) ("[H]ere we have an obvious alternative explanation . . . . a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."); Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009) (identifying an "obvious alternative" explanation for plaintiff's treatment: the "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.").

have changed the plausibility of the competing explanations.[106] Thus, to survive a motion to dismiss, plaintiffs must provide either an explanation of the events that could succeed at trial (for example, that *could* be considered over alternative, pro-defendant explanations) or they must explain how discovery will provide evidence to support their explanation and render it more plausible.[107] These implications, to be sure, depend on contested issues involving the nature of legal evidence and proof, on one hand, and the highly contested normative issues involving the roles of pleading requirements in modern civil litigation, on the other.

My point here is not to defend any particular conceptions or thesis. Rather, my aim has been to illustrate how a deeper understanding of evidence and the process of proof at trial can shed light on litigation issues far removed from the trial—in this example, pleading requirements. If the motion to dismiss is designed to eliminate cases without merit, then we must look to the evidentiary proof process to determine what "merit" even means.[108] As with summary judgment, one's conception of burdens and standards of proof will play a role in determining which cases may succeed and which will fail and, thus, should also play a role in screening complaints for their plausibility. In other words, the "plausibility" pleading standard is another example in which attention to evidence, evidentiary rules, and evidence theory will help illuminate non-trial issues throughout the litigation process.

IV. EVIDENCE OUTSIDE OF LITIGATION

The preceding Parts have sketched several of the ways in which evidence (in its different senses) matters outside of trials but *within* the litigation process. The focus was primarily on civil

106. *See* FED. R. CIV. P. 11(b)(3) (requiring signing attorneys to represent that alleged facts have evidentiary support or are likely to have such support after "a reasonable opportunity for further investigation or discovery.")

107. *See* Pardo, *supra* note 62, at 1483 ("If, however, there is an alternative explanation of the events that a reasonable jury must find at least as plausible and that would not entitle the plaintiff to relief, then the claim ought to be dismissed—unless the plaintiff's allegations raise a reasonable expectation that discovery will reveal evidence making the claim plausible.") (internal quotation marks omitted).

108. *Twombly* and *Iqbal* seem to erect a screening process for courts to "weed out" meritless claims—*i.e.*, ones that are unlikely to be proven at trial. But exactly how much "merit" a claim must, or should, have to survive is debated. *See id.* at 1497 (discussing the potential efficiency benefits of other proposed standards, but noting that higher standards might "prevent meritorious claims from ever seeing the light of day" or "prevent[] plaintiffs with potentially meritorious claims from reaching further stages in the adjudicative process.") (internal quotations omitted).

litigation, including more detailed discussions of two issues: summary judgment and pleading requirements. Many of the same considerations also apply to criminal litigation.[109] In addition to evidence playing several important roles *internal* to litigation, it is important to note that evidence also plays several important roles *outside* of litigation. Therefore, in this Part, I will mention some of the ways in which evidence matters that are *external* to the civil and criminal litigation processes.

First, evidence and evidentiary rules continue to play important roles in otherwise adjudicative processes that occur outside of civil or criminal litigation. Two examples include arbitration[110] and administrative agency adjudication.[111] Even if not subject to the same formal, detailed evidentiary rules as traditional trial settings,

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109. *See, e.g.*, *supra* notes 4, 6–7, 10–11, 15, 22.

110. *See* Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISPUTE RESOLUTION 141, 159–62 (2016) (discussing the importance of evidence for arbitration proceedings).

111. Indeed, as Thomas Merrill has argued, modern agency adjudication is modeled on the trial's evidentiary proof process and the relationship between judge and jury. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011).

> Modern administrative law is built on the appellate review model of the relationship between reviewing courts and agencies. The model was borrowed from the understandings that govern the relationship between appeals courts and trial courts in civil litigation—which in turn were derived from the relationship between judge and jury. The appellate review model, as developed in the civil litigation context, has three salient features: (1) The reviewing court decides the case based exclusively on the evidentiary record generated by the trial court. If the reviewing court determines that additional evidence is critical to a proper decision, it will remand to the trial court for development of a new record but will not take evidence itself. (2) The standard of review applied by the reviewing court varies depending on whether the issue falls within the area of superior competence of the reviewing court or the trial court. (3) The key variable in determining the division of competence is the law-fact distinction. The trial court, which hears the witnesses and makes the record, is assumed to have superior competence to resolve questions of fact; the reviewing court is presumed to have superior competence to resolve questions of law.

Id.; *see also* Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1 (1987) (surveying the overlap between the Federal Rules of Evidence and evidentiary decision-making at the administrative level).

administrative evidentiary considerations are still critically important in agency adjudications.

Second, as discussed above, there is an epistemological dimension to all legal analysis.[112] Therefore, evidentiary considerations are important in any context in which a contested question of law is at issue. Thus, to put it bluntly, evidence will matter whenever and wherever law matters, even outside the context of a specific litigated dispute.

Third, finally, and perhaps most importantly, evidence and evidentiary rules play important roles in influencing primary behavior—*i.e.*, behavior that occurs prior to, and outside of, litigation altogether. Three specific examples of such influence include the design of contracts,[113] precautionary or defensive behavior,[114] and criminal acts.[115] These specific examples are part of a larger pattern. Many types of individuals and entities—including, for example, doctors, police officers, lawyers, and contractors, or institutions such as corporations, hospitals, universities, churches, and so on—organize

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112. *See* Allen & Pardo, *supra* note 40 (discussing the epistemological aspects of legal questions); SCHAUER, *supra* note 42 (discussing the epistemological aspects of legal reasoning).

113. *See* Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 825–34 (2006) (explaining how evidentiary considerations influence contracts even in the absence of active litigation).

114. Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518, 518 (2010):

> We show that evidentiary motivations will often lead actors to engage in socially suboptimal behavior when doing so is likely to increase their chances of prevailing in court. Because adjudicators must base decisions on observable and verifiable information—or, in short, evidence—rational actors will always strive to generate evidence that can later be presented in court and will increase their chances of winning the case regardless of the cost they impose on third parties and society at large. Accordingly, doctors and medical institutions will often refer patients to undertake unnecessary and even harmful examinations just to create a record demonstrating that the doctors or medical institutions went beyond the call of duty in treating them. Owners of land and intellectual property may let harmful activities continue much longer than necessary just to gather stronger evidence concerning the harms they suffer.

115. *See* Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227 (2001) (defending the general ban on character evidence based on the potential effect that admitting the evidence could have on incentivizing criminal acts). In other words, the substance of evidence law can influence human behavior *out-of-court* by changing the incentives that actors may have for engaging in, or refraining from, particular conduct.

and carry out their activities in the shadow of, and in avoidance of, possible litigation. Evidence and evidentiary rules not only help to structure the process of such litigation. They also play important roles in dictating who is likely to win. Such knowledge is vital for individuals and entities trying to organize their behavior. To put this point another way, when the outcomes of trials are predictable, we are not only less likely to see such cases go to trial—in addition, primary actors are better able to organize their activities to avoid similar situations in the first place.

These points, taken together, essentially turn the theme of this symposium on its head: they suggest that a diminishing need for trials may be a *consequence* of evidence law's dual influence on litigation outcomes and primary behavior outside of litigation. Thus, rather than being a symptom or cause of the diminishing importance of evidence law, vanishing trials may instead be a sign of evidence law's continuing health and vitality.

CONCLUSION

Evidence matters, even in a world of diminishing trials. Understanding the many reasons why this so, moreover, helps to illuminate issues that tend to be overshadowed by the overarching role that evidence plays *within* the trial. Once we shift our focus away from the trial, the importance of evidence throughout civil and criminal litigation—and throughout the law more generally—reveals itself more clearly. Drawing attention to the manifold ways that evidence (in its many senses) matters outside the trial has been the focus of these remarks. The unifying theme underlying them is the following: evidence matters whenever and wherever facts matters, and facts matter whenever and wherever law matters.

The Importance of the Federal Rules of Evidence in Arbitration

Paul Radvany*

INTRODUCTION

The cliché about introducing evidence in arbitration is that there are no rules of evidence that apply, but arbitrators may take submitted evidence for what it is worth.[1] This notion of how evidentiary rules operates in arbitration is linked to principles—that the discovery phase of arbitration is intended to be efficient, proportional to the size of the dispute and complexity of issues presented and, ultimately, limited in scope.[2] Under many arbitration

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* Professor Radvany is a Clinical Professor at Fordham Law School, where he directs the Securities Arbitration Clinic and teaches Trial and Arbitration Advocacy. He would like to thank Professor James Kainen for his very helpful input for this paper and my research assistant, William Bergesch, for his exceptional work.

1. Bruce A. McAllister & Amy Bloom, *Evidence In Arbitration*, 34 J. MAR. L. & COM. 35, 53 (2003).

2. *See generally* Paul Radvany, *Recent Trends In Discovery In Arbitration And In The Federal Rules Of Civil Procedure*, 34 REV. LITIG. 705 (2015) (contrasting

rule regimes, discovery is written to be fairly limited; yet after the discovery phase is concluded, there are few if any procedural safeguards against the subsequent admissibility of material discovered. Many arbitrators admit almost anything proffered as evidence, and these decisions are largely beyond review.[3]

Broadly speaking, however, this is a reversal of how discoverability and evidentiary admissibility work in civil litigation. In civil litigation, the discovery phase is intended to be broad, while the admission of evidence at trial is highly regulated, requiring evidence to be not only relevant,[4] but also reliable and not unfairly prejudicial.[5] Furthermore, many other rules of evidence—such as the hearsay doctrine, the rules surrounding experts and opinions, and requirements such as authentication and personal knowledge—serve to promote other important purposes simply not considered by the rules governing discovery. Evidence law serves as a procedural safeguard to limit the ultimate admissibility of material discovered.[6] It does this by balancing the discovery regime's initial desire to provide parties with the best opportunity to uncover information with a later set of hurdles, which ultimately promotes the resolution of cases on the most reliable information available.[7]

This article will examine the dichotomy between discovery and evidentiary admissibility in civil litigation and arbitration. It will suggest that, contrary to the idea that principles of evidence have no role to play in arbitration, those principles may in fact be important both for counsel to argue and for arbitrators to consider, regardless of whether or not evidence proffered will ultimately be admitted. This is because evidence law was created for the purpose of weighing the reliability of evidence and articulating how a certain piece of evidence may or may not be used. The attorney prepared to make evidentiary

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the philosophy of broad discovery, the upcoming revisions to discovery in the Federal Rules of Civil Procedure, and the intent for more limited discovery under the rules for various arbitration regimes).

3. *See* discussion *infra* Part II.a.

4. FED. R. EVID. 401. The term "relevance" is encountered both in discussion of civil discovery under the Federal Rules of Civil Procedure, as well as in evidence law, as described by the Federal Rules of Evidence. As will be discussed further, the term has differing meanings in the two settings. However, it is useful to point out that the scope of "relevant" material in the discovery sphere has undergone recent changes, with the enacting of the 2015 revisions to the Federal Rules of Civil Procedure. *See* Radvany, *supra* note 2, at Part II.C.1.

5. FED. R. EVID. 403.

6. *See* discussion *infra* Part I (discussing FED R. CIV. P. 26 and the scope of "relevance" in discovery).

7. *See infra* Part I (explaining the reasons particular forms of evidence or testimony are excluded).

arguments on issues raised by a proffered piece of evidence—despite the fact that in arbitration, the evidence will likely be admitted—is in the better position to control how much weight the arbitrator gives that evidence.[8] Thus, if inadmissible evidence may be admitted by an arbitrator "for what it's worth," it can be helpful if attorneys representing clients in arbitration are able to explain why that evidence would be otherwise inadmissible under the rules of evidence at trial. This explanation can be given in the form of an objection to the offered evidence or strategically placed within that attorney's closing argument.

Part I of this paper will outline the theory of the Federal Rules of Evidence, focusing on the idea that proffered evidence must satisfy certain qualifications to be admitted or be excluded as unreliable for one of several reasons. Part II will compare various arbitral rule regimes, showing how they largely do not lay out a framework for admission or exclusion of evidence. Rather, arbitrators may admit whatever they wish—with the expectation that they will give the evidence whatever weight they deem to be appropriate—provided that the evidence is relevant and material. Part II will also discuss the latitude that arbitrators have to admit or not admit evidence. Part III will discuss how arbitrators are affected by evidence that might be excluded under the Federal Rules of Evidence, and whether or not there are still reasons counsel might be interested in presenting evidence based arguments during arbitration.

I. THE THEORY OF EVIDENCE RULES

This section will outline the overall philosophy of, and some specific rules found within, the Federal Rules of Evidence ("FRE"). I begin by contrasting the FRE's constraints on admission of evidence discovered, with the relatively broad and unconstrained nature of the prior discovery phase itself. Thus, having provided for relatively broad access to material through discovery, the structured approach to evidentiary admissibility seeks to promote the resolution of the dispute

8. In contrast, some commentators have suggested that certain factors have developed the arbitral forum beyond being simply a venue where evidence rules are relaxed, and that arbitration has instead become, for some lawyers, a refuge the primary advantage of which is that evidence rules are rarely consciously acknowledged, and in many cases openly ignored. *See* discussion *infra* Part II (discussing the overall decline of jury trials, the relative litigation inexperience of present day litigators, the perception of evidence law as a discrete subject within the legal community, and the strengths and weaknesses of individual arbitrators).

on the more, rather than less, reliable forms of the information discovered.[9]

The FRE are comprised of eleven articles, which collectively regulate what documents, testimony, or physical evidence may be presented to the fact finder and how that presentation must occur.[10] The common-law evidence tradition underpinning the FRE — particularly the doctrine of hearsay—established certain policies about which forms of evidence are more reliable, less reliable, or whose reliability are contingent on other factors.[11] In general, the FRE require evidence to be authenticated on the record,[12] relevant to the merits of the legal dispute itself or the bias or credibility of witnesses,[13] not unfairly prejudicial,[14] and not derived from inadmissible hearsay.[15] A person must generally proffer testimony with personal knowledge about that which they are testifying.[16] Speculation and opinion by lay witnesses is generally prohibited.[17] However, subject to proper qualification, "expert" witnesses may be proffered and subsequently provide opinion testimony based upon their area of expertise to assist the trier of fact in situations where such knowledge is necessary to understand or determine a fact at issue.[18]

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9. *See generally* FED. R. EVID. 401, 402, 807; *see also* Tamara F. Lawson, *Can Fingerprints Lie?: Re-Weighing Fingerprint Evidence in Criminal Jury Trials*, 31 AM. J. CRIM. L. 1, 14 (2003) (characterizing FRE 401 and 402 as establishing a generalized "requirement of the Federal Rules of Evidence that only relevant and reliable evidence be admitted").

10. For a review of this, see PETER MURPHY, MURPHY ON EVIDENCE 18–19 (6th ed. 1996) ("Evidence is said to be admissible, or receivable, if it may be received by the court for the purpose of proving facts, when judged by the law of evidence.").

11. *See* Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 370 (1991–1992) (discussing the principle that hearsay is considered less reliable than live testimony because live testimony is subject to trial safeguards that help the fact finder evaluate its trustworthiness and necessity).

12. FED. R. EVID. art. IX.

13. FED. R. EVID. art. IV.

14. FED. R. EVID. 403.

15. FED. R. EVID. art. VIII.

16. FED. R. EVID. 602.

17. FED. R. EVID. 701; *see also* Joseph Richard Ward III, *The Interpretation of Context: How Some Federal Circuits Are Bypassing the Familiar Requirement of Firsthand Knowledge for Lay Witnesses*, 15 LOY. J. PUB. INT. L 117, 120 (2013) ("Rule 701 limits lay opinion testimony to those opinions or inferences that are rationally based on the perception of the witness, helpful to a clear understanding of the witness's testimony, and not based on the type of specialized knowledge reserved for expert witnesses in Rule 702").

18. FED. R. EVID. 702.

The role of evidence law is relatively narrow; thus, the FRE identify only certain narrow, nuanced issues pertaining to specific pieces of evidence or testimony. Similarly, the FRE contemplate the exclusion of the evidence based upon those limited issues. Other phases of the American litigation process occurring prior to trial provide differing features and safeguards that ensure parties will have all material to which they are entitled to *attempt* admitting as evidence.[19] Specifically, the civil discovery process functions in a broad fashion, without reference to whether material discovered may ultimately be admissible at trial.

Civil discovery exists to give parties the opportunity to acquire the information necessary to substantiate the claims or defenses that comprise their case. The discovery phase of litigation, governed by rules found within the Federal Rules of Civil Procedure, is substantively over-inclusive, revealing to the parties more information than may ultimately be admissible. The 2015 Advisory Committee note to the newly revised Rule 26 states that "[i]nformation is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case" but does not reference evidentiary admissibility.[20]

The purpose of this rule is to give parties the best opportunity to discover the underlying facts and to construct the strongest, most complete case possible; the law of evidence resolves the evidence's admissibility at a later stage in the litigation process.[21] The rules thus establish a far-reaching ability to discover evidence that may not be admissible at trial. This is preferable because while lawyers are building their cases, it is unclear which facts they may be able to present at trial. Information made known to parties through discovery—even from inadmissible evidence—allows parties to seek out admissible evidence to show those facts.[22]

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19. *See* FED. R. CIV. P. 26 (providing various requirements governing disclosure during the discovery phase).

20. FED. R. CIV. P. 26; *see* Radvany, *supra* note 2, at 712 (indicating the particular changes made).

21. *See* Hickman v. Taylor, 329 U.S. 495, 507–08 (1947) (stating that the rules of discovery are to be accorded "broad and liberal treatment," because "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation"); *see also* S.E.C. v. Kramer, 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) (recently applying and repeatedly citing to *Hickman* in context of securities litigation-related discovery issues).

22. In re Cooper Tire & Rubber Co., 568 F.3d 1180, 1191 (10th Cir. 2009) (allowing discovery of information on a different model of tires than the model at issue in the case on the basis that it "could tend to lead to discoverable evidence").

Ultimately, the discovery/admissibility rule structure errs on the side of allowing parties to discover information that may not be admissible, rather than potentially preventing them from even knowing of the existence of such information.[23] Discovery takes place at a phase in the litigation process in which parties are both identifying issues and assessing the scope of those issues.[24] Thus, it is impossible to make even a threshold determination of what will ultimately be "relevant" in the evidentiary sense at a future trial on the merits. Therefore, the standard for "relevance" during the discovery phase must be broader, both (1) to accomplish the different purpose of the discovery phase of litigation, and (2) to prevent discovery from devolving into a premature trial-within-a-trial on the merits, particularly at a time when the scope of the factual inquiry is still developing.

During the discovery phase, for example, a witness may usually be deposed and asked about any relevant, non-privileged matter, although counsel may reach other agreements between themselves that limit the scope of a particular deposition.[25] The witness's answer at the deposition may implicate hearsay concerns, reveal a prior bad act, or cause the witness to conjecture or speculate.

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23. However, the most recent changes to FED. R. CIV. P. 26 did make certain changes to the "proportionality" requirement, although it remains to be seen how they will affect discovery in practice. *See* Radvany, *supra* note 2, at 737–38 (considering the outcomes that could result from these changes to Rule 26).

24. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) ("Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. . . . Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.") (citing *Hickman*) (internal citations omitted).

25. *See, e.g.*, In re Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 619 (D. Nev. 1998) ("A party may instruct a deponent not to answer *only* when necessary to *preserve a privilege*, to enforce a limitation on evidence directed by the court, or to present a motion") (emphasis added) (citing FED. R. CIV. P. 30(d)(1)); Rohrbough v. Harris, 549 F.3d 1313, 1329 (10th Cir. 2008) (Lucero, J., dissenting) (stating that the purpose of FED. R. CIV. P. 30 is to allow parties to be "safe in the knowledge that objectionable [deposition] questions and answers would not be admitted at trial."). *See also* Eric B. Miller, *Lawyers Gone Wild: Are Depositions Still A "Civil" Procedure?*, 42 CONN. L. REV. 1527, 1536 (2010) ("Under the Federal Rules of Civil Procedure, objections to the form of the question are proper if the question is: 1. Leading or suggestive; 2. Ambiguous or uncertain; 3. Compound; 4. Assum[ing] facts not in evidence; 5. Call[ing] for a narration; 6. Call[ing] for speculation or conjecture; or 7. Argumentative.") (internal marks omitted). *See generally* E. Stewart Moritz, *The Lawyer Doth Protest Too Much, Methinks: Reconsidering the Contemporaneous Objection Requirement in Depositions*, 72 U. CIN. L. REV. 1353, 1365–74 (2004) (discussing the history of objections during depositions).

At trial, that same witness would be prohibited from providing the same testimony by the FRE, because the rules reflect a policy that evidence of that sort proffered in such a way is unreliable for the trier of fact or could taint their ability to reach a decision on the merits. During the discovery phase, however, such objections are prohibited at deposition because the witness's answer might, as discussed above, provide a party with the knowledge to derive admissible evidence establishing what the witness testified to, but from another admissible source.[26] Additionally, witness testimony given free from evidentiary objection gives the party questioning the witness the ability to delve into other avenues of inquiry which may subsequently establish that something to which the witness testified but which appeared inadmissible is actually admissible, but for a reason that is not immediately apparent.[27]

A second presumption that helps frame the policies of the FRE is the idea that the judge who rules on the admissibility of a piece of evidence is separate from the fact finder, and performs a "gatekeeper" function.[28] The reason the judge must exclude unreliable and unduly prejudicial evidence from the fact finder is because the fact finder cannot be trusted to accurately gauge reliability or may be prejudiced, and thus might be led astray; but at the same time, the reason the trier of fact, and not the judge, is intended to determine the ultimate outcome is because they have not been exposed to the unreliable evidence at all.[29]

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26. Although some objections are permitted during depositions and may be argued in front of a Magistrate Judge, counsel attempting to object to clearly relevant non-privileged testimony run the risk of sanctions. *See* First Tennessee Bank v. Fed. Deposit Ins. Corp., 108 F.R.D. 640, 640 (E.D. Tenn. 1985) ("It is well-settled that counsel should never instruct a witness not to answer a question during a deposition unless the question seeks privileged information or unless counsel wishes to adjourn the deposition for the purpose of seeking a protective order from what he or she believes is annoying, embarrassing, oppressive or bad faith conduct by adverse counsel.").

27. Several of the Federal Rules of Evidence, discussed later, provide that evidence may be inadmissible for one purpose, yet admissible for another; however, the proponent of the evidence has the burden to articulate his or her proffered admissible purpose once an objection has been made. *See infra* Part I.A, C (discussing FRE 404, 801, 803, 804).

28. The "gatekeeper" is most specifically spoken of in the context of the judge's responsibility to prevent the jury from seeing unreliable expert evidence. *See, e.g.*, Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV 217, 221 (2006) (characterizing the case of expert testimony as being subject to a "strong" judicial gatekeeper function).

29. *See* Kathryn Cameron Walton, *An Exercise in Sound Discretion: Old Chief v. United States*, 76 N.C. L. REV. 1053, 1080–81 (1998) ("[I]n the context of Rule

A. Relevance

The most fundamental substantive requirement for evidence to be admissible is that it be relevant.[30] Relevant evidence is any evidence that "has any tendency to make a fact more or less probable than it would be without the evidence."[31] However, not all of the Article IV rules that discuss relevance are intrinsically concerned with the reliability or unreliability of evidence.[32] In many cases, the various Article IV exclusionary rules represent policy-based determinations about how certain evidence is likely to be perceived or used by jurors.[33] The exclusionary rationale of these rules presumes that the

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403, prejudice may not merely refer to an appeal to emotion. Rather, prejudice may occur when facts cause the jurors to base their decision on feelings, such as hostility or sympathy, and to disregard the probative worth of the evidence presented."). *Compare* Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 REV. LITIG. 117, 123–25 (2013) (discussing "Ironic Mental Processes" and "Mental Contamination" as reasons to separate the function of the judge from the function of the jury), *with* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1451–52 (2007) (describing the "presumption that jurors can understand and follow limiting instructions" as "plainly . . . a new legal fiction").

30. *See* David A. Schlueter, *Evidence*, 22 TEX. TECH L. REV. 573, 578 (1991) (characterizing relevance as "[t]he minimum threshold for any offered item of evidence").

31. FED. R. EVID. 401(a).

32. *See* 2 MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 403:1 (7th ed.) ("Evidence which meets the standard of relevancy, Rule 401, may nevertheless possess attendant disadvantages of sufficient importance to call for its exclusion."). There is some disagreement amongst academics, however, about how to interpret the framework of a general rule of relevancy, and its subsequent modifications, limitations, and exclusions. *Compare* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1522 (1999) (arguing that the cumulative impact of Rules 401–403 works to "make economic sense") *with* Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1677–78 (2001) (arguing that contrary to pure economic sense, Rule 403 is designed to be "tilted towards admissibility," and that the "substantially outweighed" language "indicates that the drafters were not thinking in purely cost-benefit, much less economic, terms").

33. There is a distinction between rules that foster "epistemic" versus "extrinsic" goals in evidence law, the latter most classically showcased by rules such as the exclusion of subsequent remedial measures, liability insurance, or offers made in settlement negotiations. The "extrinsic" policies underlying such rules—that they "are designed to create the proper incentives for socially desirable out-of-court conduct"—are, in these cases, given priority above the epistemic goal of providing the finder of fact with as much relevant information as possible. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 167–68 (2006) (characterizing various policy-based rules of evidence as seeking "extrinsic" goals, designed to "create incentives for socially desirable out-of-court

process as a whole may benefit from exclusion of such evidence, despite that evidence being relevant (at least in part).[34]

Rule 403 excludes evidence that is relevant but substantially more prejudicial than probative, because of the danger that the fact finder will be unduly influenced by the inflammatory nature of the evidence, relative to whatever the actual relevant purpose of the evidence may be.[35] Evidence may also be excluded for reasons other than the inflammatory nature of the material,[36] but the rule is most classically invoked in the context of material or testimony which has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one," such as "bias, sympathy, hatred, contempt, retribution or horror."[37] That said, the fact that the standard for exclusion is "substantially more" prejudicial than probative means that this rule still favors admissibility of relevant evidence, with judges conducting Rule 403 balancing tests in favor of the proponent of the evidence.[38]

Rule 404 excludes character evidence, *i.e.* evidence that attempts to prove that a party acted in a certain way on a certain occasion, based on the party's actions on previous occasions, or based on a party's personality or tendency to act in a relevant way.[39] Rule

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conduct" as the "exception," in comparison to most of the exclusionary rules aimed at "increasing the accuracy and efficiency of fact finding").

34. *Id.*

35. *See* United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979) ("Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance."). *See also* 2 MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 403:1 (7th ed.).

36. *See* 2 MICHAEL H. GRAHAM, § 403:1 (discussing "confus[ion of] the issues, misleading the jury, and considerations of undue delay, wasting time and needlessly presenting cumulative evidence").

37. *See* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 503 (1983) ("Current case law considers 'emotion' the hallmark of unfair prejudice."); 2 MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 403:1 (7th ed.); *see also* Brandom v. United States, 431 F.2d 1391, 1398 (7th Cir. 1970) ("Inflammatory, irrelevant evidence is improper and inadmissible. Under appropriate circumstances, its admission may constitute reversible error.").

38. *See* United States v. Morris, 79 F.3d 409, 412 (5th Cir. 1996) ("Because Rule 403 requires the exclusion of relevant evidence, it is an extraordinary measure that should be used sparingly."); *see also* 1 JACK B. WEINSTEIN & MARGARET A BERGER, WEINSTEIN'S EVIDENCE MANUAL § 6.02(1) (2017) ("The trial court should strike the balance in favor of admission in most cases.)

39. FED. R. EVID. 404. The psychological consistency of the use of character traits has been under debate for some time, with scholars broadly acknowledging some basis upon which to measure future conduct, but disagreeing on how to apply

404—which codifies long-standing common law practice of excluding character evidence—stems from a traditional acknowledgment that there may be some marginal relevance to a person's propensity to act a certain way, but excludes evidence that is susceptible to that chain of inference alone.[40] This is because character evidence by definition does not serve as direct evidence of the specific act with which a given defendant is charged with, and it raises a substantial danger of prejudice.[41] A decision made on such a calculus falls quite short of the standards desired in legal decision making, despite the fact that character evidence is acknowledged to be, on some level, "relevant" under the rules.[42]

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any objective measurement apparatus to determine consistency. *See generally* David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 26–29 (1987) (outlining various research approaches through the 20th century).

40. *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, *even though such facts might logically be persuasive* that he is by propensity a probable perpetrator of the crime . . . [t]he overriding policy of excluding such evidence, *despite its admitted probative value*, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice" (emphasis added)).

41. Some have suggested that the danger of the jury simply inferring that, because of prior bad acts, the defendant is a "bad man" is in fact more severe than the drawing of a direct propensity inference. *See* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 525 (1983) ("[The greatest danger] is that [the jury members] will convict because their conclusion that defendant is a 'bad person' leads them to draw inferences concerning his likely conduct that are not reasonable or are believed with an unreasonable degree of certainty."); *see also* Michelson v. United States, 335 U.S. 469, 489 (1948) ("The common law has not grown in the tradition of convicting a man and sending him to prison because he is generally a bad man or generally regarded as one. General bad character, much less general bad reputation, has not yet become a criminal offense in our scheme. Our whole tradition is that a man can be punished by criminal sanctions only for specific acts defined beforehand to be criminal, not for general misconduct or bearing a reputation for such misconduct."); United States v. Avarello, 592 F.2d 1339, 1346 (5th Cir. 1979) ("The danger inherent in evidence of prior convictions is that juries may convict a defendant because he is a 'bad man' rather than because evidence of the crime of which he is charged has proved him guilty.").

42. *See* Jones v. Southern Pacific R.R., 962 F.2d 447, 449 (5th Cir. 1992) ("The reason for the rule is that such character evidence is of slight probative value and tends to distract the trier of fact from the main question of what actually happened on a particular occasion."). The specific and long-standing mistrust of fact finders giving rise to this rule is such that the rule against "circumstantial" use of character evidence "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence." *See* FED. R. EVID. 404, 1974 Advisory Committee Note (discussing

Rule 407 prohibits introduction of evidence that after an injury occurred, "subsequent remedial measures" were taken that would perhaps have made the initial injury less likely to occur, for a number of reasons.[43] Despite the fact that evidence of these measures would arguably tend to suggest some consciousness of guilt or the existence of danger,[44] the FRE opt to exclude such evidence based on a policy that if evidence of remedial measures was admissible, there would be a disincentive to fix potentially dangerous situations post–injury.[45] Further, evidence of taking subsequent measures to make something safer is not necessarily probative of whether or not the prior state was so unsafe as to be grounds for legal liability; the classic standard for negligence being reasonable—rather than elevated—care, based on the information or technology available at the time of manufacture.[46]

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criminal cases specifically, but also acknowledging that circumstantial use is also prohibited in civil actions). Despite the Advisory Committee's acknowledgement of "basic relevancy," commentators still disagree about the actual basis of excluding character evidence. *See* David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 30–31 (1987) (contrasting whether character evidence is "logically irrelevant," of "little," or of "no probative value.").

43. FED. R. EVID. 407.

44. *See* David A. Schlueter, *Evidence*, 22 TEX. TECH L. REV. 573, 587–88 (1991) ("The logical relevance of a subsequent repair is that it may amount to an admission of fault by the responsible party"). But, to the degree that such evidence cannot be admitted, courts have explained that even if admitted, such evidence would have relatively low weight. *Compare* In re Air Crash Disaster, 86 F.3d 498, 529 (6th Cir. 1996) (describing how Rule 407 excludes a class of evidence which is "very poor proof of negligence or defectiveness") *with* Rimkus v. Nw. Colorado Ski Corp., 706 F.2d 1060, 1064 (10th Cir. 1983) (stating as an example that some conduct "would also be consistent with an injury due to contributory negligence").

45. *See* Rimkus, 706 F.2d at 1064 ("One of the general policies behind Rule 407 is that it encourages desirable repairs"); *see also* FED. R. EVID. 407 advisory committee's note to 1972 proposed rules ("[The more impressive] ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety."). In this way, Rule 407 provides the classic case of a rule of evidence concerned primarily with promoting a substantive policy goal, specifically, public safety. *See* David P. Leonard, *Rules of Evidence and Substantive Policy*, 25 LOY. L.A. L. REV. 797, 803 (1992) (using the rule as the example of one that "has an intended positive effect on the important substantive policy of accident deduction but at some loss to the goal of accurate adjudication"); *see also* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1531 (1999) (framing the rationale for Rule 407 economically and concluding that the benefits of encouraging repairs surpass the future evidentiary cost of exclusion).

46. *See* Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983) ("The jury's attention should be directed to whether the product was reasonably safe at the time it was manufactured"); *see also* Columbia & P. S. R. Co. v. Hawthorne, 144 U.S. 202, 208 (1892) (explaining the rationale by reference to

Rule 408 excludes from relevancy any mention of compromise offers, settlement discussions, and statements made in negotiation.[47] Although such statements could tend to show acknowledgement of liability, the Advisory Committee specifically acknowledges that a desire to settle may well be motivated by ancillary concerns, rather than admission of fault, in which case evidence of the settlement offer would be irrelevant.[48] Moreover, a strong public policy seeking efficiency in the settlement of disputes is encouraged by Rule 408's protection of such discussions.[49] Somewhat similarly, Rule 411 excludes mention of whether a party carries insurance,[50] on the basis that a fact finder with knowledge that a party *either* (a) carries insurance, which would be obligated to pay any liability ultimately found, or (b) was injured, but has already been compensated by insurance yet is still seeking additional damages may be influenced by that knowledge.[51] Moreover, like with the making of subsequent changes under Rule 407 and the offering of settlement under Rule 408, courts have made the point that part of the rationale of Rule 411 is that the mere carrying of insurance is not direct proof of liability.[52]

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older English case law, which criticized the logic that "because the world gets wiser as it gets older, therefore it was foolish before") (citing Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869)).

47. FED. R. EVID. 408.

48. *See* Sternberger v. United States, 401 F.2d 1012, 1018 (Ct. Cl. 1968) ("An offer in settlement is ordinarily not admissible, for it is deemed to be an indication only of a desire for peace and not an admission.").

49. FED. R. EVID. 408 advisory committee's note to 1972 proposed rules. *See also* Perzinski v. Chevron Chemical Co., 503 F.2d 654, 658 (7th Cir. 1974) ("[T]he law favors settlements of controversies and if an offer of a dollar amount by way of compromise were to be taken as an admission of liability, voluntary efforts at settlement would be chilled."); Olin Corp. v. Insurance Company of North America, 603 F. Supp. 445, 449 (S.D.N.Y.) *on reargument,* 607 F. Supp. 1377 (S.D.N.Y. 1985) ("The purpose of the rule is to encourage full and frank disclosure between the parties in order to promote settlements rather than protracted litigation.").

50. FED. R. EVID. 411.

51. *See e.g.*, LaMade v. Wilson, 512 F.2d 1348, 1350 (D.C. Cir. 1975) ("[A]dmission of evidence concerning an injured party's receipt of collateral social insurance benefits constitutes reversible error, because it involves a substantial likelihood of prejudicial impact and the possibility of its misuse by the jury outweighs its probative value."); Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751, 758 (3d Cir. 1976) ("Knowledge that a party is insured may also affect a verdict if the jury knows that some of the loss has been paid by insurance or that it would satisfy a judgment against a defendant.").

52. *See* Cox v. E. I. Du Pont de Nemours & Co., 38 F.R.D. 8, 9 (W.D.S.C. 1965) (existence of liability insurance "can throw no light on the question of negligence or other circumstances of the accident").

B. Hearsay

Hearsay is an out-of-court statement being offered in court to prove the truth of whatever the statement asserts.[53] Hearsay most classically occurs when somebody is testifying in court for the purpose of establishing a fact which they know only based upon some other person relating that fact to them;[54] however, the doctrine expands to far more than mere oral testimony.[55] The reason it is desirable to exclude hearsay is because when a situation such as this occurs, it is impossible to go beyond taking the word of the original speaker for the fact of whatever the statement asserts.[56] However, the idea that parties have a right to interrogate, cross examine, and otherwise probe the testimony being offered against them has been central to the Anglo-American common law process ever since the repudiation of the "Star Chamber" and other such inquisitorial methods used to convict Sir Walter Raleigh.[57]

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53. FED. R. EVID. 801.

54. Michael S. Pardo characterizes the admission of such classic hearsay as essentially providing the jury with an epistemological surrogate for first-hand knowledge, if the statement related by the testifying witness were allowed to be admitted to establish the truth of the matter itself. *See* Michael S. Pardo, *Testimony*, 82 TUL. L. REV. 119, 150 (2007) ("From an epistemological standpoint, hearsay statements function like formal, in-court testimony.").

55. For the reason that documents are often comprised in whole or in part of statements and often are considered statements in and of themselves, a number of hearsay exceptions exist which refer to hearsay specifically in document-based form. *See, e.g.*, Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find Out About It*, 17 YALE J. L. & TECH. 1 (2015) (discussing the "ancient document exception" in the modern context); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1415 (1987) (discussing documents containing statements of multiple declarants); Fred Warren Bennett, *Federal Rule of Evidence 803(8): The Use of Public Records in Civil and Criminal Cases*, 21 AM. J. TRIAL ADVOC. 229, 229 (1997) (discussing the "public records exception" for certain types of documents presumed to be reliable and therefore admissible); Thomas P. Egan & Thomas J. Cunningham, *Admission of Business Records into Evidence: Using the Business Records Exception and Other Techniques*, 30 DUQ. L. REV. 205 (1992) (discussing the "business records exception" for certain documents regularly produced in the course of business).

56. The common-law commentator on evidence James Bradley Thayer theorized the rationale for the hearsay rule as deriving from the fact that while jurors could construe evidence presented to them "in any way," witnesses "could testify only of what they had seen and heard." Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 918 (1937).

57. The existence of, and doctrines surrounding, the Confrontation Clause of the 6th Amendment of the U.S. Constitution are closely linked to hearsay concerns,

More specifically, hearsay is undesirable because whether or not the statement is reliable cannot be determined in the declarant's absence.[58] If John, an eyewitness to an accident, tells Shirley, who has just arrived at the scene and did not see the accident, that the truck which ran through the intersection and hit a pedestrian before speeding off was "a green truck" and only Shirley is available to testify at trial, the defense cannot conduct the cross examination that would reveal that John was colorblind.[59] Most testimony given by witnesses at trial is susceptible to at least one of the several testimonial infirmities: the passage of time since the event, precision of the witness's memory, verbal ambiguity from a witness's choice of words, insincerity, and sheer fault in perception.[60] The hearsay doctrine exists because while the testimony of a witness appearing under oath at trial can be tested against these, the statement of a non-appearing witness generally cannot.[61]

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to the degree that defendants have a constitutional right to confront witnesses who are the source of "testimonial" hearsay evidence offered against them. The Supreme Court has recently re-acknowledged the specific historical basis for this right. *See* Ohio v. Clark, 135 S. Ct. 2173, 2182 (2015) (describing "the notorious use of ex parte examination in Sir Walter Raleigh's trial for treason, which we have frequently identified as 'the principal evil at which the Confrontation Clause was directed.'" (quoting Crawford v. Washington, 541 U.S. 36, 50 (2004))).

58. *See* Wm. Garth Snider, *The Linguistic Hearsay Rule: A Jurisprudential Tool*, 32 GONZ. L. REV. 331, 334 (1997) (suggesting that the hearsay rule exists as a means of "subjecting the credibility of the witness testimony to an analysis of the witness' perception, memory, and narration."). Commentators have further noted that the reliability of even a first-hand eyewitness can be questionable at best. *See* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1452–53 (2007) (contrasting the traditional Wigmorean view of eyewitness reliability with the more modern evidence challenging juror competence to weigh the reliability of eyewitness testimony, or factors weighing for or against eyewitness testimony).

59. Although the colorblindness example used here is the author's own variation, this example is broadly similar to the hypothetical provided by the *Handbook of Federal Evidence*, which characterizes circumstances similar to that described above as "the classic hearsay statement." 6 MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 801:1 (7th ed.).

60. FED. R. EVID. 801 advisory committee's note to 1972 proposed rules. *See also* Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974) (discussing the infirmities at play with hearsay testimony); Michael S. Pardo, *Testimony*, 82 TUL. L. REV. 119, 150 (2007) (referencing "the law's preference for in-court testimony" as more reliable in contrast to hearsay, based on the oath and threat of perjury, the ability of the jury to examine witness demeanor, and the possibility of cross-examination).

61. *See* United States v. Parry, 649 F.2d 292, 294 (5th Cir. 1981) ("[W]hen an out-of-court statement is offered as a testimonial assertion of the truth of the matter stated, we are vitally interested in the credibility of the out-of-court declarant. Because a statement made out of court is not exposed to the normal credibility safeguards of oath, presence at trial, and cross-examination, the jury has no basis for

Hearsay is perhaps considered to be a confusing doctrine because of the myriad intricacies—the several-dozen "exclusions" and "exceptions" to the rule—which modify the exclusionary effect of the doctrine for, at best, murky reasons.[62] Without going into detail, the basis of providing for admission of certain hearsay evidence under one of the various exceptions is that certain classes of evidence are considered to be less susceptible to the infirmities, and more likely to be reliable for one reason or another. Ultimately, hearsay *itself* is a simple doctrine: direct, rather than secondary evidence ought to be required to prove one's case. However, much scholarly ink has been spilt in the debate about whether the various "exceptions" themselves do, in fact, properly identify "more reliable" forms of evidence, in cases where secondhand evidence may be admitted; the following subsection will discuss a handful of these debated points.

C. Definitions, Exemptions, Exclusions, and Exceptions

Despite the apparently rigid doctrine of exclusion laid down by Rules 801 and 802, much evidence and testimony from secondhand evidence is admitted at trial. The definitions provided for the words "statement,"[63] "declarant,"[64] and "hearsay"[65] within Rule 801 as legal terms of art actually exclude from the very scope of hearsay many

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evaluating the declarant's trustworthiness and thus his statement is considered unreliable.")

62. *See, e.g.*, Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 882–83 (2015) ("The hearsay rule, a vexingly complex doctrine that purports to bar secondhand evidence in court, has received significant attention from legal academics, who have pored over its myriad intricacies in an effort to understand fully its contours and implications. The difficulties that legal academics have confronted in developing a coherent understanding of the hearsay doctrine is evidenced in part by their inability to agree on the rationale for the rule's existence."); *see also* Pardo, 82 TUL. L. REV. at 148 (describing "the Byzantine structure of the [hearsay] rules" as "a trap for the wary" that may either contribute or detract from just results); Glenn Weissenberger, *Reconstructing the Definition of Hearsay*, 57 Ohio St. L.J. 1525 (1996) ("Evidence professors seem to have a pathological compulsion to scrutinize and reorder the hearsay system.").

63. FED. R. EVID. 801(a) ("Statement. 'Statement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.").

64. FED. R. EVID. 801(b) ("Declarant. 'Declarant' means the person who made the statement.").

65. FED. R. EVID. 801(c) ("Hearsay. 'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.").

things that would facially appear to be barred under the doctrine.[66] Perhaps most commonly, almost any "statements" made by "declarants" can be admitted for reasons which do not seek to "prove the truth of the matter asserted," if the mere fact that the statement was made, or that someone heard it, or some other reason makes the existence of the statement in and of itself relevant, under Rule 401.[67] Also, while many declarants make statements through documents—*i.e.*, communicated through a written medium—many documents contain "statements" which are made by machines, rather than "declarants;" under the definition, "declarants" must be "people."[68] Finally, many apparent statements are not actually considered to be statements under all circumstances, such as testimony that a potentially hearsay declarant asked the testifying witness the question, "How are you doing today?" Questions—and also imperative commands, such as "stay where you are"—may not contain an assertion of anything, in the way that the statement "The sky is blue"

66. *See* Glen Weissenberger, *Unintended Implications of Speech and the Definition of Hearsay*, 65 TEMP. L. REV. 857 (1992) ("[I]f conduct is not intended as an assertion, it cannot be hearsay. Likewise, conduct and oral communication intended to be assertive, but offered to prove something distinct from the intended fact to be communicated, are not hearsay. And, of course, where the evidence is not hearsay, it cannot be excluded by the hearsay proscription.").

67. "A statement may be logically relevant in two ways: (1) the mere fact that it was made, or heard, by a particular person, regardless of its truth [or] falsity, may tend to establish an ultimate fact in the case; or (2) the statement may be relevant only if the statement is true." Norman M. Garland, *An Overview of Relevance and Hearsay: A Nine Step Analytical Guide*, 22 Sw. U. L. Rev. 1039, 1052 (1993); *see also* Dutton v. Evans, 400 U.S. 74, 88 (1970) ("The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements."); United States v. Bursey, 85 F.3d 293, 296 (7th Cir. 1996) ("[S]tatements that are offered not to prove 'the truth of the matter asserted,' but for some other legitimate purpose, do not qualify as hearsay.").

68. "A printout of machine-generated information, as opposed to a printout of information entered into a machine by a person, does not constitute hearsay because a machine is not a person and therefore not a declarant capable of making a statement." People v. Dinardo, 801 N.W.2d 73, 79 (2010) (discussing police breath test machine). However, the testimony of Police Officer A that Police Officer B told him or her, "This breath test machine was inspected this morning for use and is properly calibrated" would be hearsay, if it was necessary to show not only that the breath test machine indicated that the driver was drunk but also that it had been recently inspected and calibrated.

clearly asserts some putative truth.[69] Thus, such oral declarations may in fact fail the "statement" part of the definition of "hearsay."[70]

Conversely, however, some of those definitions confusingly *include* things that would facially appear outside the purview, or contain nuances that appear to go directly against the examples laid out above. For example, under certain circumstances, the attempt to admit the lack of a statement—silence—can be deemed hearsay.[71] A report containing many readouts of machines compiled by a lab tech who uses those readouts to reach some further conclusion now contains an asserted truth value, predicated on the inferential statements of the lab tech. Finally, Rule 801(d) lays out a host of things which, despite meeting the definitions in 801(a), (b), and (c), are nonetheless "Statements That Are Not Hearsay."[72]

The nuances of what is or is not even *subject* to the hearsay bar from the outset, under Rule 801, is emblematic of why hearsay is

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69. *See, e.g.*, United States v. Rodriguez-Lopez, 565 F.3d 312, 314 (6th Cir. 2009) ("[I]f the statements were questions or commands, they could not—absent some indication that the statements were actually code for something else—be offered for their truth because they would not be assertive speech at all. They would not assert a proposition that could be true or false."); United States v. Thomas, 451 F.3d 543, 548 (8th Cir. 2006) ("Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay."); United States v. Wright, 343 F.3d 849, 865 (6th Cir. 2003) ("[A] question is typically not hearsay because it does not assert the truth or falsity of a fact. A question merely seeks answers and usually has no factual content."); Quartararo v. Hanslmaier, 186 F.3d 91, 98 (2d Cir. 1999) ("An inquiry is not an 'assertion,' and accordingly is not and cannot be a hearsay statement.").

70. In a case where a U.S. marshal testified that he overheard a witness tell the defendant that the price of his favorable testimony was $10,000, the effect of what was overheard was merely the demand of "give me $10,000," and the issue therefore becomes only the credibility of whether the marshal was reporting the demand correctly. *See* United States v. Montana, 199 F.3d 947, 950 (7th Cir. 1999) ("Performative utterances are not within the scope of the hearsay rule, because they do not make any truth claims. Had the marshal overheard Dodd tell Montana, 'your father has promised me $10,000,' Dodd's overheard statement would have been hearsay, because its value as evidence would have depended on its being truthful, that is, on such a promise having actually been made.").

71. *See* Lisa Kern Griffin, *Silence, Confessions, and the New Accuracy Imperative*, 65 DUKE L.J. 697, 708 (2016) ("[S]ilence in response to a statement by someone else can qualify as a defendant's adoption of that statement for purposes of the exemption of a party's own admissions from the hearsay prohibition."); *see also* United States v. Hove, 52 F.3d 233, 236–37 (9th Cir. 1995) ("Silence may constitute an adoption or belief in the truth of a statement if, under the circumstances, an innocent person would have responded to the statement."); but see Jackson v. United States, 250 F.2d 897, 900 (5th Cir. 1958) ("Silence, in the absence of a duty to speak, is not an admission.").

72. FED. R. EVID. 801(d).

somewhat of a contentious subject. The "bar" on hearsay in 801 appears rigid, but only to the degree that it is clear to what 801 applies, which is a matter altogether more complicated. Then, in 801(d), several things are summarily excluded from the definition, for reasons that appear to have little to do with reliability,[73] or the reliability of which is questionable at best.[74] But even further, to the degree that the later rules—Rules 803 and 804—appear to subsequently establish specific, equally rigid "exceptions" to hearsay based upon the supposed "reliability" of some hearsay statements made under certain circumstances, the wisdom of the "reliability" in *those* rules is somewhat questionable. Satisfaction, however, of one of the exceptions often leads to relatively easy admission of hearsay testimony.

The vagueness of what is or is not hearsay under 801, compounded with around thirty subsequent exceptions whose wisdom and rationale are equally vague, has resulted in decades of scholarship and multiple conflicting, entrenched camps of practitioners, academics, and judges, supporting every possible combination of the following positions: whether the doctrine serves the purpose of promoting reliable evidence or not; whether the doctrine should be changed or not; whether the doctrine is in fact internally consistent or not; and whether their own or others' personal, individual comfort with the practical application and effective use of the existing doctrine plays any role whatsoever in the state of the present hearsay system.[75]

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73. The defendant's own statements are almost universally admitted against the defendant under 801(d)(2), on the rationale that the defendant must own their own words, and may elect to take the stand and deny or place into context the potentially problematic statements they themselves have made.

74. The statements of a "coconspirator," admitted under 801(d)(2)(E), bring up the questions of the applicability of the rule itself and how to prove by extrinsic evidence that the declarant witness is, in fact, a coconspirator. *See* Bourjaily v. United States, 483 U.S. 171, 176 (1987) (discussing the "preponderance of the evidence" standard rendering the coconspirator exception operable). There is also the further question of whether or not the potential motives of those who are in fact coconspirators may lead them to make wholly unreliable false statements in many or even most cases.

75. *See generally* David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1 (2009); Marilyn J. Ireland, *Deconstructing Hearsay's Structure: Toward A Witness Recollection Definition of Hearsay*, 43 VILL. L. REV. 529 (1998); James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203 (1995); Mueller, *supra* note 12, at 368; Roger C. Park, *Evidence Scholarship, Old and New*, 75 MINN. L. REV. 849 (1991); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339 (1987); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51 (1987); Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974); Ted Finman, *Implied Assertions As Hearsay: Some Criticisms of the Uniform Rules*

Turning specifically to the two rules providing exceptions to hearsay, Rule 803 provides exceptions that apply whether or not the original declarant is "available" as a witness,[76] and Rule 804 provides exceptions that only apply under circumstances where the declarant is considered to be "unavailable," as defined by the rule.[77] Both Rule 803 and Rule 804, as described by the Advisory Committee, represent the codification of principles that evolved out of the common law of hearsay;[78] however, it is some of these venerable exceptions that draw the sharpest criticism from commentators.

Under Rule 803, the theory is that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."[79] Three of the most venerable common law exceptions—old enough to still commonly be referred to in Latin as the *res gestae* exceptions—are 803(1)'s "Present Sense Impression," 803(2)'s "Excited Utterance," and 803(3)'s "Then-Existing Mental, Emotional, or Physical Condition" rules. A present sense impression is a statement "describing or explaining an event or condition, made while or immediately after the declarant perceived it."[80] An excited utterance is a statement "relating to a startling event or condition, made while the declarant was under the stress of excitement that [the event] caused."[81] Statements of then-existing mental, emotional, or physical condition are those which describe the declarant's then-existing "state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will."[82]

These three rules are classic examples of hearsay exceptions that are widely criticized as being based on unsubstantiated assumptions about what may make a statement "reliable," enough so

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of Evidence, 14 STAN. L. REV. 682 (1962); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

76. FED. R. EVID. 803.

77. FED. R. EVID. 804

78. FED. R. EVID. 803 advisory committee's note to 1972 proposed rules; FED. R. EVID. 804 advisory committee's note to 1972 proposed rules.

79. FED. R. EVID. 803 advisory committee's note to 1972 proposed rules.

80. FED. R. EVID. 803(1).

81. FED. R. EVID. 803(2).

82. FED. R. EVID. 803(3).

to relieve it from the harsh, exclusionary definition of 801.[83] The rationale for the present sense impression rule is that "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation."[84] Similarly, the rationale for the excited utterance rule is that the effect of a shocking, exciting, or otherwise extreme event upon a declarant "stills the capacity of reflection," and that statements they therefore make are unlikely to be consciously fabricated.[85] The "Then-Existing" rule of 803(3) is predicated upon similar ideas,[86] that the declarant is likely to be reliable in relating their immediate mental, physical, or emotional state.

However, the idea that contemporaneity in time and excitement of circumstance leads to reliability is "questionable at best,"[87] and even if assumed to be true, it remains difficult to establish what those two nexuses in fact were in any objective fashion. The Advisory Committee themselves even acknowledges that "the theory of Exception [paragraph] (2) has been criticized."[88] Also, there is no

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83. *See, e.g.*, Angela Conti & Brian Gitnik, *Federal Rule of Evidence 803(2): Problems with the Excited Utterance Exception to the Rule on Hearsay*, 14 ST. JOHN'S J. LEGAL COMMENT. 227, 250 (1999) (arguing that 803(2)'s "excited utterance rule" is "a legal doctrine based upon a psychological theory, and modern psychology has proven its core element to be a falsehood."); Moorehead, *supra* note 75, at 227–42 (arguing that neither excitedness in the context of 803(2) nor contemporaneity under 803(1) or 803(3) are reliable guarantors of trustworthiness or impossibility of fabrication); Aviva Orenstein, *"My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 180 (1997) (questioning the psychological basis for the excited utterance exception, and proposing a specific hearsay exception for survivors of rape and crimes involving sexual violence); *cf.* Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 914 (2001) (arguing that because present sense impressions poses only two of four potential hearsay risks, they are sufficiently reliable to warrant exception).

84. FED. R. EVID. 803 advisory committee's note to 1972 proposed rules.

85. *Id.* In a recent criticism of the rationale that such shocking or exciting statements are not susceptible to conscious fabrication, Prof. Alan G. Williams has recently argued that the statement from the famous scene in the movie *Casablanca* where Captain Louis Renault, seconds after Rick Blain shoots a Nazi officer, falsely says "Major Strasser has been shot—round up the usual suspects!"—a statement that would be admitted as substantive proof that Blain did not shoot Strasser, under the excited utterance exception. Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717 (2015).

86. The Advisory Committee calls Exception (3) "essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility." FED. R. EVID. 803 advisory committee's note to 1972 proposed rules.

87. Moorehead, *supra* note 75, at 228.

88. FED. R. EVID. 803 advisory committee's note to 1972 proposed rules.

reason to believe that this truly reduces any of the previously discussed testimonial infirmities which hearsay seeks to exclude.[89]

Rule 804 requires a showing that the declarant is "unavailable," but upon showing that they qualify as unavailable, certain statements may be admitted. Declarants are "unavailable" when the subject matter of testimony is privileged, when they defy a court order to testify, when they affirmatively testify that they do not remember the subject matter, when they are physically absent despite the proponent of the statement's reasonable attempts to procure their presence, or most classically, when the declarant is unable to testify at trial because they are infirm, ill, mentally incapable, or deceased.[90]

The classic exception within Rule 804 that raises questions of reliability is the "Statement Under the Belief of Imminent Death" exception, which allows "a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."[91] The classic, common-law basis for admission of such a statement is that no declarant "who is immediately going into the presence of his Maker, will do so with a lie on his lips."[92] However, similarly to the justifications for the *res gestae* exceptions to 803, it seems facially clear that there is no particular reason to believe a declarant will lose all ability to lie or misrepresent something, and in fact, there exist conceivable reasons why they could do the exact opposite; here, the Advisory Committee once again specifically acknowledges that "the original religious justification for the exception may have lost its conviction for some persons over the years."[93] Also as stated above, with this exception as well as the *res gestae* 803 exceptions, there is no particular reason to assume that their

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89. *See* Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 965 (1974) (discussing and critiquing the four testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory).

90. FED. R. EVID. 804(a)(1). *See also* Glen Weissenberger, *Federal Rules of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1081 (1987) (highlighting 804(a)'s distinction between unavailability of the declarant's person, and the testimony itself).

91. FED. R. EVID. 804(b)(2).

92. Regina v. Osman, 15 Cox Crim. Cas. 1, 3 (N. Wales Cir. 1881) (Lush, L.J.).

93. FED. R. EVID. 804 advisory committee note. Some commentators, however, have argued that despite the relative secularization of society in the modern era, "powerful psychological forces" still come to bear upon a declarant at the moment of death, giving rise to increased reliability of such deathbed statements. *See* Glen Weissenberger, *Federal Rules of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1107 (1987) ("In the more secular world, however, this rationale for the [deathbed] exception has largely been supplanted by the theory that the powerful psychological forces bearing on the declarant at the moment of death engender a compulsion to speak truthfully").

words will be less susceptible to the testimonial infirmities, even if it is assumed that the imminence of death does indeed have some effect upon the declarant's motivation to lie.

D. Opinions and Experts

Article VII of the FRE limits the ability of lay witnesses to give opinion based testimony, and regulates the "expert" witness who may give such testimony and the circumstances under which they may do so. Rule 701 states that unless a witness is testifying as an expert, opinion testimony is limited to that which is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[94] Rule 702 states that a witness "who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion."[95] However, they may do so only if their scientific, technical, or otherwise specialized knowledge is necessary for the fact finder to understand the evidence or determine a fact at issue; if their testimony is based on sufficient facts or data; if the testimony is the product of reliable principles and methods; and the expert has reliably applied those principles and methods to the facts of the instant case.[96]

Fact finders are not expected to be doctors, engineers, chemists, or to otherwise possess any preternatural abilities to understand the facts of any given case laid before them.[97] However, establishing the proof of one or more elements of many cases may require such specialized knowledge. As such, the law permits qualified individuals to come before the fact finder and explain to them how—based on the expertise generally relied upon by experts who *do* understand the technical or specialized subject matter—those facts should or should not be construed.[98]

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94. FED. R. EVID. 701.

95. FED. R. EVID. 702.

96. *Id.*

97. "(I)t is not to be inferred that the opinions of ordinary witnesses are competent as to subjects which require special study and skill and which are proper for the testimony of the expert as distinguished from the ordinary witness." Randolph v. Collectramatic, Inc., 590 F.2d 844, 847 (10th Cir. 1979) (quoting 2 BURR W. JONES & SPENCER A. GARD, JONES ON EVIDENCE, §14:3 (1972)).

98. In the forum of arbitration, however, this functions somewhat differently, as multiple arbitrator panels often include industry specialists, such as in construction arbitrations.

A lay person may testify to their "opinion" in circumstances where they testify to their state of mind at a particular point in time, based upon "relevant historical or narrative facts that the witness has perceived" which led them to believe a certain thing, and that state of mind is itself relevant.[99] In such a situation, testimony of the state of a lay person's mind at a time when they drew an inference based upon facts is "not the expression of an opinion within the meaning of the rule."[100]

The sharp divide between lay witnesses and experts shields the fact finder from accepting conjecture from sources other than those who have been shown to present some reliable basis for positing conjecture. The statement of a lay witness that is based "solely upon his own opinion, and which is merely a conclusion of an ultimate fact in issue, has no probative value."[101] The statement of a qualified expert, however, may be truly necessary in order to prove certain elements—causation, typically—which require not only facts to be established, but moreover interpreted or explained. In an insurance subrogation case subsequent to a restaurant fire, the insurer sought to recover from a company whose fluorescent light "ballast" arguably caused the fire; expert testimony was necessary, however, to explain a particular scientific principle which would have made it possible for ballast burning at 340 degrees to ignite a nearby stockpile of wood, which was shown to require an ignition temperature of 400 degrees or above.[102]

However, the requirements to certify the expert themselves provide another important shielding of the fact finder from unreliable opinion. In the above-mentioned dispute about causation of a fire, the expert testimony seeking to introduce the scientific theory explaining the difference in ignition temperature was excluded, on the basis that the proffered theory was "insufficiently reliable even for trained experts," under FRE 702.[103]

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99. Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 403 (3d Cir. 1980).

100. Phillips v. United States, 356 F.2d 297, 308 (9th Cir. 1965) (admitting lay witness opinion in a mail fraud case, where lay witnesses testified about their belief in the suitability of land for residential, recreational, and sound investment purposes, based upon the representations about the land in the fraudulent sales materials).

101. Schott Optical Glass, Inc. v. United States, 468 F. Supp. 1318, 1325 (Cust. Ct. 1979).

102. Truck Insurance Exchange v. MagneTek, Inc., 360 F.3d 1206, 1215 (10th Cir. 2004) (discussing "pyrolysis").

103. *Id.* at 1216.

Relatively recent Supreme Court cases[104] have expanded the realm of who and what may be considered an "expert," as well as the subject of expert testimony. Echoing those cases, Rule 702 provides important safeguards against charlatans, mystics, and hacks masquerading as experts, as well as against perhaps-legitimate experts who nonetheless peddle scientific theories of questionable veracity.[105] Although *Daubert* opened the doors to testimony that might not yet be "generally accepted" as practice in whatever the field of expertise was, the acceptance of a theory—alongside other checks such as peer review and replication of results—remains relevant under 702. *Kumho* expanded the definition of what constituted "expert testimony" beyond simple scientific testimony, allowing many individuals whose purported area of expertise may not require an advanced degree to nonetheless be qualified. However, the requirements that "experts" and the testimony they provide be avouchable in some way—whether by general acceptance, peer review, known error rate, repeatable process—and that the expert performed some specific application of their knowledge to the facts of the instant case ensures that the fact finder is not exposed to opinions which are either wholly unreliable, or not necessarily meaningful in the context of the specific case.

E. Authenticity & Personal Knowledge

Two other rules within the FRE concern principles that underlie all evidence that may potentially be offered. Within Article VI, which concerns "Witnesses," Rule 602 states that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."[106] Within Article IX, Rule 901 states that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[107]

There is a close relationship between authenticity and the need for personal knowledge, and each of the previously discussed

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104. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

105. *See* Truck Insurance Exchange v. MagneTek, Inc., 360 F.3d 1206, 1216 (10th Cir. 2004). (referring to the excluded testimony about the "pyrolysis" theory, the court somewhat apologetically acknowledged that "[t]hough the theory of long-term, low-temperature ignition of wood is an interesting one that eventually may be sufficiently tested and researched to serve as the basis for an expert opinion under Rule 702 . . . the foundation for pyrolysis has not yet reached that point").

106. FED. R. EVID. 602.

107. FED. R. EVID. 901.

principles of evidence law. "Authentication and identification," the Advisory Committee acknowledges, "represent a special aspect of relevancy."[108] The personal knowledge requirement guarantees that a witness actually did *witness* an event described, or perceived in some way the thing to which they testified. Personal knowledge bridges important gaps, such as those created by the hearsay exceptions; a witness who did not see an event—but who heard a declarant's statement about the event—has the level of personal knowledge necessary to give testimony about the statement. That testimony will be admissible if the statement is outside the definition of hearsay or falls within one of the exceptions or exclusions.

II. EVIDENCE RULES IN ARBITRATION

This Part shall discuss the various rules within different arbitration rule regimes. Arbitration is a creature of contract law, and parties have the option to exert significant control over the process. However, many parties opt to use bodies of rules promulgated by a variety of different mediation and dispute resolution organizations. These organizations have, over the years, provided rule regimes, each of which has some rule or series of rules describing how the arbitrator may control the introduction of evidence, and suggesting how to consider evidence entered when making their awards.

The treatment of evidence among arbitral regimes exhibit broad similarities in that arbitrators are generally given relatively wide latitude to admit what they wish. The specific treatment of evidence within the various bodies of rules, however, differs: some regimes cabin discussion of evidence to its own rules, while others package it within rules governing the overall conduct of the arbitration hearing. Unlike the FRE, none of these rules or rule regimes, however, provide a comprehensive framework for analyzing evidentiary admissibility. While some regimes reference the FRE, it is only to distinguish the need to follow them, rather than an incorporation of the explicit concepts of evidence law in the arbitral forum.

Prior to discussing the rule regimes, however, it is necessary to explain the federal statutory scheme within which those rules function.

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108. FED. R. EVID. 901 advisory committee's note to 1972 proposed rules.

A. *The Federal Arbitration Act, and Arbitration Generally*

In civil litigation, failure to properly apply the FRE can sometimes, although rarely, lead to reversal on appeal.[109] Arbitrations, however, largely exist to provide a means of dispute resolution where the result is final and non-appealable. Arbitration is "a matter of contract,"[110] which is further governed by a federal statute, the Federal Arbitration Act of 1925 ("FAA").[111] A party seeking to vacate an arbitration award based upon some purported error in the arbitrator's conduct or admission of evidence must, therefore, frame the challenge to state a claim under the FAA.

The FAA lays out certain statutory bases for judicial review of arbitral decisions. Also, under common law principles, which still arguably survive in some circuits, an arbitrator's decision can be reversed for "manifest disregard" of the law.[112] Under *Oxford Health Plans LLC v. Sutter*[113] and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[114] courts may only vacate in "unusual circumstances,"[115] because maintaining a limited judicial review is essential to preserve the efficiency value of arbitration as a method of dispute resolution.[116] Arbitration awards are not generally reviewable

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109. There is generally wide discretion under the FRE allowing impeachment of credibility to establish bias of witness. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988) (partial exclusion of an incomplete letter found to be "clear abuse of discretion"); United States v. Abel, 469 U.S. 45, 54–55 (1984) ("The standard of review applicable to the evidentiary rulings of the district court is abuse of discretion").

110. United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)

111. 9 U.S.C. § 10(a)(3) (2015). Because arbitration is also a creature of contract law, a flaw in the arbitration clause or the contract itself may give rise to a collateral attack, premised upon some substantive contract law doctrine. This form of attack is, however, beyond the scope of this article, as attacking the underlying validity of the contract or the clause under contract law does not take into account the conduct or process of the arbitration itself.

112. *See, e.g.*, Dewan v Walia, 544 F App'x 240, 242 (4th Cir 2013) (vacating an award that was the product of manifest disregard of the law).

113. 133 S. Ct. 2064, 2068 (2013).

114. 559 U.S. 662, 693 (2010).

115. *See* Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 693 (2010) (both quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995)).

116. *Oxford*, 133 S. Ct., at 2068 (interpreting Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 588 (2008)).

for errors of either law or fact.[117] Section X of the FAA provides four exclusive grounds for vacatur, which collectively hinge on providing a fundamental fair process, rather than strict procedural mandates. Section 10(a)(1) vacates awards "procured by corruption, fraud, or undue means;" Section 10(a)(2) vacates awards where there was "evident partiality" in the arbitrators towards a given party; Section 10(a)(4)—the section giving rise to the "manifest disregard" doctrine—permits vacatur "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[118] The final section is Section 10(a)(3), which I will discuss in more depth.

Out of the four sections, only section 10(a)(3) provides that arbitrators may be overturned for "refusing to hear *evidence* pertinent and material to the controversy."[119] Section 10(a)(3) is a significantly limited basis for reversing an arbitration decision.[120] Overall, reversal of an arbitral decision for any reason is rare, and in many cases where an arbitrator has made an evidentiary decision the court has upheld the decision regardless of whether the evidence was admitted or excluded.[121] Courts have interpreted the FAA to mean that although

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117. *See* Stolt-Nielsen S.A., 559 U.S. at 671 ("[I]n order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error—or even a serious error."); *see also* Seed Holdings, Inc. v. Jiffy Int'l AS, 5 F. Supp. 3d 565, 585 (S.D.N.Y. 2014) ("Arbitration awards are not reviewed for errors made in law or fact.").

118. 9 U.S.C. § 10(a)

119. 9 U.S.C. § 10(a)(3) (2015) (emphasis added).

120. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 746 (1996) (characterizing all 10(a) grounds as "extraordinarily narrow," and subsequently discussing 10(a)(3)).

121. *See, e.g.*, Schwartz v. Merrill Lynch & Co., 665 F.3d 444, 453 (2d Cir. 2011) (upholding award despite arbitrator's exclusion of testimony regarding certain events significantly prior to the dispute as "too remote"); Century Indem. Co. v. Certain Underwriters at Lloyd's, London, subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646, 584 F.3d 513, 559 (3d Cir. 2009) (upholding award after arbitrators considered, but subsequently deemed evidence from certain witness statements "irrelevant"); Howard Univ. v. Metro. Campus Police Officer's Union, 512 F.3d 716, 721 (D.C. Cir. 2008) (upholding award despite arbitrator's arguably erroneous exclusion of union chief negotiator's testimony based upon attorney-client privilege), *and*; Hudson v. ConAgra Poultry Co., 484 F.3d 496, 504 (8th Cir. 2007) (upholding award despite arbitrator's refusal to hear evidence of plaintiff's tort claims after arbitrators heard argument from both parties, and determined that such claims were barred by *res judicata*); Robbins v. Day, 954 F.2d 679, 685 (11th Cir. 1992) (upholding award where arbitrators excluded testimony of brokers as "unimportant" and "cumulative"); *cf.* Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.), INC., 846 F. Supp. 2d 298, 304 (D. Me.), *aff'd*, 695 F.3d 181 (1st Cir. 2012) (upholding arbitration award despite panel's "procedural irregularity" in relying

arbitrators "must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments,"[122] they are "not required to hear all the evidence proffered by a party."[123] Arbitrators have indeed been upheld for decisions to exclude significant evidence, based on reasons similar to policies found within the FRE. In *Rai v. Barclays Capital Inc.*, an arbitrator's decision was upheld after not only refusing to postpone a hearing based upon a witness's inability to appear and testify, but moreover deciding to exclude that witness's affidavit on the basis that cross-examination was not possible.[124] In *LJL 33rd Street Associates, LLC v. Pitcairn Properties Inc.*, an arbitrator's decision to exclude hearsay evidence about the valuation of a property based specifically on the fact that the evidence was hearsay was upheld.[125]

Conversely, an arbitrator has "substantial leeway to admit any evidence that [they] find[] useful—even hearsay evidence."[126] In *Raiola v. Union Bank of Switzerland, LLC*, an arbitrator decided to admit handwritten notes over objections that they were hearsay and did not qualify for the business record exception.[127] The court upheld the arbitrator's decision to admit the evidence on the basis that the notes were clearly material and pertinent to the conflict.[128] In *Raiola*,

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upon evidence outside the record to construe an ambiguity in parties' contract). *But see* Gulf Coast Indus. Workers Union v. Exxon Co., USA, 70 F.3d 847, 850 (5th Cir. 1995) (vacating arbitration award where arbitrator prevented employer from presenting additional evidence—the discharged employee's cigarette stub found in discharged employee's vehicle which tested positive for marijuana—after justifying the exclusion by telling the employer that the chemical report confirming the presence of marijuana had been admitted as a business record, but then citing the employer's failure to present evidence the employer had been told not to present as a predicate for ignoring the results).

122. Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 395 (5th Cir. 2003) (confirming arbitral award despite refusal to compel production of certain financial documents).

123. Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) (confirming arbitral award despite exclusion of testimony by company official).

124. Rai v. Barclays Capital Inc., 739 F.Supp.2d 364, 374–75 (S.D.N.Y. 2010).

125. LJL 33rd St. Associates, LLC v. Pitcairn Properties, Inc., 725 F.3d 184, 187 (2d Cir. 2013) (holding that arbitrator's exclusion of hearsay was not abuse of discretion, and confirming award).

126. ARMA, S.R.O. v BAE Sys. Overseas, Inc., 961 F. Supp. 2d 245, 263 (D.D.C. 2013) (explaining further that "An arbitrator may likewise opt to expedite a proceeding by excluding evidence and testimony that it finds irrelevant or duplicative").

127. Raiola v. Union Bank of Switzerland, LLC, 230 F. Supp. 2d 355, 360 (S.D.N.Y. 2002) (holding that admission of the notes did not deprive adverse party of fundamentally fair trial).

128. *Id.*

the court also observed that the arbitrator's findings on credibility were non-reviewable.[129] In *Farkas v. Receivable Financing Corp.*, the court made direct reference to the AAA commercial rules in holding that arbitrators "did not exceed their powers by considering hearsay evidence."[130] Arbitrators are also permitted to admit evidence that is speculative in nature.[131]

Ultimately, however, arbitrators do not automatically expose themselves to vacatur "in refusing to hear evidence pertinent and material to the controversy."[132] Section 10(a)(3) "cannot be read . . . to intend that every failure to receive relevant evidence constitutes misconduct which will require the vacation of an arbitrator's award."[133]

Parties contracting to resolve disputes by arbitration can mutually agree to any governing rules or procedures in advance, or, at the time of the arbitration, make preferences known to the arbitrator.[134] Many parties, however, opt to utilize various bodies of rules already available and promulgated by nonprofit and private entities specializing in various forms of alternative dispute resolution. The discussion will now shift to an examination of some of the well-known rule regimes and how they deal specifically with the admission of evidence in arbitration.

B. The American Arbitration Association ("AAA")

The American Arbitration Association ("AAA") is a private organization specializing in offering various forms of dispute resolution services. As one of those services, the AAA promulgates a

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129. *Id.* ("[I]t is not within this Court's authority to question that determination.").

130. Farkas v. Receivable Fin. Corp., 806 F. Supp. 84, 87 (E.D. Va. 1992) (upholding arbitration award in employment dispute arbitrated under AAA rules); *see also* Petroleum Separating Co. v. Interamerican refining Corp., 296 F.2d 124 (2d Cir. 1961) (per curiam) (upholding arbitrator's decision in payment amount dispute to admit hearsay evidence from both parties, in context of an arbitration subject to AAA rules).

131. D.E.I., Inc. v. Ohio and Vicinity Regional Council of Carpenters, 155 F. App'x 164, 170 (6th Cir. 2005).

132. Century Indem. Co. v. Certain Underwriters at Lloyd's, London, Subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646, 584 F.3d 513, 557 (3d Cir. 2009).

133. Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir. 1968).

134. *See* Radvany, *supra* note 2, at 729, 741 (discussing party choice).

number of rule regimes for different kinds of arbitrations.[135] Under the rules for commercial arbitration, R-34 discusses "Evidence."[136] The text of R-34 reads:

> (a) The parties may offer such evidence as is *relevant and material* to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. *Conformity to legal rules of evidence shall not be necessary.* All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.
>
> (b) The *arbitrator shall determine the admissibility, relevance, and materiality* of the evidence offered and *may exclude* evidence deemed by the arbitrator to be *cumulative or irrelevant.*
>
> (c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.
>
> (d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.[137]

R-34 presents a fairly typical example of how evidence is handled in arbitration. The rule does not explicitly direct arbitrators to ignore evidence law but specifically states that adherence is not required. The only guiding principle specifically stated within the rule in the (a) section is "relevance" and "materiality" and the only basis

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135. *See Rules, Forms & Fees*, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/Rules (last visited March 29, 2017) (Commercial Arbitration Rules and Mediation Procedures, Construction Industry Rules and Mediation Procedures, Consumer Arbitration Rules, Employment Arbitration Rules and Mediation Procedures, Labor Arbitration Rules, International Dispute Resolution Procedures).

136. AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-34 (2016) [hereinafter AAA COMMERCIAL ARBITRATION RULES].

137. *Id.* (emphasis added).

of exclusion specifically stated in the (b) section other than lack of relevance is evidence that is cumulative.

AAA R-35 discusses "Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence," and is worth noting because some of the provisions suggest that the AAA rules are at least cognizant of some other evidentiary concerns.[138] The (a) section of the rule requires that parties give written notice for any witness who has given a written statement.[139] If that witness fails to appear for examination in person at the arbitration, "the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable."[140] The (b) section of the rule goes on to provide fallback provisions for the situation where a witness who is "represented by a party to be essential" is unable to testify. The (a) section of R-35 appears designed to bolster R-32, "Conduct of Proceedings," the (c) section of which requires that in the presentation of evidence through a witness, the arbitrator "provide an opportunity for cross-examination."[141]

C. JAMS

Founded in 1979, JAMS is the "largest private alternative dispute resolution (ADR) provider in the world" and employs almost 300 full-time neutrals, including retired judges and attorneys.[142] JAMS arbitration and mediation services provide various sets of rules and procedures to govern arbitrations.[143]

JAMS provides several arbitral rule regimes, such as the "Comprehensive," "Streamlined," and "Employment" rules. All of these regimes discuss evidence, but within the context of a broader rule. In both the "Comprehensive" and "Employment" regime, Rule 22 governs "The Arbitration Hearing," while in the "Streamlined" regime the same name is attached to Rule 17. Under "Comprehensive" and "Employment" Rule 22(c) and "Streamlined" Rule 17(c), "[t]he

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138. *Id.* at R-35.

139. *Id.* at R-35(a).

140. *Id.*

141. *Id.* at R-32(c).

142. *About JAMS*, JAMS ARB., MEDIATION, & ADR SERVICES, http://www.jamsadr.com/aboutus_overview/ (last visited Apr. 5, 2015).

143. *ADR Clauses, Rules, and Procedures*, JAMS ARB., MEDIATION, & ADR SERVICES, http://www.jamsadr.com/adr-rules-procedures/ (last visited Apr. 5, 2015) (referring to specific rule bodies, the "Comprehensive" and "Streamlined" rules. JAMS also features "Class Action," "Construction," and "Employment" arbitration rules, which are not discussed in this Article).

arbitrator shall require witnesses to testify under oath" if requested by a party or at the discretion of the arbitrator.[144]

Evidence is specifically discussed in the (d) section of both Rule 17 and Rule 22. Similar to AAA, JAMS directs arbitrators that "[s]trict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product."[145] However, JAMS goes further than AAA in suggesting to the arbitrator how to manage the evidence offered, affirmatively directing the arbitrator that they "shall consider evidence that he or she finds relevant and material to the dispute, *giving the evidence such weight as is appropriate*."[146] Under the plain language of this rule, it would seem that JAMS forbids the absolute exclusion of any evidence which satisfies the general requirement of relevancy and materiality, instead charging the arbitrators to simply give it "appropriate" weight, which may be none. The JAMS rules do not specifically say that an arbitrator may not exclude evidence, except for cases where the evidence is "immaterial" or "unduly repetitive." This once again appears to echo the AAA rule, which speaks of exclusion of cumulative evidence.

The plain language reading of the rule, however, may be somewhat tempered by the fact that the rule does provide that "[t]he Arbitrator may be guided in that determination [of "relevant and material"] by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence."[147] This appears to allow arbitrators some leeway when determining whether or not to allow certain evidence to be admitted. In each of the three rule bodies—Comprehensive, Streamlined, and Employment—the text of the rule is identical. In all three versions of subsection (f), the JAMS rules preclude parties from offering, and arbitrators admitting as evidence, prior settlement offers made by parties. This parallels FRE 408, which prohibits introduction of similar evidence on the basis within the Article IV "Relevance" framework.

Even if this is the case, however, it would still be a powerful exclusionary provision; an arbitrator who looks within Article IV of the FRE and nowhere else can still exclude improper character evidence, evidence of subsequent remedial measures, evidence of

144. JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES Rule 22(c) (2014); JAMS EMPLOYMENT ARBITRATION RULES & PROCEDURES Rule 22(c); JAMS STREAMLINED ARBITRATION RULES & PROCEDURES Rule 17(c) (same quoted material).

145. *Id.*

146. *Id.* (emphasis added).

147. *Id.*

insurance, and many other things which the FRE frame within "Relevance and its Limits." Thus, it is at least arguable that an arbitrator, functioning under the JAMS rules could—if so inclined—exercise substantial discretion to exclude proffered evidence, and yet not violate the apparent policy of the JAMS rules to admit all evidence that is "relevant and material." By using the FRE as a guide, the arbitrator could exclude from the definition of "relevant and material" those things that, under the FRE, are excluded by Article IV.

D. Financial Industry Regulatory Authority ("FINRA") Arbitrations

FINRA is a private, self-regulatory organization ("SRO") that, in 2007, consolidated the regulatory functions of the NASD and the NYSE. FINRA conducts arbitrations in securities disputes, under its own regime of rules and procedures, typically between investors and broker dealers, or disputes between two industry parties.[148] FINRA arbitration is largely compulsory, as securities brokers and dealers must be members of FINRA in order to participate in the securities arena. Members of FINRA submit to FINRA arbitration when disputes arise between themselves. Correspondingly, FINRA broker dealers typically require customers to similarly submit to arbitration and include an arbitration clause in their account opening statements.[149]

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148. While FINRA does promulgate two sets of rules, this subsection refers only to the set which governs disputes between investors and individual entities registered with FINRA, such as cases between investors and brokers or broker dealers. This set of rules is referred to as the "Customer Code." The rules governing disputes between two industry parties are referred to as the "Industry Code." FINRA MANUAL, FINRA RULES Rules 12000, 13000 (2017), http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=607 [hereinafter FINRA RULE].

149. *See* Jill Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, 15 CARDOZO J. CONFLICT RESOL. 597, 599 (2014) (discussing the "ubiquitous arbitration clause" in customer agreements from brokerages); *see also* North American Securities Administrators Association, *Mandatory Binding Arbitration: Is it Fair and Voluntary?*, at 1 (Sep. 15, 2009), http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Arbitration-Statement-9.15.09.pdf ("Today, almost every broker-dealer includes in their customer agreements, a predispute arbitration provision that forces public investors to submit all disputes that they may have with the firm and/or its associated persons to mandatory arbitration"); Constantine N. Katsoris, *Roadmap to Securities ADR*, 11 FORDHAM J. CORP. & FIN. L. 413, 426 (2006) (outlining the development of the use of the pre-dispute arbitration clause).

FINRA also provides arbitration services, governed by a rule regime that discusses the admission of evidence. For arbitrations involving customer disputes, Rule 12604 states that:

> (a) The panel will decide what evidence to admit. The panel is not required to follow state or federal rules of evidence.
>
> (b) Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may state objections to the introduction of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.[150]

The FINRA evidence rule does not specifically provide for exclusion. However, the fact that it draws a distinction between material produced and material that may or may not ultimately be admissible at the hearing suggests that circumstances exist whereby some material may be excluded. More importantly however, the discussion of state or federal rules of evidence in the negative—for example, that the panel "is *not* required to follow"—arguably implies something other than mere rejection of the FRE principles. One reasonable construction is that arbitrators should start from such rules, but may then use their discretion to diverge from them in appropriate circumstances. Alternatively, it could be construed that arbitrators may generally do what they please, but when a party makes an objection predicated on policies contained in such rules, they should at least consider the basis of the objection—to the degree that it stems from the rules of evidence—to carry some weight, despite the fact that they may still admit the evidence.

E. CPR Arbitrations

The International Institute for Conflict Prevention and Resolution Arbitrations (CPR) is an independent nonprofit organization that helps global businesses prevent and resolve commercial disputes efficiently and effectively.[151] Under Rule 12 of CPR's rules, "Evidence and Hearings," the arbitral tribunal has control over the form of proceedings, and is empowered to "determine the

150. FINRA RULE, *supra* note 148.

151. INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION ARBITRATIONS, https://www.cpradr.org/about (last visited September 15, 2016).

manner in which the parties shall present their cases."[152] Parties may be permitted to submit briefs or pre-hearing memorandums, stating the facts, claims, applicable law, and requests for relief.[153] However, this must also include "[a] statement of the nature and manner of presentation of the evidence, including the name, capacity and subject of testimony of any witnesses to be called and an estimate of the amount of time required for each witness's direct testimony."[154] The tribunal may ultimately determine whatever method of presentation of evidence it deems appropriate.[155] When it does so, the tribunal "is not required to apply any rules of evidence used in judicial proceedings, provided, however, that the tribunal shall apply any lawyer-client privilege and work product immunity it deems applicable."[156] Regardless of what evidence is submitted and whether a party asserts privilege or work product immunity, it is ultimately the Tribunal who "shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered."[157] Finally, CPR's rules provide that the Tribunal may require further evidence from the parties, and appoint neutral experts to give testimony and be subject to cross examination and rebuttal.[158] Thus, CPR allows the arbitrator to determine the admissibility of evidence while not requiring him/her to apply any formal rules of evidence. This allows for some flexibility as an arbitrator can use his/her discretion when deciding whether or not to exclude proffered evidence.

III. PRESENTING EVIDENCE IN ARBITRATION

This part will examine the differences between the regime of evidentiary admissibility under the FRE, and presenting evidence within arbitration as described by arbitration rules.

As the foregoing makes clear, arbitration largely examines whether evidence is (a) relevant and material and (b) not unduly cumulative, while characterizing the other prominent doctrines and issues dealt with in the FRE as questions of weight, not admissibility. An arbitrator or an arbitral tribunal is entrusted to decide the impact of

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152. INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION ARBITRATIONS, CPR PROCEDURES & ARBITRATION CLAUSES: ADMINISTERED ARBITRATION RULES Rule 12.1, *available at* https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules [hereinafter CPR RULE].

153. *Id.* Rule 12.1.

154. *Id.* Rule 12.1(e).

155. *Id.* Rule 12.2.

156. *Id.*

157. *Id.*

158. *Id.* Rule 12.3.

such evidence, and what, if any, weight to give it when making his, her, or their decision. Correspondingly, greater emphasis on evidentiary principles in arbitration may be more useful to counsel in arbitration, as the ability to make evidence arguments about material—regardless of whether or not it will be admitted—can meaningfully impact the weight given certain pieces of evidence by arbitrators.

A. The Federal Rules versus Arbitration Rules

There is little doubt that the FRE and case law interpreting the Rules provide a significantly more nuanced framework than the various arbitration rules for the admission of evidence. The various articles of the FRE take account of numerous different issues of admissibility.[159] The arbitration rule regimes surveyed typically apply only to the thresholds of "relevance" and "materiality."[160] Without the strictures of the FRE, arbitrators will often admit evidence that would be inadmissible in federal courts. A witness at an arbitral hearing may testify to hearsay or double hearsay, or a document may be produced during discovery and subsequently admitted with no witness to provide the proper foundation for the document.

The difference in the rigor and application of evidentiary rules between arbitration and civil litigation controlled by the FRE stems from different considerations. One is the fact that because arbitrators are typically lawyers and therefore trained in evidence, they are perceived to be more "trusted"[161] than jurors and more able to perform in a role similar to that of a bench trial judge.[162] Also, there is a notion

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159. *See generally* discussion *supra* Part I (discussing relevance, hearsay, opinions and experts, personal knowledge).

160. *See generally* discussion *supra* Part II (AAA Rules, JAMS rules, FINRA rules, CPR rules).

161. *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 15–16 (1827) ("Where is the consistency between this utter distrust of juries, and the implicit faith bestowed, with so much affection, on the decisions they are permitted to give on such evidence as they are permitted to receive?").

162. *See, e.g.*, Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 165–66 (2006) (discussing how "[n]umerous American trial judges" have resisted application of formal evidence law principles in non-jury trials); Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 243 n.39 (2008) ("The arbitral hearing is not unlike a bench trial in which the absence of a jury alleviates the need for elaborate rule frameworks through which information is filtered. In fact, especially in California, arbitrators often are retired judges who have extensive familiarity with legal procedures for trial."); Michael Z. Green, *No Strict Evidence Rules in Labor and Employment Arbitration*, 15 TEX. WESLEYAN L. REV. 533, 535 (2009)

that arbitration should be an efficient, cost-effective process.[163] This notion informs the discovery regime at work within arbitration as much as it informs the evidentiary regime. The broad discovery regime of Rule 26 unearths substantial amounts of relevant and material information.[164] However, that regime is expensive to administer and time consuming to navigate for litigators; moreover, the information discovered is susceptible to all the various problems the FRE were designed to guard against.

Arbitration, however, benefits from its own substantially more limited perspective on how to administer a discovery regime. The various arbitration rule regimes typically feature significantly more limited discovery than what would be permitted under Rule 26, with one arbitration regime, FINRA, even using pre-made "Discovery Guides,"[165] which specify certain documents or types of documents that are presumed to be discoverable.[166] Also, in discovery, arbitrators are arguably supposed to exercise a more "managerial" role in controlling discovery, for the purpose of limiting time and expense.[167]

The limited nature of arbitration discovery provides one way to understand the apparently liberal approach to evidence. In the

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("[A]rbitration proceedings and bench trials are similar—as contrasted with jury trials"); Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 464–65 (2008) (arguing that one of the primary purposes of evidence law is to "carefully screen the evidence to which jurors are exposed, frequently withholding relevant information *on the basis of fears that jurors would use it in an irrational or legally impermissible manner*.") (emphasis added). However, it must also be noted that while many arbitrators come to be selected for their experience within the field derived from years of practice, this does not necessarily imply intrinsic competence with evidence law, a subject that many lawyers struggle with in practice. *See* James A. Wright, "The Use of Hearsay in Arbitration," *Arbitration 1992: Improving Arbitral and Advocacy Skills*, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 290–91 (1992) ("Many advocates are unskilled in the intricacies of hearsay evidence. Even many lawyers are unable to determine whether an offered item is hearsay.").

163. *See generally* Radvany, *supra* note 2, at 749 (describing the efficiency and financial value of arbitration).

164. *See* discussion *supra* Part I.

165. *See* FINRA RULE, *supra* note 148, at Rule 12506(a) (requiring Director to notify parties of the location of the FINRA Discovery Guide).

166. The list of documents, however, is not dispositive; counsel in FINRA arbitrations may request further discovery, or raise objection to documents contained within the Discovery Guide. The Guide simply provides a useful starting point, which often saves time or even provides sufficient discovery to resolve the dispute. Discovery beyond, or objection to discovery within the terms of the Guide may be granted upon showing of appropriate cause by the party requesting or opposing discovery under the Guide.

167. *See* Radvany, *supra* note 2, at 734 (providing the AAA rule requiring the arbitrator to manage information exchange with a view to achieving an efficient).

course of providing limited discovery in arbitration, the arbitral process itself limits the ability of parties to conduct discovery in a the same manner as they would if the case were being litigated in court. Parties can discover evidence in an inadmissible form through wide discovery, but they can also use that knowledge to find the same evidence in an admissible form or otherwise find a means of admitting the evidence within the FRE. In arbitration, however, a party may not be able to call a witness to provide authentication testimony to put a document into a non-hearsay context, because the arbitrator might limit its presentation of witnesses. Allowing a process similar to civil litigation would also take significantly more time and increase the expense of arbitrating that dispute. In arbitration, however, the intent of the process is largely concerned with saving both time and expense.

Thus, in arbitration, it is necessary for the relatively relaxed application of the rules of evidence. Limitation of discovery leads to circumstances where much of the evidence in arbitration may raise hearsay concerns, may not come with a certifying witness, or may not have witnesses knowledgeable or willing enough to testify.

B. Dangers of Admission or Exclusion

Though under the FRE much of the evidence typically utilized in arbitration would be excluded, arbitrators admit such evidence frequently. A 2012 survey of 401 arbitrators found that in response to the question, "Do you exclude evidence that is not admissible under the evidentiary standards you believe would be appropriate outside the arbitration forum rather than take the evidence and give it such weight as you deem appropriate," 33.9% of arbitrators would "never" exclude such evidence, while 55.2% would "sometimes (i.e., around 25% of the time)" exclude such evidence.[168]

The decision-making of arbitrators can arguably be tainted by the admission of evidence that is subject to evidentiary problems. To one degree or another, arbitrators and judges are similar—both are exposed to evidence that would be inadmissible under the FRE. With respect to judges, courts and commentators have long scrutinized the ability of judges to remain unaffected by such exposure. A study by Andrew Wistrich, Chris Guthrie, and Jeffrey Rachlinski concluded that judges who heard favorable-but-inadmissible evidence were

168. Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 AM. REV. INT'L ARB. 487, 491 (2013). Sussman also elaborates further upon the methodology of the survey. *See id.* at 491, n.22 (concluding that while her sample is not completely representative of the overall population of arbitrators, it provides a useful benchmark).

significantly more likely to rule in favor of the proponent of the inadmissible evidence.[169] Outside the context of judges, judges like Learned Hand and Justice Robert Jackson have called the attempt to ignore inadmissible evidence in general as "mental gymnastic[s]," and "unmitigated fiction."[170]

Thus, based on the fact that within arbitration much evidence is admitted despite the fact it would not pass muster under the FRE, there is little doubt that arbitrators are at least somewhat at risk of being influenced by questionable evidence. Although the arbitrator is directed to "weigh" evidence "for what it is worth,"[171] such a directive presumes that an arbitrator has the ability to do exactly what some commentators and judges are highly skeptical of: not be misled by evidence of questionable veracity.

The significance of this danger comes from the fact that evidence that would be excluded under the FRE is no less misleading

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169. *See generally* Andrew J. Wistrich et. al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1251–52 (2005) ("We conclude that judges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware."). Other commentators have described a similar "backfire" effect, occurring specifically when jurors are given limiting instructions. *See* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 689 (2000) ("The backfire effect occurs when jurors pay greater attention to information after it has been ruled inadmissible than if the judge had said nothing at all about the evidence and allowed jurors to consider it.").

170. *See* Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Judge Hand describing limiting instructions for the jury as recommendations in mental gymnastics); Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (Justice Jackson describing as "unmitigated fiction" the idea that prejudicial effects can be overcome by instructions to the jury). Most discussions of this take place in the context of jurors and the questionable efficacy of limiting instructions. *See, e.g.*, Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163, 212 (2004) (proposing that reviewing courts should take account of the fact that "instructions have been misunderstood [by jurors] in significant numbers," contrary to the presumption of juror understanding); Joel D. Lieberman & Jamie Arndt, *supra* note 166, at 686 ("With few exceptions, empirical research has repeatedly demonstrated that both types of limiting instructions are unsuccessful at controlling jurors' cognitive processes.").

171. An approximation of the "for what it's worth" phrase is encountered in the JAMS Rules. *See* JAMS Comprehensive Rule 22(d) ("The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate."). However, the recurring use of the phrase by numerous commentators makes it impossible to determine the original source of the phrase, only that it is widely known and used throughout the arbitration community.

simply because it is admitted in arbitration, and many of the same situations can arise within arbitration as within trials. Some FRE rules are admittedly less likely to directly surface within arbitration. For example, Rule 404 character evidence is primarily a concern in criminal trials, although it is possible to make character evidence objections within civil trials.[172] Nevertheless, certain character evidence situations could in fact surface in arbitration, such as the past conduct of an employee offered to show the employee's conduct on the occasion in question. Some of the other FRE rules of exclusion with primarily policy-based rationales, such as FRE 407, 408, and 411, also have the potential to surface in arbitration, given the fact that arbitrators—operating in the interest of efficient disposition of disputes—may be privy to settlement talks and negotiations between parties, due to the decreased formalities of arbitration or an individual arbitrator's more managerial approach to arbitrating a dispute. There is no basis to think that their knowledge of those discussions would not trigger similar risks to the admission at trial of evidence of an offer to compromise. Thus, some arbitrators already take account of 407-, 408-, and 411-type concerns and refuse to accept such evidence.[173]

Arbitrators do have the power to exclude certain evidence without being reversed. However, the nature of arbitration has led to the widely held belief that arbitrators almost never exclude evidence.[174] Discussing the refusal of arbitrators to receive evidence, an American Law Reports article even concedes that "in effect, it is assumed that the evidence should, or at least could, have been properly received, with the courts determining whether the refusal to receive it is fatal to the award."[175] However, the case law from the Supreme Court interpreting the FAA—specifically, the paucity of cases affirmatively vacating arbitration awards for evidentiary failures—suggests that vacatur based upon refusal to receive evidence is

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172. *See* discussion *infra* Part I.

173. *See* Laird C. Kirkpatrick, *Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement*, 25 LOY. L.A. L. REV. 837, 845–46 (1992) ("Many arbitrators refuse to admit evidence revealing pre-hearing negotiations and offers of compromise in order to encourage parties to engage in settlement discussions, thereby adopting the policy of Federal Rule 408.").

174. *See* Mary Jane Trapp, *How to Prepare Your Case for the Arbitrator*, GPSOLO, Jan./Feb. 2015, at 36, 38 (noting "most everything offered is admitted"); *see also* Kirkpatrick, *supra* note 173, at 847 ("[E]vidence offered by parties, provided it is relevant, should generally be received, with concerns regarding its probative force going to weight rather than admissibility.").

175. Alan R. Gilbert, *Refusal of Arbitrators to Receive Evidence, or Permit Briefs or Arguments, on Particular Issues as Grounds for Relief from Award*, 75 ALR.3d 132 (2015).

something of a rare occurrence. Thus, from the outset, if arbitrators were inclined to utilize their discretion more frequently to exclude evidence, it seems they would be able to do so reasonably, and without significant fear that their award will be vacated.[176] This corresponds to recent calls for judges in civil litigation to act in a similar fashion, but during the discovery phase of litigation, pursuant to the newly revised discovery rules in the Federal Rules of Civil Procedure.[177]

Some have called for arbitrators to exercise their authority to limit evidentiary presentations more frequently. Tracey Frisch, a Senior Counsel at AAA, notes that "[a]rbitrators play a critical role in asserting their authority to provide parties with a cost-effective and expeditious arbitration," and therefore that "[n]o informed arbitrator should shy away from their responsibility for fear of jeopardizing the award."[178] Thus, exclusion of evidence is one of the areas where arbitrators can exercise some discretion. However, others have argued how the burgeoning of ADR-style dispute resolution techniques have gone hand in hand with a liberalization of evidence philosophy, one that shies away from an increasingly exclusionary arbitral role.[179]

There are a number of reasons to believe that arbitrators are unlikely to significantly restrict evidentiary presentations. Arbitrations are, first, inherently party-controlled means of dispute resolution.[180] Parties contract for a certain set of rules, many of which are, as discussed, worded with wide latitude to admit evidence.[181] Both for fear of being vacated on appeal, and in hopes of giving parties the benefit of their bargained-for contract, arbitrators are unlikely to begin rigorously applying exclusionary doctrines. As a secondary matter, absent a change to discovery in arbitration, the narrow bounds of discovery are simply inconsistent with a narrow and structured regime

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176. Tracey B. Frisch, *Death by Discovery, Delay, and Disempowerment: Legal Authority for Arbitrators to Provide A Cost-Effective and Expeditious Process*, 17 CARDOZO J. CONFLICT RESOL. 155, 156 (2015) ("Judicial review of awards on the ground that arbitrators have refused to hear evidence is limited. Courts have confirmed awards so long as the arbitrators' refusal to hear evidence or deny discovery requests did not deprive the party of a fundamentally fair hearing.").

177. *See, e.g.*, Radvany, *supra* note 2, 707–09, 708 n.10 (relating the motivation behind the 2015 revisions to dissatisfaction with judges' enforcement of discovery limitations among other things).

178. Tracey B. Frisch, *Death by Discovery, Delay, and Disempowerment: Legal Authority for Arbitrators to Provide A Cost-Effective and Expeditious Process*, 17 CARDOZO J. CONFLICT RESOL. 155, 178 (2015).

179. Kirkpatrick, *supra* note 173, at 852 (suggesting further that alternative forums of dispute resolution are places "where rules of evidence are not even formally recognized").

180. *See* Radvany, *supra* note 2.

181. *See* text *supra* Part II.

of evidentiary admissibility; unless parties were able to conduct more thorough and probing discovery, rigorous attention to evidentiary admissibility would likely affect parties' ability to make their case, which would again open the arbitrator up to vacatur.

C. *Evidence Has a Role, Regardless of Admissibility*

Despite the fact that arbitrators appear unlikely to begin applying a more exclusionary, litigation-style regime of evidence, the principles underlying the law of evidence should not be entirely disregarded during arbitration, simply because rules for ultimate admissibility have been relaxed. "[T]he chasm between an adjudicatory system with strict principles of evidentiary exclusion and a system where such principles go only to the weight of the evidence is not as wide as is sometimes assumed."[182] Many principles from evidence law apply to certain procedural matters, such as limiting the purpose of certain evidence, taking judicial notice, and the use of presumptions.[183] With regard to other doctrines such as hearsay, to the degree that the principles underlying the FRE do not simply vanish in a different forum, the weight that an arbitrator gives a piece of evidence could potentially be affected by the underlying rationale of exclusion because the underlying rules of exclusion "have a direct bearing on questions of weight."[184]

Making the arbitrator aware of such a rationale has potentially significant implications. Admittedly, the policy of generally admitting evidence may serve other important objectives of the arbitral process. Arbitrators are likely to continue the practice of generally admitting most evidence. Nonetheless, the arbitrator is still at risk of being affected by seeing that evidence, and, as discussed, the standing directive to the arbitrator to weigh evidence does not necessarily map well to arbitrators consciously doing so in practice with each and every piece of evidence. For example, a counsel who calls attention to multiple levels of hearsay within certain evidence forces arbitrators to consciously weigh the reliability of proffered pieces of evidence.[185]

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182. Kirkpatrick, *supra* note 173, at 848.

183. *See id.*, at 845 n.44 (discussing the arbitration procedures consistent with the FRE).

184. *Id.*, at 848.

185. *See* Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 AM. REV. INT'L ARB. 487, 493 (2013) ("Reviewing preliminary conclusions of the case to see if the outcome would differ if unreliable evidence admitted on that basis had not been introduced may serve as a check by showing the arbitrators the extent to which such pieces of evidence have influenced their thinking.").

Legally trained arbitrators are often broadly familiar with the principles of evidence, and therefore are at least able to appreciate that a cognizable evidence-based argument about the weight of evidence should, indeed, affect the weight they give that evidence.[186]

Another reason counsel should take care to make certain evidentiary arguments is that on panels of multiple arbitrators, evidentiary decisions may be handled exclusively by a chairperson, who does have the opportunity to vet evidence before showing it to other members of the panel. This does not necessarily mean the single arbitrator charged with evidentiary decisions is more likely to exclude evidence, but it still raises the incentive for counsel to make evidence arguments. If a counsel can make clear the unreliable nature of a piece of evidence, there is a chance that only one out of multiple arbitrators will be exposed to the evidence at all, decreasing the potential danger of contamination.[187]

Finally, if arbitrators are more consistently apprised of evidence-based reasons to weigh evidence, the results of arbitrations could also become more predictable, and this would have other beneficial outcomes. Knowledge that an arbitrator has been apprised of FRE-based arguments about certain pieces of evidence and is likely to weigh evidence accordingly would foster faster resolution of cases by settlement. Attorneys capable of making evidentiary arguments in arbitration are better able to determine the value of both favorable and unfavorable evidence, articulate that value to an arbitrator, and be certain of the outcome that an arbitrator may reach based upon that evidence.

CONCLUSION

It is broadly true that most evidence proffered is likely to be accepted in arbitration. However, it is still important for counsel and arbitrators to appreciate evidence-based arguments in the context of arbitration for a number of reasons. Evidence and discovery function in different and inverted ways in civil litigation versus arbitration for reasons of efficiency, cost, and ease of dispute resolution. This does not, however, eliminate the underlying rationale of evidence law: to

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186. *See* Michael Z. Green, *No Strict Evidence Rules in Labor and Employment Arbitration*, 15 TEX. WESLEYAN L. REV. 533 (2009) (noting that arbitrators are "expected to have the expertise and experience to properly evaluate the evidence and to accord it the appropriate weight dependent upon the corroborating circumstances surrounding it").

187. *See supra* note 30 and accompanying text (discussing "Mental Contamination").

promote the resolution of disputes upon more, rather than less, reliable evidence.[188]

Therefore, although the interests of arbitration may be served by narrow discovery and open evidentiary admissibility, arbitrators should be made cognizant of evidentiary principles during arbitration. This can often be done during a summation, but should only relate to important pieces of evidence where, under the FRE, a judge would likely have excluded the evidence. It can also be done during the presentation of evidence by making a short spoken objection to proffered evidence. This should be done somewhat sparingly as arbitrators will lose patience if a party makes too many objections and thereby unnecessarily interrupts his or her adversary's presentation of evidence.

Failure to consider these principles can lead to situations where arbitrators lend greater weight to questionable or unreliable evidence by not taking the time to consciously "weigh" evidence properly. Use of evidence law during arbitration by counsel would serve to force arbitrators to do so. Thus, while an arbitrator may be able to admit almost anything during an arbitration hearing, the principles of evidence could nonetheless be used to inform how they should view and weigh the evidence they admit. Overall, it is possible that greater attention to the role evidentiary principles could play in arbitration should produce beneficial outcomes, such as increasing the reliability and predictability of arbitral outcomes. Although attorneys in arbitration may not be able to prevent unfavorable evidence from being admitted, the attorney able to place the proffered material into the proper evidentiary context is better able to influence how, if at all, that evidence will affect the arbitrator. As the rules of evidence hinge on issues such as reliability, prejudice, first-hand knowledge, and authentication, this paper suggests that making evidentiary arguments in arbitration can promote the determination of cases based upon more persuasive, rather than less persuasive evidence.

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188. *See* Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1965 (2008) (arguing that since the 18th century, the central function of evidence law has been "to secure the best available evidence"); *see also* Michael L. Seigel, *Rationalizing Hearsay: A Proposal for A Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 896 (1992); Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988) (both modern proponents of the "best evidence"-oriented theory of evidence law).

In a World of Vanishing Trials: Why the Evidence Course Matters More than Ever—and Could Matter Even More

Eileen A. Scallen*

Imagine there's no trials. It isn't hard to do.[1] We are told we live in the age of "The Vanishing Trial."[2] Of course, this is an overstatement—we still have plenty of trials even if there are many less than there used to be. However, civil litigation and criminal trials are expensive. Cases are frequently settled or dispatched through pretrial procedures based on paper (now electronic) filings. There is no arguing with the data. The odds of a case going to trial are lower than they used to be. So what is an evidence professor to make of this? As someone who has taught evidence for over twenty-five years and who is now an associate dean whose main responsibility is curriculum—analyzing what courses our students should be taking—I have a deeply personal view on this trend. So given the diminishing, if not vanishing, trial, does the course in evidence law still matter? The reader may be shocked—shocked—to learn that my position is that

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* Associate Dean for Curriculum and Academic Affairs; Adjunct Professor of Law, UCLA School of Law. This essay is based on a presentation given as an invited speaker at the Association of American Law Schools Annual Meeting, Litigation Section Program, "Does Evidence Law Still Matter?" January 9, 2016. Dean Scallen would like to thank Adam Dec and the other editors of *The Review of Litigation* for their hard work in editing this article and sponsoring this Symposium.

1. Apologies to John Lennon and Yoko Ono.

2. The "Vanishing Trial" phenomenon was most prominently first documented in Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEGAL STUDIES 459 (2004). Subsequent studies and commentators continue to document a diminishing number of civil and criminal trials, both on the federal and state level, pointing to the impact of sentencing guidelines that punish criminal defendants who choose to go to trial rather than to take a negotiated plea, and the increase in alternative dispute resolution and dispositive motions. *E.g.* Marc Galanter, *A World Without Trials?*, 12 J. DISPUTE RESOLUTION 20 (2006); Robert P. Burns, *Advocacy in the Era of the Vanishing Trial*, 61 KANSAS L. REV. 893 (2013); Benjamin Weiser, *Trial by Jury, a Hallowed American Right, is Vanishing*, N. Y. TIMES, (Aug. 7, 2016), http://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?_r=0 (print version, Aug. 8, 2016, at A1, *Jury Trials Vanish, and Justice Is Served Behind Closed Doors*).

the evidence course matters more than ever. But, as I will suggest in this essay, it could matter even more.

I. EVIDENCE MATTERS, OBVIOUSLY

It is worth asking—did the evidence course ever matter? Even when the American trial was not on the endangered species list, most law students did not become *trial* lawyers. Yet the Multistate Bar Examination, and most state bar examiners, test Evidence as a core topic. I have watched as state bar examiners consider adding Immigration Law or dropping Federal Income Taxation as essay topics, but no one suggests that evidence law be dropped. Why is this?

First, there is a basic practical rationale: evidence law arises frequently outside the context of a trial. The evidence rules are alive and well and often applied in dispositive pretrial motions, such as summary judgment,[3] and even in some alternative dispute resolution contexts.[4] In addition, although evidentiary privileges and confidential communications are sometimes also taught in professional responsibility courses, they are still a central part of the course in evidence. All lawyers need to understand the contours of the attorney-client privilege and the related ethical duty to keep a client's confidences.

Second, evidence law has always mattered in one fundamental sense—there is no legal concept of truth without evidence. This is the case no matter how one defines truth. Depending on one's philosophical bent on the definition of truth: A) we reveal the truth—by presenting evidentiary facts that demonstrate the truth and exposing the falsehoods that mask the truth; or B) we construct the truth—through narratives about the evidence that the decision maker concludes are just. These rough explanations gloss over an infinite number of approaches to legal truth, spelled out in great detail in

3. Federal Rule of Civil Procedure 56(c)(2) requires "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Further, Federal Rule of Civil Procedure 56(c)(4) requires: "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts *that would be admissible in evidence*, and show that the affiant or declarant is *competent to testify* on the matters stated." (emphasis added).

4. Paul Radvany, *The Importance of the Federal Rules of Evidence in Arbitration*, 36 REV. LITIG. 469 (2017); Michael S. Pardo, *Some Remarks on the Importance of Evidence Outside of Trials*, 36 REV. LITIG. 443 (2017).

hundreds of thousands of pages of law review articles (some of them my own responsibility).[5]

Yet no matter what theoretical lens one uses, at bottom, all of these theoretical explanations of truth-telling or truth-making operate in practice through the American adversary system. Even if criminal or civil disputes do not go to trial, lawyers must prepare as if they might—which means lawyers must understand evidence law. The adversary system is based on the notion that advocates on different sides of the dispute will present competing versions of the truth, all grounded in evidence presented to the trier of fact. Whether truth is "revealed" or "constructed," evidence is the raw material of truth under either philosophical perspective. So it is—and always has been—essential for a lawyer to know what evidence the fact finder may use and what evidence she may not use to decide a dispute.

Evidence law matters for other reasons too. The evidence course offers students the opportunity to understand a central question in our adversary system: who gets to make the rules about what evidence "counts" for decision-making?[6] In the federal system, the original set of Federal Rules of Evidence was drafted through the Rules Enabling Act process.[7] In 1965, Chief Justice Warren appointed a special committee to craft a uniform code of evidence.[8] However, the proposed rules were met with considerable objection once submitted for public comment.[9] The Senate delayed the enactment of the rules in 1973.[10] Yet despite the controversy, particularly surrounding proposed codifications of evidentiary privilege, Congress did not abandon the project. Ultimately, Congress enacted the rules

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5. *See, e.g.*, Symposium, *Truth and its Rivals, The Goals of Evidence Law*, 49 HASTINGS L.J. 289 (1998) (exploring "whether the rules of evidence help or hinder the chances that a trial will successfully uncover the truth of the matter which originally gave rise to the litigation"); Eileen A. Scallen, *Foundationalism and Ground Truth in American Legal Philosophy: Classical Rhetoric, Realism, and Pragmatism*, ON PHILOSOPHY IN AMERICAN LAW (Francis J. Mootz III ed., 2009).

6. *See* Edward J. Imwinkelried, *Using the Evidence Course as a Vehicle for Teaching Legisprudential Skills*, 21 QUINNIPIAC L. REV. 907 (2003) (asserting that the evidence course should be used to teach statutory construction skills).

7. 28 U.S.C. §§ 2071–2077. For a clear description of the federal rule-making process under the Rules Enabling Act, see *Overview for the Bench, Bar, and Public*, U.S. CTS., http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited July 7, 2017).

8. Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000).

9. *Id.*

10. *Id.*

directly as legislation, rather than as judicial rules.[11] However, when the Judicial Conference of the United States re-established the Federal Rules of Evidence Advisory Committee in 1993,[12] evidence rule-making power once again was split between the legislative and judicial branches. Importantly, Congress is free to legislate rules directly.[13]

Many states have based their evidence rules on the Federal Rules of Evidence, with the state judiciary and legislature sharing responsibility for them (although there is substantial variation in whether they take the shape of court rules or state statutes).[14] In New York and Massachusetts, the judiciary controls the rule-making power through common law development.[15] In other state systems, California, for example, the legislature dominates the rule-making process. Students of the law need to understand that the rules of procedure and rules of evidence do not descend on stone tablets from the heavens. Rather, they are the products of interested parties with different constituencies. Some will eventually participate in that rule-making process as legislators and judges; others will represent clients with particular interests they seek to advance through shaping the rules. But all should understand the fundamental concept that it matters greatly who gets to make the rules, and evidence law offers a unique, if underutilized, opportunity to study this process.

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11. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926; *see also* Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995) (describing the tumultuous passage of the Federal Rules of Evidence).

12. STEPHEN A. SALTZBERG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 7 (9th ed. 2006).

13. Notably, Congress actually uses this power. Federal Rules 413–415 were added by statute. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2135–37 (1994).

14. According to Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE T-1 (2d ed. 2015), "forty-four states, Guam, Puerto Rico, the Virgin Islands, and the military have adopted rules of evidence patterned on the Federal Rules of Evidence." However, the subsequent table only lists 42 states, omitting Illinois and Georgia, the two most recent states to adopt rules based on the Federal Rules of Evidence. *Id.*; David N. Dreyer, F. Beau Howard & Amy Lynch, *Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence*, 63 MERCER L. REV. 2 n.3 (2011).

15. *See* Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992) (discussing the battle to codify New York's law of evidence); SUPREME JUDICIAL COURT ADVISORY COMMITTEE ON MASSACHUSETTS EVIDENCE LAW, MASSACHUSETTS GUIDE TO EVIDENCE § 102 (2017) (noting that because Massachusetts "has not adopted rules of evidence, the development of Massachusetts evidence law continues to be based on the common law and legislative processes").

The course in evidence also allows students to explore a central tension in our American adversary system: we love the jury system, but we are terrified of juries. We love the jury system so much that the right to jury trial appears in the United States Constitution twice—in the 6th and 7th Amendments. But we are also terrified of the jury—its emotional passions and its irrationality. We have all sorts of procedural devices to control the jury—summary judgment, judgment as a matter of law (directed verdict, judgment notwithstanding the verdict), and jury instructions. But nothing is more central to exploring the systematic tension underlying our jury system than the policy decisions concerning what evidence the jury can hear and use to reach a verdict. The evidentiary rules banning character evidence to prove conduct on a particular occasion are key examples of our distrust of the jury.[16] Paradoxically, exceptions to this ban on character evidence—such as the use of a defendant's prior sexual misconduct[17]—reveal another conflict. We hesitate to limit a jury's access to powerful or seemingly probative evidence, even if we fear that that evidence may be misused to convict someone based on his past conduct rather than on the evidence of the current charged offense. For a different example, the debate over "junk science" and misuse of expert testimony is, in a large sense, a dispute over what evidence the jury can "handle" or understand.[18]

Finally, the evidence law course has always mattered because it is a core subject for teaching basic legal analysis—how to "think like a lawyer." In legal education, there is a tendency to ignore the need for a curricular spiral—revisiting and deepening analytical skills. The first year of legal education is critical; it lays students' foundations and begins to develop students' attitudes and professional values. However, despite their substantial intellectual progress in the first year—which may be reinforced or eroded during the summer after the first year—most law students have substantial room for intellectual growth as they begin their second or third year. I am reasonably confident that most law professors have had the experience—in the

16. FED. R. EVID. 404(a).

17. FED. R. EVID. 413, 414, and 415.

18. Critics have "decr[ied] the expanding use of scientific expert testimony today." Eileen A. Scallen & William E. Wiethoff, *The Ethos of Expert Witnesses: Confusing the Admissibility, Sufficiency and Credibility of Expert Testimony*, 49 HASTINGS L.J. 1143 (1998). But "[b]y giving the judge control over the admissibility of expert testimony based on natural or social science evidence under Rule 104(a), the Court betrays its irrational fear of the power of one side's expert speech to control the jury." *Id.* I have argued that expert testimony is, at bottom, testimonial and argumentative, and jurors can appropriately evaluate and scrutinize that testimony within a fair adversarial system. *Id.*

evidence course or other upper-level courses—of referring to a concept that the student undoubtedly encountered in the first year, such as *res judicata* or *res ipsa loquitur* and seeing a blank stare. The professor prompts, "you studied this in [civil procedure, torts, fill in the blank], right?" Some students will acknowledge this tentatively, while other students shake their heads, "no." When this happens to me, I am puzzled; I know that they have encountered the concept, studied it, been tested on it, and actually demonstrated substantial knowledge of the concept because often I was their professor in the prior course. After reflection, I think I understand what these students mean. They know they have studied the concept and have some grasp of it, but they want us to teach it again. Students want to engage in that curricular spiral—revisiting earlier knowledge to both broaden and deepen their understanding of the content and analytical skill.

The evidence course is perfect for the curricular spiral needed to learn legal analysis. In the first year, students focus on understanding how to read cases and statutes. They begin to use facts to raise arguments under legal rules and concepts. In the evidence course, those skills are revisited—strengthening and deepening them. In the evidence course, we are constantly drilling students in the art of using evidence permitted by the rules to prove propositions. This takes their skill and understanding to new depths. Students are immersed in the knowledge that rules and case law mean nothing apart from the evidentiary facts that call them into play. Although students started to appreciate the importance of facts in the first year of law school, evidence law forces students to see the difficulty of persuading a decision maker through the use of facts. A good evidence professor always understands that she is teaching advanced legal analysis as much as a doctrinal area of law. We need to be especially conscious that student learning needs to continue and grow deeper in the second year and beyond and adjust our objectives for the course accordingly.

II. LAW PROFESSORS CAN MAKE EVIDENCE MATTER MORE

This carries us to the second part of my argument: as essential as the evidence course is and always has been, the course can matter even more. It is no secret that law schools have been under stress after the Great Recession. Until recently, applications to law school have declined, leading many law schools to increase grants and scholarships to attract the most qualified students, putting law school budgets in the red. Administrators always talk about doing more with less, but it has never been truer for law schools. At the same time that law schools have less revenue, we are increasing our commitment to experiential

learning, which contains intensive feedback requirements. The American Bar Association requires six credit hours of experiential learning for all students entering law school in 2016.[19] The New York State Bar has substantially increased the experiential training requirements for applicants to its bar,[20] and the State Bar of California has been considering a similar proposal.[21]

As a result, we need to make our law school courses do more even as the number of credit hours for doctrinal classroom interaction shrink. Students need the kind of rigorous training in legal analysis to have the best chance of succeeding in bar passage and in professional life. Students need more experience with writing, receiving feedback on their work as they learn. Students need strong oral communication experience to communicate effectively with clients and decision makers. Finally, students need help discerning and applying professional and ethical values in an age where there are financial and other competitive pressures to take short cuts that may endanger a lawyer's professional status. And all of this learning must occur in an environment in which our students are distracted by laptops, texts, email, and videos—and, of course, the pressures of finding employment that will allow them to pay off student loan debt.

So how can the community of evidence teachers respond to this state of affairs? By doing what we have always done—innovate and lead in legal education. Evidence professors were some of the first professors to move away from using traditional casebooks—collections of appellate decisions—and toward a "problem-based" method of teaching.[22] Some evidence professors, including Judge Richard Posner, go even farther, adopting a "clinical" or experiential method of teaching the evidence course, in which they use simulated case files to have students learn the basic evidence rules through extensive trial advocacy exercises (direct examination and cross-

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19. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 303(a)(3) (2016–2017), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf.

20. Andrew Denney, *Court Adopts Requirement for Experiential Learning*, N.Y. L.J. (Dec. 17, 2015).

21. Karen Sloan, *California's Practical-Skills Plan Alarms Out-of-State Deans*, NAT'L L.J. (July 8, 2015).

22. *See* RICHARD OWEN LEMPERT ET AL., A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES (5th ed. 2013) (this was the first evidence text to use problems as the basis for learning the Federal Rules of Evidence).

examination). [23] Some of the first computer-assisted legal instruction came from an Evidence professor—Roger Park.[24] Evidence professors have long incorporated movie and video clips in their class to help students "see" the process of advocacy.[25] Professor Fred Galves and his co-authors were some of the first law professors to experiment with interactive texts—electronic versions of the book that contained hyperlinks to additional cases and reference material, including examples of demonstrative evidence. [26]

But not everyone has abandoned traditional casebooks in teaching evidence. This has been somewhat controversial—the most significant evidence decisions are made at the trial level, so appellate decisions, especially ones that turn on the admissibility of evidence, are the exception rather than the norm.[27] However, even those who prefer casebooks for the basic evidence course have their reasons. Professor Roger Park launched a vigorous defense of the traditional casebook in response to Judge Posner's evangelical embrace of the experiential mode of teaching evidence.[28] Professor Park, while acknowledging his conflict of interest—he has authored one of the major evidence casebooks—argued that teaching basic evidence law through simulated case files could mislead students about the difficulty of evidence law.

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23. Richard A. Posner, *Clinical and Theoretical Approaches to the Teaching of Evidence and Trial Advocacy*, 21 QUINNIPIAC L. REV. 731 (2003).

24. Roger Park & Russell Burris, *Computer-Aided Instruction in Law: Theories, Techniques, and Trepidations*, 1978 AM. B. FOUND. RES. J. 1 (1978). One might not call Professor Park's Evidence and Civil Procedure computer-assisted exercises the earliest "online" legal education—they were first available on floppy disks before the internet was available to the public. Of course, now students connect to these exercises via the internet. THE CENTER FOR COMPUTER-ASSISTED LEGAL INSTRUCTION, http://www.cali.org (last visited June 30, 2017).

25. *E.g.* MY COUSIN VINNY (Palo Vista Productions 1992).

26. SYDNEY A. BECKMAN, SUSAN W. CRUMP, FRED A. GALVES, EVIDENCE: A CONTEMPORARY APPROACH (3d ed. 2016).

27. Evidence professor Robert P. Burns takes a very dim view of the use of appellate opinions as a basis for learning evidence law:

> Certainly, the usual law school approach to evidence law through the study of appellate cases would be of very limited value. Because the profession will be unlikely to change the culture of American law schools' teaching methods anytime over the next ten years (beyond that I am unsure), we cannot count on law schools contributing much to this enterprise.

Robert P. Burns, *Advocacy in the Era of the Vanishing Trial*, 61 KAN. L. REV. 893, 895 (2013).

28. Roger C. Park, *Posner on Teaching Evidence*, 21 QUINNIPIAC L. REV. 741 (2003).

> When cases are discarded in favor of fact scenarios and bare statutory materials, students will ask the teacher to become the oracle of evidence law. The ordinary professor would be tempted by the siren song of certainty. Students constantly hope that the professor will stop hiding the ball and state the black-letter principles more clearly. This tempts us to make the law simpler than it is, to state doctrine that solves problems instead of creating them. Good casebooks act as a counterweight, presenting cases with all their doctrinal warts.[29]

In my view, it makes little difference which method a professor chooses, as long as the professor has thought about her communication style and the needs of her class—in other words, as long as she has sound, educational reasons for her choice. My point is that evidence teachers have never been shy about trying new and better ways to teach.

But the obstacles seem so high and the needs are so many—how can one evidence course respond to all these concerns? Here are some specific recommendations on how evidence courses could respond to the current needs in legal education. First, we need to move away from using multiple-choice examinations as the sole means of evaluating students at the end of a course. Because of its statutory and rule-based quality, evidence has always been an easy course in which to write multiple-choice questions.[30] Moreover, using only multiple-choice questions does make it possible for professors to lecture to large classes of over 100 students—very effective from a cost perspective. Further, interesting and amusing hypotheticals make many students happy—I confess, as someone who was pretty good at playing "the sage on the stage," that it is a lot of fun for the professor too. So what administrator wants to unsettle happy students and happy professors? The problem is this—"the sage on the stage" leaves class knowing more about how students responded to that class than whether they have actually learned and can transfer that learning to new situations.

I am not suggesting that we toss out our question banks. Multiple choice or other objective quizzing can be a very effective tool to help students understand whether they understand doctrine, but it needs to happen more frequently, providing quick feedback to students about whether they need to spend more time on a particular topic to deepen their understanding. Most course management systems

29. *Id.* at 742.

30. I am not saying that it is easy to write good multiple-choice questions!

(TWEN, Blackboard, Canvas, and others) allow for online quizzes and tests. If these formative assessments, which are meant primarily to help students understand their strengths and weaknesses, are given frequently but with lower stakes, they do not carry the pressure that one final exam can carry. Small stakes quizzes work especially well with a "flipped classroom" model, where a professor records short lectures (narrated PowerPoints or actual video) on discrete topics that complement the reading assignments. These videos are assigned as out-of-class work along with the reading. When students come to class, the time is spent working through problems and exercises—applying the rules in a variety of ways, including short quizzes.

Students can engage with evidence law in a variety of ways in addition to traditional quizzes or tests. It is not difficult to incorporate short, focused simulations into an evidence course without going over to Judge Posner's "all experiential" model. For example, I have students study hearsay exceptions for documents, authentication, and foundation requirements for documents in one two-hour class. It is sometimes difficult to get students to apply multiple evidence rules in the alternative with just a hypothetical or even a more complex problem, but they are able to synthesize these diverse rules through this exercise. There is a different quality of learning in having to stand up, mark a paper exhibit, ask the appropriate questions to lay a foundation for it (to get past relevance, hearsay, authentication and any other objections), offer the paper exhibit into evidence, and publish it. To add an ethical and professionalism dimension, introduce facts that tempt the student who is offering evidence for one purpose to cope with the possibility that a jury will use the evidence for an improper purpose. To make this exercise most effective, give students more than one chance to do it, with feedback for each effort. Focus the feedback on just one thing the student did well, and one thing the student needs to improve. The awkwardness of the initial attempts, followed by greater comfort with a repeated event cements the lessons more than the most compelling lecture.

Another easy-to-design short simulation is a motion *in limine* that can be based on any evidence rule being studied. You can divide the class into proponents of the evidence, opponents of the evidence, the judge deciding the motion, and law clerks who advise the judge on how to rule. This exercise can be as limited or as elaborate as you wish. But to make the most of this, you need to have the students arrive adequately prepared (see my comments above on the flipped classroom) and have them discuss their positions with each other to arrive on a unified strategy (or in the case of the law clerks and judges, a ruling based on the arguments they heard and any other arguments

they generate). You can do all of this through oral argument, but you can also do it as a short writing assignment.

The key to success is to have these learning simulations provide feedback to students on their performance through the use of a rubric. It can be as simple as laying out a short list of criteria: 1) accurate application of the evidence law; 2) persuasive use of the relevant facts; 3) anticipation or response to counterarguments; and 4) delivery (clear, concise communication). Then, circle a level of performance for each criterion—again, keep it simple: exceeds expectations, meets expectations, or needs improvement. Leave space for short comments. You can expand the engagement of the rest of the class by requiring them to complete an evaluation too. These evaluations should always be done immediately, while still in class, so students get the benefit of immediate feedback.

Incorporating short and focused simulations is an effective way to engage a wider range of students and increase the depth of learning, but they will likely not qualify your evidence course for the new ABA Experiential Learning requirement unless your course is "primarily experiential." The meaning of this requirement is not entirely clear at this point but it undoubtedly means more than incorporating a few simulations in your evidence course. However, there is a way to make clear that part of an evidence class does count, and that is to create an optional "lab" component for one or two additional credits. This "add-on" may more clearly warrant experiential credit under the ABA standard if each class involves exercises tied to the doctrine at issue at that point in the "regular" class. Students who have taken the course, or part-time faculty who want to make a more limited commitment to the academic program, can lead lab students under the supervision of the instructor. Alternatively, the instructor can conduct these sessions.

In my ideal world, every student would take the evidence course, followed by a full course in trial advocacy. Again, the idea is to spiral the lessons. In evidence, the rules are taught one by one. Only at the end does the student have the full arsenal of arguments to bring to issues of admissibility. If the evidence class is then followed by a trial advocacy class, the student has the opportunity to review and apply the full range of evidence principles as the student would in practice.

However, many trial advocacy courses are three, four, or more credits. Students who are trying to take upper level required courses, bar courses, specialization courses, and other useful experiential courses (such as drafting or negotiation) may find it difficult to find room in their schedules for both evidence and trial advocacy,

especially since most students will not be handling trials immediately on graduation. For these students, it makes sense to offer an option that does not require such an intensive time commitment, and yet offers a more engaging way to learn the material.

Although the process of redesigning one's evidence course to align with the needs of today's student may seem daunting, there is actually a systematic way to do so that can save time and help professors comply with new ABA Standards requiring individual courses to have published "learning outcomes" and assessments that align with those outcomes The process I am referring to is one of "backward design," which begins with a professor identifying the knowledge, skills, and values that the professor wants the students to leave with at the conclusion of the course.[31] Most educators suggest keeping these "big ideas" to three to five overall goals.[32] For example, I use the following Learning Outcomes in my Evidence course:

At the end of this course, students should be able to:

1. Identify and explain all essential terms and concepts (e.g., "relevance," "undue prejudice," "character evidence," "hearsay," "*Daubert*," "motion *in limine*," etc.) discussed in the required reading assignments and exercises.
2. Identify applicable evidence rules and apply them to solve complex factual scenarios, using a methodical, step-by-step analytical process.
3. Generate appropriate interpretations of complex evidentiary rules requiring careful and accurate reading.
    a. Articulate and critique, where appropriate, the policies and principles giving rise to evidence rules. One way to gain this knowledge is to be aware of different choices made by some U.S. states (departing from the federal approach) and by other countries, which requires comparing different rules or approaches.
    b. Utilize appropriate interpretive techniques including textual analysis, contextual analysis, drafting history, purpose, precedent and public policy to make arguments on all sides.

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31. GRANT J. WIGGINS & JAY MCTIGHE, UNDERSTANDING BY DESIGN 56–60 (expanded 2d ed. 2005)

32. MICHAEL HUNTER SCHWARTZ, SOPHIE M. SPARROW & GERALD F. HESS, TEACHING LAW BY DESIGN 39 (2009).

c. Tailor these interpretations to fit the perspectives of different participants in a dispute.

4. Evaluate the different arguments for resolution of an evidentiary problem, and explain your choice of the best resolution, articulating the various policies and values that bear on your assessment (accuracy, reliability, justice, fairness, efficiency, etc.).

5. Identify, articulate and evaluate potential responses to ethical and professional issues that can arise in advising a client or dealing with an opposing client/attorney, in the context of making evidentiary objections.

The next step is to ask yourself: how will I know whether the students possess that knowledge or skill? This question relates to the kind of assessments you will use to gather your evidence of student achievement of the outcomes. I use a multiple-choice mid-term, because until the mid-term I find students are focused primarily on understanding the concepts and rules; after they have a grasp of this process, it is possible to go deeper into interpretation, argument, and policy discussions. Thus, for a final examination, I use multiple choice to assess students on a wide range of concepts, and use one or two essay questions to assess my students' ability to argue about doctrine, interpretation of rules, and policy.

The next step is to figure out the criteria for your rubric—what criteria will help me judge the quality of the students' work? What does a passing performance look like? What does a superior performance look like? What does underperforming work look like? I never finalize my final examination rubric until after I quickly read about twenty to twenty-five of the final examinations to see what most students focused on in responding in essay exams.

The final step is to figure out how to prepare students for those assessments. What reading do you need to assign? What exercises should they do to practice the skills you want them to demonstrate? These are the materials, exercises, assignments, and formative assessments you will use to help the students learn the skills, knowledge, and values you want them to be able to demonstrate by the time they leave your course.

This approach to curricular design is not new. The ABA's Section of Legal Education and Admissions to the Bar has begun to focus on outcomes as a means of evaluating J.D. programs. In August 2014 the Section's Council adopted revisions to the ABA Standards and Rules of Procedure for Approval of Law Schools ("the

Standards"). The stated goals of the revised Standards include improving legal education and aligning ABA accreditation processes with "the latest and best thinking of both the higher education and legal education communities."[33] Of particular significance to curricular design are:

- Standard 301 (Objectives of Program of Legal Education)
- Standard 302 (Learning Outcomes)
- Standard 314 (Assessment of Student Learning) and
- Standard 315 (Evaluation of Program of Legal Education, Learning Outcomes, and Assessment Methods).[34]

Standard 301(b) requires that a law school "shall establish and publish learning outcomes" designed to prepare its students for admission to the bar and for effective, ethical and responsible participation in the profession.[35] Generally speaking, the ABA defines learning outcomes as "clear and concise statements of knowledge that students are expected to acquire, skills students are expected to develop, and values that they are expected to understand and integrate into their professional lives."[36] Standard 302 does not explicitly identify the institutional level at which learning outcomes apply, but subsequent interpretations issued by the Managing Director state that learning outcomes are required for the school's entire three-year course of education—what have become labeled "institutional learning outcomes," for specializations within the school's larger curriculum, and for each individual course.[37] Standards 314 and 315 regarding assessment require the use of formative and summative assessment methods to provide meaningful feedback to students and to gauge student learning, although there is no requirement that each

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33. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, MANAGING DIRECTOR'S GUIDANCE MEMO, Standards 301, 302, 314 and 315 (June 2015), http://www.americanbar.org/groups/legal_education/accreditation/consultants_memos.html.

34. *Id.* Standard 301 also requires the creation and publication of learning outcomes, which are described more specifically in Standard 302. I am indebted to the Chair of the 2016 UCLA School of Law Curriculum Committee, Professor Tim Malloy, for this cogent summary of the new ABA Standards regarding learning outcomes and assessments.

35. *Id.* at 1.

36. *Id.* at 4.

37. *Id.*

particular class use both formative and summative assessments. This process of determining how to improve a course by 1) stating desired outcomes, and then 2) assessing whether those outcomes have been met are paralleled by Standard 315, which requires the law school itself to gauge students' competency in the institutional learning outcomes and to make appropriate changes to improve the curriculum. It is likely that the best law professors and law schools already do this, but now we must engage in the process universally.

One might conclude on reading this essay that I think evidence is one of the most important courses in law school. And you would be right. I have never thought so to the degree of suggesting it should be a required course; I don't need to since most students take it because of its prominence on most state bar examinations. But, for the reasons I have outlined, I believe evidence is a critical part of legal education, and one that can help those in the field meet the needs of our students. Already, the evidence course matters: it has met the essential educational needs of generations of students and practitioners. But evidence can matter more. While legal education has new challenges, to be sure, it also contains some of the most creative and thoughtful teachers we have ever had. With some effort, the community of evidence professors can lead the way toward meeting the challenges of our students.

Is Evidence Obsolete?

Katharine Traylor Schaffzin*

I. INTRODUCTION

Even before the Federal Rules of Evidence were first proposed in 1969, the incidence of federal cases going to trial had commenced a precipitous and steady decline. While Congress debated these rules, alternative forums for resolving disputes were just being introduced into modern litigation. One must ask why a need for alternative forums existed at the very time a uniform federal evidentiary code was

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* Katharine Traylor Schaffzin is the Associate Dean for Academic Affairs and a Professor at the University of Memphis Cecil C. Humphreys School of Law. She is grateful for the support of the Law School, especially that of Dean Peter Letsou, Professor Demetria Frank, and Professor Daniel M. Schaffzin. Special thanks go to Professor Paul Radvany, Ken Kandaras, Morris Ratner, and the Litigation Section of the Association of American Law Schools for their excellent panel on the question of whether evidence is obsolete at the 2016 AALS Annual Meeting. Finally, this article would not have been possible without the thorough and efficient research assistance of Garrett Haynes.

enacted. The costs of litigating a case through trial had risen so quickly that, in addition to seeking alternative forums for resolution of disputes, parties engaged in settlement negotiations more than ever, motivated by economic efficiencies. Meanwhile, criminal defendants made such gains in court-recognition of due process rights that criminal trials became more complex and the concept of the plea bargain was born. Were trials and the formal evidentiary code that accompanied them already past their heyday by the time Congress got around to enacting this uniform system in 1975?

With the decline of the trial as a tool of dispute resolution, perhaps it is time to reconsider the role of the Federal Rules of Evidence in the federal judicial system. Is a uniform code worth saving? If so, can such a concept be reconceived to provide the flexibility required of any long-standing tradition that one hopes will bend rather than break when challenged by posterity? Can the Federal Rules of Evidence remain relevant?

There is still value in maintaining a uniform evidentiary code that will uphold our society's ideals of truth and justice. In this article, I consider the importance of evidence rules in modern practice and demonstrate that the rules could be dramatically simplified to better accomplish the goals that existed when they were first adopted. A wholesale rethinking of the rules will better equip them to adapt to the constant evolution in what constitutes evidence, without the need for continuous amendment.

In Part II of this article, I briefly discuss the purpose of the Federal Rules of Evidence. In Part III, I detail trends in civil and criminal litigation, demonstrating how rare the trial has become. I summarize the variety of explanations scholars offer for this phenomenon. I identify shortcomings in the Federal Rules of Evidence that may be responsible for pushing litigants away from trial, perpetuating the perception of evidence's obsolescence.

In Part IV, I discuss how simplifying the Federal Rules of Evidence could foster the goals for which such a code was adopted. I suggest appropriating the flexible approach to implementing the rules utilized in many alternative forums of dispute resolution. A great deal of this flexibility already exists at the heart of the Federal Rules of Evidence. The Advisory Committee on Evidence Rules could expand Rules 403, 611, and 807 to cover many of the more specific rules complicating the current rules. With those expanded rules in place, the Advisory Committee could then delete many of the redundant and complex rules remaining. Through such reforms, the Federal Rules of Evidence could better achieve their purpose, address many of the

concerns of those avoiding trial courts that implement such complex rules, and better situate the rules to adapt to quickly evolving forms of evidence.

II. THE PURPOSE OF THE FEDERAL RULES OF EVIDENCE

The rules of evidence implemented at trial reflect certain societal norms and expectations that exist beyond the courthouse. "[E]vidence is not merely a subject for courts and lawyers and juries. It is a universal field of thought, and the use of it in courts of justice is only one phase."[1] The stated purpose of the Federal Rules of Evidence is to "administer every proceeding [in federal court] fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[2] Truth and justice are, thus, the end goals of this evidentiary code, although they transcend litigation as fairly significant societal goals as well. In reaching those goals, courts strive for fairness, efficiencies of cost and time,[3] and the development of a body of evidence law through judicial precedent.[4]

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1. Jack M. Sabatino, *ADR as "Litigation Lite": Procedural & Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1342 (1998) (quoting JOHN HENRY WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE vii (6th ed. 1980)).

2. FED. R. EVID. 102.

3. *See* JACK B. WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE § 102.02 (Matthew Bender & Co. ed., 1st ed. 1987) (asserting that Rule 102 requires courts to use the rules to "secure fairness in administration, eliminate unjustifiable expense and delay, and promote growth and development of the law of evidence"); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §§ 2–3 (2nd ed. 1999); GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY & AUTHORITY § 102.1 (6th ed. 2009); *see also* Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393 (1994); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307 (1992); Edward J. Imwinkelreid, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993); James M. Christian, *The Proposed Federal Rules of Evidence*, 33 FED. B.J. 96 (1974); Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125 (1973); Mason Ladd, *Some Highlights of the New Federal Rules of Evidence*, 1 FLA. ST. U.L. REV. 191 (1973); C. Clyde Atkins, *Significant Changes in the Proposed Federal Rules of Evidence*, 9 FORUM 175 (1973).

4. *See, e.g.*, United States v. Bibbs, 564 F.2d 1165, 1168–69 (5th Cir. 1977) (discussing how prior case law directed its evaluation of the trial court's decisions on admitting evidence); United States v. King, 73 F.R.D. 103, 105–06 (E.D.N.Y 1977) (applying case law to question involving the Federal Rules of Evidence); *see also* WEISSENBERGER & DUANE, *supra* note 3, § 102.1 (arguing that by allowing

To better enable courts to achieve the stated purpose of the Federal Rules of Evidence, the drafters entrusted trial courts with a great deal of discretion.[5] This discretion, expressed through Rules 102,[6] 103,[7] 403,[8] 611,[9] and 807,[10] is essential to the evolution of the evidence rules relevant as societal norms and new forms of evidence continue to develop.[11] As Professors Glen Weissenberger and James Duane note, "A system of rules that does not allow for some discretion on the part of a trial judge in making evidentiary rulings lays the groundwork for its own obsolescence."[12] Have the Federal Rules of Evidence become so formal and inefficient in the modern era that they have become obsolete?

III. LITIGATION TRENDS

Congress enacted the Federal Rules of Evidence in 1975 amid a steep decline in both civil and criminal trials.[13] As a result, the Rules

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courts to have discretion in admitting evidence, the rules allow for fair outcomes); *In re* Richter & Phillips Jewelers & Distrib., 31 B.R. 512, 514 n.1 (Bankr. Ohio S.D. 1983) (finding that the interests of justice could be grounds for admitting evidence).

5. *See* WEISSENBERGER & DUANE, *supra* note 3, § 102.1 ("Rule 102 relies on the discretion of the trial court to fulfill its stated objectives.").

6. *See* United States v. Thorne, 547 F.2d 56, 59 (8th Cir. 1976) ("We think it a purpose of this and other rules to permit exercise of discretion by the trial court in implementing the purpose of the rules to 'the end that truth may be ascertained and proceedings justly determined.'" (quoting FED. R. EVID 102 (1975)).

7. *See* Jack B. Weinstein & Margaret A. Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 43, 83–85 (1969) (discussing the role of trial judge discretion in the then proposed version of Rule 103). Rule 103(a) explains the concept of harmless error as it should be considered by appellate courts considering appeals from a trial court's evidentiary rulings. FED. R. EVID. 103(a). Rule 103(e) explains the concept of plain error. FED. R. EVID 103(e).

8. *See infra* notes 141–42 and accompanying text (discussing discretion in Rule 403).

9. *See infra* notes 218–21 and accompanying text (discussing discretion in Rule 611(a)).

10. *See infra* note 272 and accompanying text for a (discussing discretion in Rule 807).

11. *See* WEISSENBERGER & DUANE, *supra* note 3 at § 102.1 ("As methods of communication and interaction between individuals change, the Rules of Evidence must accommodate this progress. Rule 102 is designed to ensure the continued viability of the Federal Rules of Evidence by providing that the evidence as to the disputed relationship between the parties is available to the trier of fact.").

12. *Id.* at § 102.1.

13. Patrick E. Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REV. (Summer 2004), http://www.rand.org/pubs/periodicals/rand-review/issues/summer2004/28.html ("Based on one set of data, civil trials, both

have been applied with declining frequency since their very enactment. The decline of the civil trial began in 1962,[14] despite the significant increase in the number of civil actions filed today.[15] Scholars attribute this phenomenon to multiple causes. One factor is likely the increasingly high costs of civil litigation.[16] Most of the costs associated with a civil trial are attributable to trial preparation, including discovery and motion practice.[17] Discovery and trial also bring large expenses for expert witnesses.[18] The high costs associated with discovery, including document production and electronically stored information, are likely contributing to efforts to avoid trial.[19]

The rise of alternative dispute resolution ("ADR") is likely another contributing factor to the decline of the civil trial.[20] Potential litigants often pursue ADR in search of a speedier, more efficient, and less costly process than that offered by traditional litigation.[21] Until 1989, however, federal courts did not enforce arbitration agreements. Indeed, for much of the 20th century, arbitration agreements were not necessarily binding on federal courts, a principle known as the "*Wilko* Doctrine."[22] In *Wilko v. Swan*,[23] the United States Supreme Court held that an individual's signature on an agreement to arbitrate did not preclude him from litigating his claim.[24] By 1989, *Wilko* had been

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bench and jury, have fallen from 5,802 in 1962 to 4,569 in 2002. . . . Similarly, the number of criminal trials has dropped from 14–15 percent of all criminal dispositions in 1976 to about 2 percent in 2002.").

14. Kirk W. Schuler, Note, *ADR's Biggest Compromise*, 54 DRAKE L. REV. 751, 758 (2006).

15. Patricia Lee Refo, *Trial Rescue*, LITIGATION, Spring 2004, at 1–2 ("[F]ederal district courts actually conducted fewer civil trials in 2002 than in 1962, despite five times more civil filings, many more judges, and a lot more lawyers."); *see also* Schuler, *supra* note 14 at 759–60 (explaining that in 1960, "there was an average caseload of just over 250 cases per authorized judgeship" but that despite fewer cases going to trial: "[i]n FY 2005, there were . . . 400 cases per authorized judgeship").

16. Refo, *Trial Rescue*, *supra* note 15, at 3.

17. *Id.* at 34.

18. Paul M. Kolker, *Recent Developments in Oklahoma Law: Expert Witness Fees as a Recoverable Item of Costs: Recent Litigation Trends*, 57 OKLA. L. REV. 803, 804 (2004) ("Unlike fact witnesses, experts have traditionally demanded a much higher hourly rate commensurate with their education, experience, and field of expertise, often resulting in substantial fees.").

19. Refo, *Trial Rescue*, *supra* note 15, at 3–4.

20. Schuler, *supra* note 14, at 776.

21. Sabatino, *supra* note 1, at 1325.

22. *See* Schuler, *supra* note 14, at 766 (briefly discussing the *Wilko* Doctrine, and its later revision in the 1980s).

23. 346 U.S. 427, 438 (1953).

24. Schuler, *supra* note 14, at 766.

effectively overturned[25] by several Supreme Court decisions that chipped away at the *Wilko* Doctrine.[26] The Supreme Court now embraces ADR, enforcing arbitration agreements.[27] The abandonment of the *Wilko* Doctrine paved the way for an increase in the number of disputes resolved through arbitration. In 1998, Congress enacted the Alternate Dispute Resolution Act, which required all ninety-four U.S. District Courts to "authorize" the use of ADR.[28] Courts now divert cases into non-binding arbitration to encourage efficient settlement and decrease their crowded dockets.[29] Although empirical studies have been skeptical about the causal effects of ADR on declining trial rates,[30] it appears that ADR is definitely contributing to the phenomenon.[31]

Others attribute the decline of the civil trial to changes in the Federal Rules of Civil Procedure. Some commentators have focused on the U.S. Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*,[32] which replaced the notice pleading standard of *Conley v. Gibson*[33] with a plausibility standard.[34] While the Supreme Court has clearly stated that *Twombly* does not require a heightened pleading standard,[35] plausibility certainly demands more detail in pleading than

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25. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 478–79 (1989) (expressly overturning *Wilko*).

26. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."); Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, 473 U.S. 614, 628 (1985) (upholding agreements to arbitrate under Anti-Trust Laws and noting that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"); Shearson/Am. Express v. McMahon, 482 U.S. 220, 221 (1987) (upholding agreements to arbitrate federal claims raised under the Securities and Exchange Act of 1934).

27. Schuler, *supra* note 14, at 766.

28. Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 849 (2004).

29. *Id.* at 849–50.

30. Schuler, *supra* note 14, at 776 (stating that "the most recent research on the subject is very skeptical about the conclusions to be drawn from the available statistics").

31. *Id.* at 773 ("ADR is a significant cause of the vanishing trial and jury.").

32. 550 U.S. 544 (2007).

33. 355 U.S. 41 (1957).

34. Jonah Gelbach, *Measuring Twombly and Iqbal's Impact on Access to the Courts: An Economic Model*, ACS BLOG (Dec. 21, 2011), http://www.acslaw.org/acsblog/measuring-twombly-and-iqbal%E2%80%99s-impact-on-access-to-the-courts-an-economic-model.

35. *Twombly*, 550 U.S. at 570.

notice pleading. Although it appears that the rate at which motions to dismiss are granted did not increase much after the decision in *Twombly*, a report by the Federal Judicial Center "found that the share of filed lawsuits that face a Rule 12(b)(6) motion to dismiss increased substantially after *Twombly*—more than 50 percent—depending on the type of lawsuit involved."[36] A substantial increase in the number of motions to dismiss, even if granted at the same rate as under the liberal notice pleading standard, would necessarily result in a corresponding increase in the number of civil cases dismissed before trial. Additionally, modern federal courts are granting motions for summary judgment at a greater rate than in years past.[37] Thus, it seems that fewer cases are reaching the trial stage under the plausibility standard than under the requirements of notice pleading.

An additional factor contributing to the vanishing trial may be the involvement of federal judges in the settlement process. This view is held by many scholars.[38] Empirical data surveying the attitudes of federal judges towards settlement supports the conclusion that judges overwhelmingly prefer settlement to trial.[39] Moreover, the Supreme Court amended Rule 16 of the Federal Rules of Civil Procedure, mandating a pretrial conference to discuss, among other items, the possibility of settlement.[40] It is not surprising that fewer civil cases are going to trial in light of a mandatory rule and a strong judicial preference for settlement.

Judges may not be the only ones preferring settlement to litigation. A jury trial requires a party to relinquish a great deal of control over the litigation and invites a significant amount of risk. Research shows that the unpredictability of jury verdicts may motivate some civil litigants to settle a case rather than leave the outcome in the

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36. Gelbach, *supra* note 34.

37. Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 141 (2000) (citing the "the emergence of summary judgment" as a cause for the decline in civil trials).

38. *See* Schuler, *supra* note 14, at 771 (2006) (noting that scholars have attributed the decline in the trial to several causes, including "aggressive settlement efforts by federal judges").

39. *See, e.g.*, Annesley H. DeGaris, *The Role of United States District Court Judges in the Settlement of Disputes*, 176 F.R.D. 601, 601–14 (1998) (discussing the results of a questionnaire distributed to federal judges on their attitudes towards and involvement in facilitating settlement in civil cases, and finding that eighty-seven percent of judges felt that settlement was preferable to trial).

40. Schuler, *supra* note 14, at 768 ("As amended in 1983, Rule 16 required judges to hold pretrial conferences and to discuss, among other things, 'the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.'").

hands of a jury.[41] This idea may also motivate potential litigants to seek an alternative forum where the rules of evidence are relaxed and often applied by stipulation. In that setting, parties can exercise greater control over the presentation of their cases than the Federal Rules currently allow in a traditional trial.

The vanishing trial is not a phenomenon unique to civil litigation; over 90% of criminal defendants plead out.[42] The concept of the guilty plea was not recognized in federal law prior to 1970, when the United States Supreme Court first upheld the constitutionality of the concept in *Brady v. United States*.[43] Until that point at common law, criminal trials had been short summary proceedings and guilty pleas were unknown.[44] At the same time, the U.S. Supreme Court's increased recognition of the due process rights of criminal defendants necessitated a more protracted trial, rendering the concept of "settlement" in a criminal case more attractive.[45] When Congress enacted the Federal Rules of Evidence in 1975, it further lengthened and complicated a criminal trial, justifying increased use of the guilty plea.[46]

Prosecutorial discretion in charging defendants may also contribute to the rise in guilty pleas and the decline in the number of criminal trials.[47] Prosecutors exercise a great deal of discretion in deciding whether to charge and what charges to bring against defendants. This permits a prosecutor to create artificial leverage

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41. Patricia Lee Refo, *The Vanishing Trial*, Litigation, Winter 2004, at 4 ("Some argue that trials are going away because litigants—particularly corporate litigants—no longer can abide the perceived uncertainty and unpredictability of a jury trial.").

42. LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT. OF JUSTICE, PLEA AND CHARGE BARGAINING 3 (2011), http://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf (finding that "[t]he overwhelming majority (90 to 95 percent) of [criminal] cases result in plea bargaining").

43. 397 U.S. 742, 753 (1970).

44. *See generally, e.g.*, John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979) (discussing the history of how increasing standards of due process and the federal rules of evidence necessitated the need for a new device to expedite criminal cases through justice system).

45. *Brady*, 397 U.S. at 753.

46. *Id.*

47. *See generally* Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 INT'L CRIM. JUST. REV. 22, 25 (2002) (noting more than 90 percent of American criminal cases are disposed of by guilty pleas).

during plea negotiations.[48] Prosecutors are expected to take into account a variety of factors when charging a defendant.[49] What makes prosecutorial discretion so significant in the United States is the prosecutor's power to *not charge* a defendant, even in the face of sufficient evidence (*nolle prosequi*).[50] The power of *nolle prosequi* is sometimes rationalized on a theory of leniency, but "the power to be lenient is the power to discriminate."[51] "Overcharging" by prosecutors can lead to increased leverage in the plea bargaining process, during which the prosecutor can offer to drop any number of the charges to secure a guilty plea on the remaining charges, resulting in more guilty pleas and fewer cases going to trial.[52]

Additionally, just as with inflated discovery in civil litigation, the expansion of discovery in criminal cases may contribute to the rise in guilty pleas and the decline in trials. A happy byproduct of discovery is that it educates participants about the respective strengths and weaknesses of their cases, thus leaving them in a better position to plea bargain and avoid trial.[53] Armed with greater information, defense counsel is able to better advise her client on the likelihood—or unlikelihood—of success at trial, resulting in a more confidently negotiated plea.

By all accounts and for whatever combination of reasons, the number of cases going to trial has been on the decline since before the Federal Rules of Evidence were even adopted. Assuming that some combination of ADR and settlement or plea negotiations is responsible for the decline, it is helpful to consider the reasons litigants choose these options over a traditional trial. ADR strives to offer quicker resolution of disputes for less cost than formal litigation.[54] Courts hope to encourage settlement and alleviate crowded dockets by referring

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48. *See generally id.* at 24 (explaining how prosecutorial discretion has been expanded in the context of plea bargaining and remains virtually "unchecked," allowing prosecutors to exact "highly pressurized pleas from defendants").

49. These factors include: sufficiency of the evidence; the degree of harm caused by the offense; "the disproportion of the authorized punishment in relation to the particular offense or offender"; the willingness of the accused to cooperate in the apprehension of others involved in criminal schemes; and the cost of the prosecution and its burden on the criminal justice system. *Id.* at 22.

50. *Id.* at 25.

51. *Id.*

52. *Id.* at 26–27.

53. *See* United States v. Gladney, 563 F.2d 491, 494–95 (1st Cir. 1977) (interpreting Federal Rule of Criminal Procedure 16, which deals with discovery, and finding that "[o]ne object of the liberalized discovery provided in . . . [the r]ule is to encourage guilty pleas and save the expenses of trial").

54. Sabatino, *supra* note 1, at 1342.

cases for non-binding arbitration.[55] Economic efficiencies spur the settlement of civil litigation.[56] Parties strive to resolve both civil and criminal cases before trial to maintain some control over the case's outcome.[57] Each of these motivations for avoiding trial is related to the administrative goal of avoiding undue expense and delay, as stated in the Federal Rules of Evidence.[58] Notably, none of these motives seeks greater fairness, truth, or justice than that available at trial. Potential parties are choosing efficiency and control through alternative means over the fairness and justice promoted by judicial resolution. These preferences reveal quite a bit about how the Federal Rules of Evidence may remain viable. If a federal court could offer more efficiency and control to litigants than it currently does, potential parties may prefer the traditional trial and the justice it strives to offer.

IV. EVIDENCE RULES ARE RIPE FOR REFORM

In recognition of the significant decline of the traditional trial and the evidentiary rules employed there, some have questioned whether the Federal Rules of Evidence have become obsolete.[59] I do not contend that all evidence rules are obsolete and should be abandoned. While the number of trials has diminished substantially in recent decades,[60] the societal norms on which the rules of evidence are based have not. To the extent that they reflect expectations of fairness and justice that will endure over time, evidence rules will never be obsolete. But, while societal expectations for justice may not have diminished, they have certainly evolved and will continue to do so. I suggest that the Advisory Committee on Evidence Rules consider a simpler and more flexible code of rules governing the conduct of trials in an ever-evolving society.

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55. Stipanowich, *supra* note 28, at 844, n.2.

56. Refo, *Trial Rescue*, *supra* note 15, at 3.

57. Refo, *Vanishing Trial*, *supra* note 41, at 58.

58. FED. R. EVID. 102.

59. Sabatino, *supra* note 1, at 1291 ("What should we make of this drift away from our courthouses? Are the various methods of ADR really that vastly different from litigation processes? If ADR is indeed the wave of the future, should we be tossing out our court rules of procedure and evidence, and instead opt to have cases resolved through ADR devices that seemingly are stripped of such constraints? Or is there more to it than that?").

60. Higginbotham, *supra* note 13.

In so amending the rules, I suggest that the Committee on Evidence Rules take a page from the arbitration playbook.[61] Many of the cases that are not going to trial have instead been diverted to some form of alternative dispute resolution in search of a speedier, more efficient, and less costly process.[62] To highlight these advantages, alternative forums may include language in their own rules dissociating their systems from formal evidentiary rules, which may be viewed as oppressive or burdensome.[63] Yet even these alternative forums recognize the need for evidentiary rules in some form[64] and, despite best efforts to the contrary, often include some additional language referencing the informal application of evidence rules.[65] ADR may thus provide some guidance on how to reform the Federal Rules of Evidence to make the trial more attractive as a vehicle for ascertaining truth and justice.

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61. Sabatino, *supra* note 1, at 1342–43 ("Much has been written, but not enough has been done, about streamlining the conventional litigation process. Courts should take a few cues in this regard from their "lighter" counterparts. . . . Requirements for briefing, premarked exhibits, witness lists, and other pretrial submissions ought to be tapered to their contextual need. This is not to suggest that such pretrial streamlining is currently non-existent, but rather to advocate that such measures be used more frequently.").

62. *Id.* at 1343.

63. *See id.*, at 1325 n.147 (citing ALA. CODE § 18-1A-255(3) (1996) ("conformity to the legal rules of evidence shall not be required"); CAL. CIV. PROC. CODE § 1282.2(d) (West 1996) (evidence rules "need not be observed"); MISS. CODE ANN. § 11-15-113(c) (1997) ("conformity to legal rules of evidence shall not be necessary")); *see also id.* at 1325 ("Nominally, many arbitration rules and statutes recite that 'the rules of evidence shall not apply,' or words to that effect.").

64. *See* Sabatino, *supra* note 1, at 1292 ("A close examination of the ADR programs connected with the federal and state courts, as well as ADR services offered in the private sphere, reveals that evidentiary and procedural norms underlying our traditional adjudicative system are substantially replicated in those alternative processes. Those court-like principles may not be as fully, or as formally, embodied in ADR practices, but they are nonetheless present. Even mediation, the least formal of ADR processes, reflects a number of features that are normally associated with courts.")

65. *See* Sabatino, *supra* note 1, at 1325–26, ("[D]eclarations of non-applicability [of the Rules of Evidence] are frequently hedged. Some arbitration rules qualify the notion by stating that 'technical' evidence rules do not apply, thus leaving open the prospect of the 'non-technical' application of evidentiary norms. Other rules provide that the arbitrator may 'relax' or 'liberally construe' the rules of evidence, but without 'sacrificing' the parties' rights to a full and fair hearing. Another frequent construct is a provision declaring that courtroom evidence rules may serve as a 'guide' within the arbitral hearing. Others call for 'general' conformity with evidence rules, or counsel arbitrators to apply the rules 'whenever practicable.'").

While I recommend many broad revisions of the Federal Rules of Evidence below, I highlight three rules in particular as key in providing the flexibility that a cumbersome code does not: Rules 403, 611, and 807. Each of these rules already gives the trial court a great deal of discretion in determining the admissibility of evidence with the goals of fairness, efficiency, truth, and justice in mind. Many of the amendments I propose below suggest that much of the evidence offered at trial today could be fairly considered within the confines of these three rules; many of the remaining rules are currently redundant or unnecessary. In keeping with the present organization of the Federal Rules of Evidence, I address my proposed reforms in the order in which they arise in the Federal Rules.

A. Article I: General Provisions

Article I of the Federal Rules of Evidence covers a laundry list of topics, including the scope[66] and purpose[67] of the rules, definitions of terms used throughout the rules,[68] objections and offers of proof,[69] harmless[70] and plain error,[71] preliminary questions,[72] limited admissibility,[73] and the rule of completeness.[74] Most rules in Article I are procedural rules providing context and instruction on how to implement rules found elsewhere in the Federal Rules of Evidence. Many of these rules are redundant precursors to more specific rules detailed in later articles. Accordingly, I suggest the Advisory Committee on Evidence Rules consider deleting all of Article I, with the exception of Rule 102, to simplify the currently complex code.

As explained in Part II above, Rule 102 sets forth the lofty purpose of the Federal Rules of Evidence focusing on fairness, efficiency, the development of a body of evidence law, the ascertainment of truth, and a just determination.[75] This rule is aspirational only and provides the trial court with a great deal of

66. FED. R. EVID. 101(a).
67. FED. R. EVID. 102.
68. FED. R. EVID. 101(b).
69. FED. R. EVID. 103.
70. FED. R. EVID. 103(a).
71. FED. R. EVID. 103(b).
72. FED. R. EVID. 104.
73. FED. R. EVID. 105.
74. FED. R. EVID. 106.
75. FED. R. EVID. 102.

discretion.[76] The discretion presumed in Rule 102 is essential to the evolution of Evidence law and should remain untouched by any efforts to amend the Federal Rules. The rest of Article I, however, should be replaced altogether with an Advisory Committee Note.

Rule 101 explains that the Federal Rules of Evidence "apply to proceedings in United States courts"[77] and defines certain terms used throughout the rules.[78] The rule provides background information for the novice without offering any actually enforceable limit on the admissibility of evidence at trial. Rule 101(a) refers litigants to Rule 1101,[79] where the true scope of the Federal Rules of Evidence is found.[80] The drafters of the rules recognized the impotence of Rule 101(a) when they intentionally left the details to Rule 1101.[81] The Federal Rules of Evidence could be amended easily to delete Rule 101(a) without anyone even noticing. The definitions set forth in Rule 103(b) are not particularly helpful, but should the Advisory Committee remain convinced of their necessity, they could be incorporated in their current form into Rule 1101 as subpart (f) without much effort. An Advisory Committee Note to Rule 102 or some other device could note the fact that the definitions previously found at Rule 101(b) have been moved to Rule 1101(f).

Rule 103 provides a great deal of guidance on the process of challenging the admissibility of evidence by detailing objections, motions to strike, and offers of proof.[82] Like Rule 101, however, this how-to guide does not contain any independent limitation on the admissibility of evidence and is, in that respect, procedural. The rule cautions the trial lawyer to be aware of two imperatives appellate courts consider when deciding an appeal from a trial court's

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76. *See supra* note 5 and accompanying text (discussing the discretion of the trial court).

77. FED. R. EVID. 101(a) (Scope).

78. FED. R. EVID. 101(b) (Definitions) (defining "civil case," "criminal case," "public office," "record," and "rule prescribed by the court," and including electronic material in the category of written material).

79. FED. R. EVID. 101(a) ("The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.").

80. *See* FED. R. EVID. 1101 (defining the applicability of the rules).

81. *See* WEISSENBERGER & DUANE, *supra* note 3, § 101.1 (citing FED. R. EVID. 101 advisory committee's note to first draft) ("Rule 101 is designed to contain a general introduction to the applicability of the Rules of Evidence. . . . [T]he Advisory Committee . . . 'will not discourage the reader of the rules by confronting him at the outset with a rule filled with minute detail.'").

82. FED. R. EVID. 103 (Rulings on Evidence).

evidentiary ruling: harmless error[83] and plain error.[84] While litigators should take note, these concepts are more reflective of the appellate court's standard of review than instructive to those involved in the trial;[85] neither creates a rule governing the admissibility of evidence at trial. It strikes me as strange that the drafters of the rules hoped to avoid inundating readers with minute detail in Rule 101(a) but had no similar concern in drafting Rule 103. There are many more appropriate resting places for these appellate rules, such as in a statute or in the Federal Rules of Appellate Procedure. To the extent that Rule 103(c) and (d) detail certain suggested procedures for use by the trial court,[86] they already fall within the broad discretion bestowed on the trial court by Rules 102,[87] 403,[88] and 611(a).[89] For these reasons, the Advisory Committee should consider deleting Rule 103 in its entirety and adding a note to Rule 611 that former Rules 103(c) and (d) remain valid guides on trial practice permitted within the discretion of the trial court.

Rule 104 addresses various issues that may arise when a court is called upon to consider a preliminary issue.[90] Rule 104(a), which relates to preliminary questions, explains certain circumstances where the Federal Rules of Evidence do not apply.[91] The substance of this subsection falls within Rule 1101, which addresses the applicability of

83. FED. R. EVID. 103(a).

84. FED. R. EVID. 103(e).

85. *See* WEISSENBERGER & DUANE, *supra* note 3, § 103.1 ("Rule 103 . . . is primarily written for lawyers and judges involved with appeals from evidentiary rulings. It defines the general circumstances under which an appeals court is authorized to reverse a lower court judgment on the basis of errors committed in the trial court, and also defines some of the steps that careful lawyers must take at the trial level to protect their rights on appeal.").

86. FED. R. EVID. 103(c)–(d) discusses a court's ability to make statements about evidence, objections, or rulings and gives discretion to make offers of proof subject to a particular format in order to prevent a jury from hearing inadmissible evidence.

87. *See supra* note 5 and accompanying text (discussing the trial court's discretion under Rule 102).

88. *See infra* notes 141–42 and accompanying text (discussing the trial court's discretion under Rule 403).

89. *See infra* notes 218–21 and accompanying text (discussing the trial court's discretion under Rule 611(a)).

90. FED. R. EVID. 104 (Preliminary Questions).

91. FED. R. EVID. 104(a). Interestingly, Rule 104(a) contains the caveat that the rules on privilege apply even when a court determines a preliminary question.

the Federal Rules of Evidence.[92] When drafting Rule 104, the Advisory Committee recognized that "[i]n some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact."[93] Thus, Rule 104(b) codifies the concept known as "conditional relevance."[94] This is a procedural notion and creates no independent rule governing the admissibility of evidence; it is covered by the court's broad discretion to control the mode and order of interrogation expressed in Rule 611(a).[95] Because Rule 104(b) unnecessarily complicates the Federal Rules of Evidence, it should be deleted. An Advisory Committee Note to Rule 611 could explain the Committee's intention not to forego the practice of conditional relevance explained in then former Rule 104(b).[96]

Rule 104(c) requires the court to conduct any hearing on a preliminary question outside the hearing of the jury in three circumstances: if "the hearing involves the admissibility of a confession," if "a defendant in a criminal case is a witness and so requests," or if "justice so requires."[97] The first two conditions reflect preexisting protections of the Fifth and Fourteenth Amendments to the U.S. Constitution.[98] The third reflects the subjective discretion of the

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92. *See* FED. R. EVID. 1101(d)(1) ("These rules . . . do not apply to . . . the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility.").

93. FED. R. EVID. 104(b) advisory committee's note on 1972 proposed rules. The Advisory Committee gives the example that if one party wants to use a spoken statement to prove that person X had notice of some fact, the statement itself lacks any probative value unless person X actually heard the statement. *Id.*

94. FED. R. EVID. 104(b).

95. *See infra* notes 218–21 and accompanying text (discussing the discretion of Rule 611(a)).

96. *Compare* FED. R. EVID. 104(b) (1987) (repealed 2011) ("When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition"), *with* FED. R. EVID. 104(b) (2011) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. *The court may admit the proposed evidence on the condition that the proof be introduced later.*") (emphasis added). A committee note on Rule 104's 2011 amendment clarifies that these changes are intended to be stylistic only, and are not intended to change the admissibility of evidence. FED. R. EVID. 104 advisory committee's note to 2011 amendment. Thus, the Committee altered the language while intentionally preserving the practice of conditional relevance. *Id.*

97. FED. R. EVID. 104(c).

98. U.S. Const. amends. V, XIV. *See* FED. R. EVID. 104(b) advisory committee's note on 1972 proposed rules (recognizing that Rule 104(c) was codified to reflect the Supreme Court's holding in *Jackson v. Denno*, 378 U.S. 368, 380

trial court in administering proceedings to effectively ascertain the truth, as already broadly outlined by Rules 102[99] and 611(a).[100] An Advisory Committee Note to Rule 611 could rectify this redundancy by explicitly recognizing the practice of conducting a hearing on a preliminary issue outside the hearing of the jury "where justice so requires" as a part of a trial judge's discretionary control over the presentation of witnesses and evidence "so as to make those procedures effective for determining the truth."[101]

Rule 104(d) is similar to Rules 104(c)(1) and (2) in that it merely highlights a preexisting Fifth Amendment protection for criminal defendants who refuse to testify at trial. A criminal defendant does not waive his right to refuse to testify at trial even if he *does* choose to testify on a preliminary question.[102]

Finally, Rule 104(e) explains that nothing in Rule 104 serves to limit the admissibility of otherwise admissible evidence to prove the weight or credibility of other evidence.[103] When drafting this rule, the Advisory Committee sought to protect the fact-finding function of the jury by explaining that the judge is not the sole determiner of preliminary questions.[104] For example, when dealing with conditional relevance under Rule 104(b), a trial court should make a preliminary determination about "whether the foundation evidence is sufficient to support a finding of fulfillment of the condition."[105] If the judge makes such a finding, then the evidence is admitted, to permit the jury to weigh the evidence to determine if the condition was actually established.[106] However, if this preliminary threshold is not met, then

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(1964)). The *Jackson* Court held that the Fourteenth Amendment forbids the use of involuntary confessions, and, because a jury determines truthfulness of a confession in assessing its probative value, "[i]t cannot be assumed . . . that the jury reliably found the facts against the accused." *Jackson*, 378 U.S. at 386–87.

99. *See supra* note 6 and accompanying text (discussing the court's discretion under Rule 102).

100. *See infra* notes 218–21 and accompanying text (discussing the court's discretion under Rule 611(a)).

101. FED. R. EVID. 611(a).

102. FED. R. EVID. 104(d); *see also* FED. R. EVID. 104(d) advisory committee's note on 1972 proposed rules ("The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. *The provision is necessary because of the breadth of cross-examination under Rule 611(b).*") (emphasis added).

103. FED. R. EVID. 104(e).

104. FED. R. EVID. 104(b) advisory committee's note on 1972 proposed rules.

105. *Id.*

106. *Id.*

the judge should withdraw the matter from the jury's consideration.[107] In this respect, the judge is meant to serve only a "gate-keeping" function. Such concerns, however, are sufficiently covered by the general rules of relevance, set forth in Rules 401 and 402.[108]

Since the entirety of Rule 104 is redundant of either existing constitutional protections or other broad rules of evidence, Rule 104 could be deleted while expanding or clarifying other rules without a substantive effect. This would simplify the rules and provide for greater flexibility and discretion for judges in ascertaining truth and justice in judicial proceedings.

A trial court may issue a limiting instruction to the jury pursuant to Rule 105.[109] When a party requests such instruction, the rule requires a court to inform the jury that certain evidence is admissible against a specific party or for a specific purpose, but not against another party or for another purpose.[110] Scholars and litigators are well aware of the research demonstrating that such limiting instructions are wholly ineffective in influencing juror decision-making and moreover serve to confuse the jury.[111] In light of the

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107. *Id.*

108. *See infra* notes 136–40 and accompanying text (discussing relevance under Rules 401 and 402).

109. FED. R. EVID. 105 (Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes).

110. FED. R. EVID. 105. Rules 106, 404(b), 407, 408, 409, 411, and 801 each explicitly recognize that evidence may be admissible against one party but not another, or for one purpose but not another. *See* WEISSENBERGER & DUANE, *supra* note 3, § 105.1 (discussing the concept of limited admissibility).

111. *See* Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U.L. REV. 87, 112 (2013) (discussing "other act" evidence under FRE 404(b) and arguing that limiting instructions in this area are "useless" because the jury is likely to consider the evidence for both a permissible purpose and for purposes of character/propensity since "other act" evidence is relevant to both propositions); Rachel K. Cush & Jane Goodman Delahunty, *The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence*, 13 PSYCHIATRY PSYCHOL. & L., 110, 113 (2006) (reviewing various studies on the impact of limiting instructions given after the jury has viewed gruesome photos and concluding that "[t]he available evidence suggests that limited-use instructions are ineffectual"). A "large body of research indicates that jurors have great difficulty ignoring information once they have become aware of it" and offers several theories to explain this phenomenon, including (1) "belief perseverance," which suggests that "once individuals form a belief, the belief becomes highly resistant to change and influences how they perceive and construct future information," (2) "hindsight bias," which "refers to a phenomenon where once the outcome to a particular event is known, individuals are prone to overestimate the likelihood that the outcome would have occurred, (3) "reactance theory," which "maintains that when individuals perceive that their ability to perform 'free

ineffective nature of such limiting instructions, many seasoned litigators may prefer not to request such instructions even when entitled to them under Rule 105, finding that such instructions may draw unwanted attention to the significance of adverse evidence. This reaction significantly undermines the utility of this rule. All in all, limiting instructions are an encumbrance unique to the traditional trial. In an effort to achieve greater efficiency, promote fairness, and reach a true and just outcome, perhaps it is time for the Advisory Committee to accept that Rule 105 works in theory only and should be eliminated.

The final rule in Article I of the Federal Rules of Evidence is Rule 106, known as the "rule of completeness."[112] This rule provides for the admission of the remainder of a given writing or recording by one party where an adverse party has introduced part of the writing or recording.[113] The court must exercise a great deal of discretion in deciding whether the remainder ought in fairness to be considered simultaneously.[114] Rule 106 is essentially a rule of timing;[115] the

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behaviors' is threatened, they become psychologically aroused," paying more attention to whatever put the particular limitation on the free behavior (in this case, the limiting instruction), and (4) "ironic processes of mental control," which theorizes that "any effort at mental control involves a combination of an active, conscious operating process that searches for thoughts indicative of the desired mental state and a more unconscious monitoring process that searches for indicators of unsuccessful mental control." Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 691–97 (2000).

112. *See* WEISSENBERGER & DUANE, *supra* note 3, § 106.1 ("Rule 106 is the federal codification of the common-law rule of completeness.").

113. FED. R. EVID. 106 (Remainder of or Related Writings or Recorded Statements).

114. *See also* WEISSENBERGER & DUANE, *supra* note 3, § 106.1 (enumerating the factors that a judge should consider in deciding whether fairness requires additional evidence).

115. *See, e.g.*, United States v. Terry, 702 F.2d 299, 314 (2d Cir. 1983) ("Rule 106 does not render admissible evidence that is otherwise inadmissible."); Merrick v. Mercantile-Safe Deposit & Tr. Co., 855 F.2d 1095, 1104 n.10 (4th Cir. 1988) (refusing to hold that Rule 106 required introduction of otherwise inadmissible settlement evidence because "Rule 403 does not explicitly provide that it is subject to other evidentiary provisions," the common law rule of completeness . . . did not require introduction of unduly prejudicial material," and "the 'fairness' standard prescribed by Rule 106 strongly suggests the appropriateness of the type of inquiry more specifically required by Rule 403"); United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982) ("[R]ule [106] covers an order of proof problem; it is not designed to make something admissible that should be excluded."); United States v. Burreson, 643 F.2d 1344, 1349 (9th Cir. 1981) (holding no abuse of discretion where trial court ruled that portions of a party's testimony were inadmissible under Rule

opponent of the evidence could always wait to introduce the remainder of the statement in its case-in-chief or rebuttal case, but Rule 106 allows for the introduction of the remainder immediately.[116] As such, the powers of the trial court under Rule 106 are presently addressed by the broad discretion of Rule 611(a),[117] rendering this rule redundant.[118] The Advisory Committee should delete Rule 106 and add an Advisory Committee Note to Rule 611 recognizing the practice of admitting evidence under the rule of completeness.

Of the six rules codified in Article I of the Federal Rules of Evidence, only one—Rule 102—is not redundant of other protections set forth elsewhere in the Federal Rules of Evidence or in the U.S. Constitution. The remainder of Article I provides background information intended to be useful in applying or effectuating other rules. As such, Article I should be amended to retain only Rule 102

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106 because the portions the appellant sought to admit were irrelevant and inadmissible hearsay); *see also* United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986) (stating in dicta that "[i]f otherwise inadmissible evidence is necessary to correct a misleading impression," then it is only admissible for the purpose of correcting the misleading impression and a limiting instruction should be issued). Nonetheless, three U.S. Circuit Courts of Appeals read Rule 106 much more broadly, finding that, where applicable, Rule 106 opens the door to the admission of evidence otherwise precluded by another rule. United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court."); United States v. Awon, 135 F.3d 96, 101 (1st Cir. 1998) ("Fed. R. Evid. 106 . . . holds that an otherwise inadmissible recorded statement may be introduced into evidence where one side has made a partial disclosure of the information, and full disclosure would avoid unfairness to the other party."); United States v. Lopez-Medina, 596 F.3d 716, 735 (10th Cir. 2010) (admitting evidence under 106 even though the evidence was subject to a hearsay objection). If the Advisory Committee agrees with this broad interpretation of a minority of Circuit Courts of Appeals, it could not delete Rule 106 without fundamentally changing the law.

116. FED. R. EVID. 106; *see also* WEISSENBERGER & DUANE, *supra* note 3, § 106.1 (noting that the rule prevents the fact-finder from considering writings out of context).

117. *See infra* notes 218–21 and accompanying text (discussing the trial court's broad discretion of Rule 611(a)).

118. A minority of U.S Circuit Courts of Appeal have interpreted Rule 106 more broadly to admit even evidence inadmissible under other rules. If the Advisory Committee agrees with the minority view, Rule 106 is much broader than Rule 611(a) and must, therefore, be retained. If this is the case, hopefully, the Advisory Committee would amend Rule 106 to clarify the broad reach of the rule of completeness because it is not expressly stated in the rule as currently written.

and delete the rest. Appropriate Advisory Committee Notes could be added as detailed above.

B. *Article II: Judicial Notice*

Article II of the Federal Rules of Evidence contains only one evidentiary rule.[119] Rule 201 governs the process of taking judicial notice in federal court.[120] It permits a court to instruct the jury to accept a particular fact as conclusive, if the court is convinced that the fact is either generally known in the area or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[121] Judicial notice does not create a substantive basis on which evidence may or may not be admitted. Instead, it details the process by which a party or the court may avoid the rigors of proving certain facts, in the names of efficiency and accuracy. Because Rule 201 works to simplify the traditional trial, it should be retained in any effort to amend the Federal Rules of Evidence.

C. *Article III: Presumptions in Civil Cases*

Presumptions in civil cases are the sole focus of Article III of the Federal Rules of Evidence, which contains only two rules. Rule 301 describes the general rule that, in a civil case, the burden of production to rebut a presumption falls on "the party against whom a presumption is directed."[122] The rule further notes that the burden of persuasion does not shift from the party with the original burden.[123] In drafting Rule 301, Congress consciously chose from competing approaches employed across jurisdictions.[124] The rule created a

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119. FED. R. EVID. 201.

120. FED. R. EVID. 201 (Judicial Notice of Adjudicative Facts).

121. FED. R. EVID. 201(b). Judicial notice is limited to adjudicative facts, FED. R. EVID. 201(a), and mandatory only when a party requests such notice and provides the court with the information necessary to satisfy the standard, FED. R. EVID. 201(c)(2); otherwise, the court may use its discretion in noticing a fact, FED. R. EVID. 201(c)(1). The instruction resulting from judicial notice requires the court in a civil action to instruct the jury that they *must* accept the noticed fact as conclusive, while in a criminal case the court's instruction must explain that the jury may or may not accept the noticed fact as conclusive. FED. R. EVID. 201(f).

122. FED. R. EVID. 301 (Presumptions in Civil Cases Generally).

123. FED. R. EVID. 301. Congress chose the presumption described in Rule 301 over Morgan presumptions, which had been proposed by the drafters and promulgated by the Supreme Court. *See* WEISSENBERGER & DUANE, *supra* note 3, § 301.1.

124. *Id.*

uniform approach across federal courts that had not previously existed. Rule 302 makes clear that in a civil case where a federal court will apply state substantive law, courts should also apply state law on presumptions,[125] thus embodying the *Erie* doctrine.[126]

The evidence rules on presumptions lay out the process for applying the substantive law of presumptions found in statutes or at common law. Because Rules 301 and 302 clarify the law to be applied to presumptions in a federal case, they avoid unnecessary argument between adversaries on such issues. In this way, these rules avoid undue delay and expense in a traditional trial. For that reason, I recommend maintaining Article III as it is currently written.

D. Article IV: Relevancy

Article IV of the Federal Rules of Evidence addresses relevance as well as the admissibility of character evidence. It includes three basic relevance rules: the definition of relevant evidence,[127] the rule that relevant evidence is admissible,[128] and the balancing test for excluding relevant evidence.[129] Additionally, Article IV details five evidence rules aimed at promoting ancillary policy considerations.[130] It also includes the general prohibition of propensity evidence,[131] an explanation of acceptable methods for proving admissible character evidence,[132] and the standard for admitting habit evidence,[133] as well as four rules focused on the admissibility of character evidence in sexual assault and child molestation cases.[134] Although they are not organized this way within Article IV, I will address all the relevance rules before turning to the rules specific to character evidence found in Article IV.

Rules 401 and 402 go hand-in-hand and, arguably, could have been combined into subparts of a single rule of evidence. Rule 401 defines relevant evidence[135] and Rule 402 provides that evidence that

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125. FED. R. EVID. 302 (Applying State Law to Presumptions in Civil Cases).

126. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (establishing that federal courts will defer to state court interpretations of state law).

127. FED. R. EVID. 401.

128. FED. R. EVID. 402.

129. *Id.*

130. FED. R. EVID. 407–11.

131. FED. R. EVID. 404.

132. FED. R. EVID. 405.

133. FED. R. EVID. 406.

134. FED. R. EVID. 412–15.

135. FED. R. EVID. 401 (Test for Relevant Evidence).

meets the definition of Rule 401 is admissible under Rule 402.[136] Pursuant to Rule 402, the converse is also true: irrelevant evidence is inadmissible.[137] Read together, these rules are the heart of the Federal Rules of Evidence.[138] Rules 401 and 402 serve as a filter in every case, limiting the scope of evidence admitted at trial to that needed to prove a fact of consequence in an effort to avoid undue delay and expense. Relevance is so central to the goals of efficiency, truth, and justice that even arbitrations, which so often seek to throw off the oppressive yoke of formal evidence rules, universally rely on the limits of relevance and materiality to reign in the scope of their own proceedings.[139] Rules 401 and 402 are essential to a system of evidence that remains useful in the modern era.

Rule 403, and arguably any exclusionary rule of evidence, is essentially an exception to Rule 402 in that it provides for the exclusion of relevant evidence under the right circumstances. Specifically, Rule 403 permits a federal court to exclude evidence where the risk of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence" substantially outweighs the probative value of the relevant evidence.[140] Such a balancing test is highly subjective and the permissive nature of the rule itself grants the trial court a great deal of discretion in its application.[141]

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136. FED. R. EVID. 402 (General Admissibility of Relevant Evidence).

137. *Id.*

138. *See* WEISSENBERGER & DUANE, *supra* note 3, § 401.1 (describing Rules 401 and 402 as the "cornerstone of the federal evidentiary system").

139. Sabatino, *supra* note 1, at 1328 ("Arbitration rules often contain the scope of hearings by resorting to the legal terminology of relevance or materiality. The UAA, for example, declares that parties are entitled 'to present evidence *material* to the controversy.' Moreover, one of the limited enumerated grounds for vacating an award under the UAA is where the arbitrator 'refused to hear evidence *material* to the controversy.' Nearly all state general arbitration statutes incorporate the UAA's materiality standard, some using the word 'pertinent' in addition to or in lieu of 'material.' The Federal Arbitration Act also refers to the baseline of 'materiality,' limiting the arbitrator's subpoena *duces tecum* powers to any 'book, record, document or paper which may be deemed *material* as *evidence* to the case.' Private arbitration rules, including those of the AAA, JAMS, and the CPR Institute, likewise hem in the arbitral proofs with materiality standards.").

140. FED. R. EVID. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons).

141. *Id.*; *see also* FED. R. EVID. 403 advisory committee's note to 1972 proposed rules (recognizing that Rule 403 codifies long-standing tradition of judicial discretion in this regard); WEISSENBERGER & DUANE, *supra* note 3, § 403.2 (discussing Rule 403's codification of this tradition).

Rule 403 embodies the goals of the Federal Rules of Evidence set forth in Rule 102. It offers trial courts the discretion to exclude otherwise relevant evidence to instead promote fairness and efficiency. Its application will necessarily vary from one case to the next as trial judges strive for clarity and fairness, which in turn promotes the search for truth and justice. Any effort to revise the Federal Rules of Evidence to avoid obsolescence should rely on Rule 403 as a model.

The miscellaneous relevance rules found later in Article IV of the Federal Rules of Evidence are tailored to generally exclude the admission of certain types of evidence, including subsequent remedial measures,[142] settlement offers and statements made during settlement negotiations,[143] offers to pay medical expenses,[144] guilty pleas,[145] and evidence of liability insurance.[146] Although the probative value of such evidence is usually low, these rules have less to do with excluding evidence of low value—which may or may not be otherwise excluded by Rule 403, depending on the counter-balancing risk—than with promoting a specific public policy.[147] Each of these five rules is

142. FED. R. EVID. 407 (Subsequent Remedial Measures).

143. FED. R. EVID. 408 (Compromise Offers and Negotiations).

144. FED. R. EVID. 409 (Offers to Pay Medical and Similar Expenses).

145. FED. R. EVID. 410 (Pleas, Plea Discussions, and Related Statements).

146. FED. R. EVID. 411 (Liability Insurance).

147. *See generally* WEISSENBERGER & DUANE, *supra* note 3, §§ 407.3, 408.2, 409.2. By banning the admission of subsequent remedial measures in many cases, Rule 407 attempts to promote remedial actions taken to ensure public safety. FED. R. EVID. 407 advisory committee's note to 1972 proposed rules ("ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety."). Rule 408 limits the admission of settlement offers and negotiations in an effort to encourage settlements, while also recognizing that settlement offers often have little probative value on a party's wrongdoing. FED. R. EVID. 408 advisory committee's note to 1972 proposed rules (noting that, as with remedial measures, exclusion of settlement offers rests on two grounds: 1) that they are irrelevant to prove a concession, and 2) that public policy favors compromise and settlement). Rule 409 seeks to encourage the actions of good Samaritans, but also reflects the low probative value of an offer to pay medical expenses in determining liability. FED. R. EVID. 409 advisory committee's note to 1972 proposed rules ("such payment or offer is usually made from humane impulses and not from an admission of liability"); 2 MUELLER & KIRKPATRICK, *supra* note 3, §§ 139–40. In Rule 410, the rules limit the use of plea discussions and withdrawn guilty pleas in civil and criminal actions to encourage alternative resolution of criminal cases. FED. R. EVID. 410 advisory committee's note to 1972 proposed rules ("Exclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise"). Rule 411 recognizes the low probative value of maintaining liability insurance in proving fault, though it may be admissible for other purposes such as knowledge of a

mandatory, requiring the exclusion of otherwise relevant evidence.[148] To fulfill these public policies collateral to the trial process, Rules 407 through 411 limit the factfinder's search for the truth and, especially because they are mandatory rules, they complicate the Federal Rules of Evidence.

The public policy argued in support of Rule 407's exclusion of subsequent remedial measures is the promotion of efforts by responsible parties to remediate dangerous conditions before causing additional injury. Critics of this rule have long countered that there is no evidence that responsible parties would not be motivated to undertake such remediation efforts in the absence of Rule 407.[149] In an effort to simplify the rules to better achieve the goals stated in Rule 102, the Advisory Committee on Evidence Rules should seriously consider the calls of these critics to eliminate Rule 407. Additionally, Rule 411 could be deleted from the Federal Rules of Evidence because the rule seeks to promote a public policy already protected by Rule 403: the risk of undue prejudice.[150] After deleting Rule 411, the

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commercial party or a specific trade usage). *See* Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751 (3d Cir. 1976) (reversing the exclusion of liability coverage from evidence because it was relevant to addressing the plaintiff's knowledge of the trade usage). As a matter of public policy, Rule 411 primarily seeks to not discourage individuals from procuring and maintaining such coverage. *See also* 23 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 411.02 (Mark S. Brodin ed., Matthew Bender 2d ed. 1997) ("Both insurers and insured are, in effect, encouraged to enter into contracts of insurance with the implied promise that they will not, as a result of their forethought, be subject to an inference of carelessness."); 2 MUELLER & KIRKPATRICK, *supra* note 3, § 153.

148. FED. R. EVID. 407–11.

149. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 407.03 (Mark S. Brodin ed., Matthew Bender 2d ed. 1997) ("The rationale that corrective action will not be taken in the absence of an exclusionary rule is weak in some respects."); 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 164 (1985) (stating the "validity" of excluding evidence of subsequent measures in order to encourage repairs "is open to serious doubt"); *see also* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5282 (1980) ("The policy of excluding evidence of subsequent measures in order to encourage repairs has been heavily criticized and is no longer a sound justification for the Rule.").

150. *See* 2 MUELLER & KIRKPATRICK, *supra* note 3, § 153 (discussing Rule 411's rejection of liability insurance as proof of wrongful conduct); Ouachita Nat'l Bank v. Tosco Corp. 686 F.2d 1291, 1301 (8th Cir. 1982) (holding admission of insurance evidence as harmless because the court failed to see "any prejudice" to plaintiff); *Posttape*, 537 F.2d at 758 (allowing evidence of insurance because it was offered for other relevant purposes); *see also* WEISSENBERGER & DUANE, *supra* note 3, § 411.2 (arguing that the probative value of insurance is at best equivocal on the issue of negligence or fault so the policy for exclusion is ultimately grounded in the

Advisory Committee could add a note to Rule 403 explicitly recognizing the high risk of prejudice engendered by liability insurance, as well as the typically low probative value of such evidence in proving negligence.

Rules 408 and 410, however, keep open the options of parties to engage in settlement or plea negotiations without fear that statements made within those confines will be admissible against them; this level of control enjoyed by the parties promotes a flourishing evidence code. Parties are free to seek out the possibilities of settlement without substantial risk to their cases, should negotiations prove unsuccessful. Rule 409 offers parties a different kind of control. Because the exclusion of offers to pay medical expenses is most frequently exercised by insurers seeking to mitigate a plaintiff's damages, this rule allows civil defendants to limit the potential damages they may incur.[151] Because Rules 408 through 410 allow parties some degree of control over the outcome of a case, any amendments should leave these rules intact.

Rules 404 and 405 are the first rules in the Federal Rules of Evidence on character evidence. Rule 404 articulates a general rule that propensity evidence should be excluded.[152] This is a mandatory, substantive rule. Much evidence that would be excluded under Rule 404 would otherwise still be excluded by Rule 403 because the risk of undue prejudice substantially outweighs the probative value of character evidence in many cases.[153] However, Rule 404 differs from Rule 403 in two important ways. First, it distinguishes between the character of a witness and the character of any other person, recognizing that the character of a witness for veracity increases the probative value of the evidence.[154] Second, Rule 404 grants a criminal

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prejudicial risk that awareness by the fact finder of insurance invites a finding based on ability or inability to absorb the loss).

151. *See* 2 MUELLER & KIRKPATRICK, *supra* note 3, § 139 ("Relevancy concerns encompass the possibility that a person paying another's medical expenses is simply a good Samaritan; a more probable basis for the Rule is the public policy of encouraging those who feel responsible for an injury to pay the resultant medical expenses."); *see also* WEISSENBERGER & DUANE, *supra* note 3, at § 409.2 (pointing out the obvious importance of encouraging advance payments by insurers to persons injured in accidents).

152. FED. R. EVID. 404 (Character Evidence; Crimes or Other Acts).

153. *See* WEISSENBERGER & DUANE, *supra* note 3, § 404.2 (clarifying that character evidence, even if relevant, may be inadmissible *because* its prejudicial effects can substantially outweigh its probative value. Thus, "[t]he considerations underlying [Rule 404] embody the same policy contained in Rule 403.").

154. *See id.* § 404.8 ("Rule 404(a)(3) provides that the character of a witness may be explored as to the witness's traits of veracity or truth-telling.").

defendant a broader right to introduce character evidence than any other party, in recognition of the fact that a criminal defendant should be permitted to defend his liberty by reasonable means; this is often called the "mercy rule."[155] In these ways, Rule 404 seems to favor the ultimate goals of truth and justice over judicially efficiency. Although the rule adds significant complexity to the Federal Rules of Evidence, much of the substance of Rule 404(a) should be maintained in any effort to amend the rules. But Rule 404(b)(1) and the first sentence of Rule 404(b)(2) are redundant of the broad ban on propensity evidence found in Rule 404(a)(1).[156] Because these subparts are fully addressed by Rule 404(a)(1), the Advisory Committee should delete them.

Rule 404, titled "Character Evidence," must be read in conjunction with Rule 405, titled "Methods of Proving Character." Rule 405 describes the form admissible character evidence may take and directs courts to exclude other types of admissible character evidence that are not specifically identified in the rule.[157] It limits the field of character evidence admissible under Rule 404 and, in that sense, avoids undue delay and expense in furtherance of Rule 102.

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155. *See* FED. R. EVID. 404 advisory committee's note on 2006 amendment ("In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need 'a counterweight against the strong investigative and prosecutorial resources of the government.'") (quoting CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES 264–65 (2d ed. 1999)); WEISSENBERGER & DUANE, *supra* note 3, § 404.6 ("This rule is based on three complementary policies. First, a criminal defendant should have every opportunity to disprove guilt. . . . Second, there is relatively little risk of unfair prejudice to the opposing party when the defendant is allowed to call favorable character witnesses. . . . Third, when evidence of an accused's trait of character is offered by the accused, the risk of prejudice is subject to the control of the accused, and the defense is afforded the opportunity to apply the cost-benefit analysis of the risk of prejudice.").

156. *Compare* FED. R. EVID. 404(b)(1) (articulating that evidence of a crime, wrong or other act is not admissible to prove character "in order to show that on a particular occasion the person acted in accordance with the character"), *with* FED. R. EVID. 404(a)(1) (prohibiting *any* evidence of a person's character from being used to prove that a person acted in accordance with that character). Rule 404(b)(1) is redundant. Similarly, while Rule 404(b)(2) articulates that such evidence could be used for another purpose, this is obvious. Rule 404(a)(1) clearly only prohibits the use of character evidence as proof that a person acted in accordance with the character on a particular occasion. It does not prohibit the use of such evidence as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Rule 404(a)(1) does not require a separate rule affirmatively granting permission to use evidence for these purposes.

157. FED. R. EVID. 405 (Methods of Proving Character).

Rule 406 addresses the use of a person's habit or routine practice as evidence.[158] While the habit evidence described in Rule 406 is technically distinct from character evidence, its proximity to Rules 404 and 405 invites natural contrasts with character evidence.[159] Rule 406 is a permissive rule; habit evidence is presumptively admissible to prove that, on a particular occasion, an individual or organization acted in conformity with his or its habit.[160] But this is somewhat redundant because Rule 404 prohibits only propensity evidence.[161] Because habit evidence is distinct from propensity evidence, it is not covered by the prohibitions of Rule 404. The second sentence of Rule 406, however, deviates from federal common law to note that the "court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness."[162] By expressly lowering the bar to admissibility for habit evidence below that set at common law, Rule 406 establishes a new substantive rule.[163] As such, it should not be targeted by any effort to substantively amend the rules.

The rules governing the relevance of evidence in sexual assault and child molestation cases were written by Congress after the Federal Rules of Evidence were enacted in 1975. Rule 412, the "Rape Shield Law," precludes the admission of evidence of the victim's sexual behavior or predisposition in a sexual misconduct case and sets forth the procedure courts should follow in determining the admissibility of such evidence.[164] Before this rule was enacted by Congress in 1978, that evidence was admissible by a criminal defendant under Rule 404

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158. FED. R. EVID. 406 (Habit; Routine Practice).

159. *See* FED. R. EVID. 406 advisory committee's notes on 1972 proposed rules (recognizing that character and habit are "close akin" but distinct).

160. FED. R. EVID. 406.

161. *See* FED. R. EVID. 404 advisory committee's notes on 2006 amendments ("[I]n a civil case, evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait."); *supra* note 155–57 and accompanying text (explaining the limitations of Rule 404 from excluding propensity evidence that may also serve as proof of other important case elements).

162. *See* WEISSENBERGER & DUANE, *supra* note 3, § 406.1 (noting that one of the functions of Rule 406 is to abolish the "no-eyewitness" rule, which served to admit habit or routine practice evidence only if there were no eyewitnesses to testify on the matter).

163. *See* FED. R. EVID. 406 advisory committee's note on 1972 proposed rules ("A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility.") (citations omitted).

164. FED. R. EVID. 412 (Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition).

as the character of a victim.[165] The Rule was later expanded by the Supreme Court in 1988 to protect victims of other sexual offenses besides rape.[166]

In 1994, Congress extended the rule to evidence in civil cases.[167] Arguably, shifting views of cultural relevance would preclude evidence of a victim's sexual behavior or predisposition under Rule 403, rendering Rule 412 redundant today. In the interests of justice, however, it may be too soon to rely on such a uniform application of Rule 403 in sexual misconduct cases. Moreover, because Congress intentionally drafted Rule 412, as well as its later amendments, in a drastically different way than was recommended by the Supreme Court, there exists a strong possibility that Congress will veto any promulgated amendments to this rule. Additionally, complex as this rule is, it does serve to limit the introduction of character evidence. This furthers the efficiency goals of avoiding undue expense and delay at trial. Thus, any amendment to the Federal Rules of Evidence should keep Rule 412 intact.

Rules 413, 414, and 415 provide for the admission of evidence that a party committed similar acts of sexual assault or child molestation in criminal or civil cases.[168] Such evidence may be considered on any matter to which it is relevant.[169] Congress added Rules 413 through 415 in an amendment to the Violent Crime Control and Law Enforcement Act of 1994.[170] In doing so, Congress bypassed

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165. 124 CONG. REC. H11944 (daily ed. Oct. 10, 1978).

166. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7046, 102 Stat. 4400–01 (amending 18 U.S.C. 109A and the evidence code to cover victims of a "sex offense" rather than "rape"); WEISSENBERGER & DUANE, *supra* note 3, § 412.1 (discussing the general scope of the rule).

167. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 40141(b), 108 Stat. 1918–19; *see also* FED. R. EVID. 412 advisory committee's notes on 1994 amendment (clarifying that Rule 412 was revised to expand protections to victims of sexual offenses, and that the rule "applies to both civil and criminal proceedings").

168. FED. R. EVID. 413–15.

169. *Id.*

170. Adam Kargman, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963, 964 (1999). Congress's unusual deviation from the normal process created by the Rules Enabling Act was probably the result of political pressure from various women's rights groups and an increased public scrutiny over sexual assault issues after the rape prosecutions of William Kennedy Smith and Mike Tyson. *Id.* at 966. During the enactment process, Representative Hughes pointed out the unusual process by which Rules 413–15 were being enacted, noting that "[t]he existing rule making process involves a minimum of six levels of scrutiny or stages of formal review. This has gone through none of those levels." 140 CONG. REC. H8968, H8990 (daily

the traditional rule-making process,[171] which involves consideration by the public, the Advisory Committee on Evidence Rules, the Judicial Conference, and the Supreme Court before a new rule reaches Congress. In enacting Rules 413 through 415, Congress chose to override the near-unanimous concerns of the Judicial Conference and the Advisory Committee.[172] Both bodies had voiced their concerns over the constitutionality of the rule, as well as the undue prejudice its application would cause.[173] One author notes, "Congress turned two centuries of evidentiary common law upside down when it enacted Federal Rules of Evidence 413, 414, and 415."[174]

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ed. Aug. 21, 1994) (statement of Rep. Hughes). In addition, the Representative also pointed out that the additions to the Federal Rules of Evidence were based on "maybe 20 minutes of debate" on the Senate floor and noted that "[t]here has been no debate on the potentially enormous impact it would have on civil or criminal cases." *Id.*

171. *See* 140 CONG. REC. H5437 (daily ed. June 29, 1994) (remarks of Rep. Hughes) ("Under [the Rules Enabling Act], changes in the rules of evidence and procedure for Federal courts originate not in the Congress but in the federal court system. We decided that a long time ago. . . . The governing body of the Federal courts, the Judicial Conference of the United States, develops and proposes rules changes which must be approved by the Supreme Court before being submitted to Congress. The changes go into effect 6 months later unless rejected or modified by the Congress. . . . The existing rulemaking process involves a minimum of six levels of scrutiny or stages of formal review. [The Violent Crime Control and Law Enforcement Act] has gone through none."); *see also* WEISSENBERGER & DUANE, *supra* note 3, § 413.1 (discussing the atypical adoption of Rules 413–15).

172. *See* Judicial Conference of United States, Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct cases, 159 F.R.D. 51, 52–54 (1995) (noting the "highly unusual unanimity of the members of the Standing and Advisory Committees" in recommending Congress reconsider its decision on the policy questions underlying the new rules). Both the Judicial Conference and its Advisory Committee unanimously recommended that Congress reconsider rules 413–15, with the exception of one dissenting vote from a representative of the Department of Justice. In the alternative, the Judicial Conference recommended that Congress instead adopt amendments to Rules 404 and 405 which would set forth a set of judicial factors for judges to weigh in deciding to admit or exclude prior acts of sexual misconduct. Congress chose to reject these suggestions as well. *Id.*; *see also* United States v. Enjady, 134 F.3d 1427, 1430 (10th Cir. 1998) (noting that "[Rule 413] was passed by a Congress that overrode concerns expressed by the Judicial Conference and its Advisory Committee on the Federal Rules of Evidence and its Advisory Committee on the Federal Rules of Criminal Procedure").

173. Judicial Conference of United States, Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct cases, 159 F.R.D. at 52–54.

174. Kargman, *supra* note 170, at 964.

Rules 413 through 415 are express exceptions to the limits placed on the admissibility of propensity evidence by Rule 404. Rule 413 permissively allows a court to admit evidence of a criminal defendant's past sexual assaults in a trial for sexual assault.[175] Rule 414 likewise provides for the admission of a criminal defendant's past child molestations in a child molestation trial.[176] Rule 415 permits the admission of a prior sexual assault or child molestation in a civil case seeking relief for sexual assault or child molestation.[177] Rules 413 through 415 are still subject to the limitations of Rule 403 and, thus, are arguably redundant of that rule. However, because Congress singled out evidence concerning sexual behavior, courts ascribe greater probative value to evidence offered under these rules, making it more difficult in practice to demonstrate that the risk of unfair prejudice substantially outweighs the probative value of the evidence.[178] The Judicial Conference opposed Rules 413 through 415 from the outset for many reasons, including their redundancy, but its proposed amendments to these rules have been rejected by Congress.[179] Despite the complexity and redundancy of these rules—as well as the fact that they expand the world of admissible propensity evidence, which may cause undue delay and expense—it seems likely that Congress would veto any attempt to amend these particular rules.

As noted above, Rules 404 through 406, as well as Rules 412 through 415, relate specifically to character evidence. In a general sense, they address when character evidence is relevant and thus admissible and, accordingly, the drafters located these rules in Article IV. However, as discussed in Section III.F below, the drafters included additional rules governing character evidence in Article VI on witnesses.[180] Should the Advisory Committee choose to undertake substantive revisions of the Federal Rules of Evidence to ensure that the rules endure with significance, I suggest they also consider consolidating all character evidence rules into a single article.

Because relevance effectively limits the scope of a traditional trial, the aim of Article IV lines up well with the goals of the rules in

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175. FED. R. EVID. 413 (Similar Crimes in Sexual-Assault Cases).

176. FED. R. EVID. 414 (Similar Crimes in Child-Molestation Cases).

177. FED. R. EVID. 415 (Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation).

178. *See* STEPHEN A. SALTZBURG ET AL., 2 FEDERAL RULES OF EVIDENCE MANUAL §413.02[3] (11th ed. 2015).

179. *See* 2 MUELLER & KIRKPATRICK, *supra* note 3, § 161.

180. *See infra* Section III.F (discussing rules regarding a witness's competence to testify, the need for personal knowledge, and impeachment using a witness's past criminal record and character for truthfulness).

general by promoting efficiencies of time and cost. As explained above, Rules 401 through 403, as well as Rules 408 through 410, should be maintained through any substantive amendment of Article IV. However, the Advisory Committee should give serious consideration to deleting Rules 407 and 411. Rules 404 through 406, as well as Rules 412 through 415, should be moved to a new article limited to the admissibility of character evidence. The result would be a more straightforward approach to limiting the scope of admissible evidence.

E. Article V: Privileges

In 1975, Congress cut Article V down to a single rule governing privilege.[181] Congress did so for many reasons, including political ones.[182] Rule 501 remained the lone rule until Rule 502 was added in 2008.[183] Rule 501 acknowledges that federal common law on privilege applies to cases in federal court applying federal substantive law, while state privilege law applies to cases applying state substantive law, thus settling any arguments under the *Erie* doctrine before they are raised.[184] This rule exists simply as a placeholder for the substantive evidentiary rules on privilege which Congress vetoed when enacting the rules in 1975.[185] The result adds minimal procedural clarity and certainly no substance concerning the admissibility of evidence, instead leaving "the law of privilege in *status quo*."[186]

In stark contrast to the vagueness of Rule 501, Rule 502 explains in great detail the process for determining when a waiver of the attorney-client-privilege or work-product doctrine has occurred.[187]

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181. FED. R. EVID. 501; Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

182. *See* FED. R. EVID. 501 notes of Committee on the Judiciary, H.R. Rep. No. 93-650 ("The rationale underlying [Rule 501] is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. . . . In addition, the Committee considered that the Court's proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts.").

183. Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537.

184. FED. R. EVID. 501 (Privilege in General).

185. *See* WEISSENBERGER & DUANE, *supra* note 3, § 501.1 ("In adopting Rule 501, Congress rejected the Supreme Court's proposed Article V which contained thirteen Rules relating to privilege.").

186. *See id.* § 501.1 ("[Congress] promulgated a single Rule that left the law of privilege in *status quo*.").

187. FED. R. EVID. 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver).

The rule was enacted specifically to limit the undue delay and expense litigants face in searching a growing body of discoverable information, both physical and electronic, for documents covered by the attorney-client-privilege and work-product doctrines.[188] Under Rule 502, parties can exchange such information during discovery without waiving those privileges, thus saving the efforts previously spent on "privilege review"—the act of combing otherwise discoverable material for privileged information to avoid waiving the privilege through inadvertent disclosure.[189]

Rule 502 may significantly reduce undue delay and expense in many cases where discovery costs would otherwise run high, furthering the goals of the Federal Rules of Evidence. It is evidence of the Advisory Committee's efforts to respond to the needs of parties in modern litigation. Any attempt to amend the Federal Rules of Evidence should maintain Rule 502. Since Rule 502 has been added to Article V, there is no longer any need for a placeholder rule; thus, Rule 501 should be deleted from the Federal Rules of Evidence.

F. Article VI: Witnesses

Article VI of the Federal Rules of Evidence covers a whole host of evidentiary rules from the fitness[190] and credibility of a witness[191] to the methods for examining witnesses and conducting a trial.[192] The first six rules govern the prerequisites to a witness's testimony. Rule 601 sets out the general rule that a witness is presumed competent.[193] This rule deviates from federal common law, as well as several states' laws, which start from the perspective that not all witnesses are competent.[194] Rule 602 limits witness testimony to matters within the witness's personal knowledge.[195] Rule 603 requires all witnesses to affirm their truthful testimony; refusal to do so will preclude the witness's testimony.[196] Any interpreter in a proceeding

188. FED. R. EVID. 502, advisory committee 2007 explanatory note.
189. FED. R. EVID. 502.
190. FED. R. EVID. 601–06.
191. FED. R. EVID. 607–10, 612–13.
192. FED. R. EVID. 611, 614–15.
193. FED. R. EVID. 601 (Competency to Testify in General).
194. *See generally* WEISSENBERGER & DUANE, *supra* note 3, § 601.1 ("Rule 601 effectively shifts the focus from witnesses' competency to their credibility in cases where federal principles apply.").
195. FED. R. EVID. 602 (Need for Personal Knowledge).
196. FED. R. EVID. 603 (Oath or Affirmation to Testify Truthfully).

must swear to translate truthfully, pursuant to Rule 604.[197] These four rules are fairly simple and also essential to reaching a truthful and just outcome in any given case. As such, they should all be maintained, but I would suggest combining them into subparts of a single rule governing witness competence. Such action is certainly not necessary, but in any broad amendment effort, consolidation of these four rules into one would streamline the Federal Rules of Evidence.

Rule 605 precludes a judge from testifying as a witness at the trial over which she is presiding.[198] The public policy behind avoiding such an uncomfortable situation for all involved, however, is already protected by 28 U.S.C. § 455(b)(1), which requires a federal judge to recuse herself in such a situation.[199] Thus, Rule 605 is an unnecessary rule complicating the Federal Rules of Evidence. As such, the Advisory Committee should consider deleting it. An Advisory Committee Note could be added to Rule 601 directing readers to the judicial disqualification statute should such circumstance arise.

Reflecting the prevailing federal common law at the time the Federal Rules of Evidence were drafted, Rule 606(a) prohibits a juror from testifying before the other jurors.[200] The process provides that any information the juror may have gained from the case relevant to a collateral legal matter of interest to the court should be shared outside the hearing of the other jurors.[201] Rule 606(b) limits a juror's testimony concerning a collateral issue on the validity of a verdict or indictment.[202] Arguably, such testimony creates a risk of unfair prejudice which would preclude most juror testimony under Rule 403; however, it might not preclude such testimony where the probative value of the testimony is particularly high. Rule 606 provides a necessary, uniform rule across federal courts that limits the scope of admissible testimony and creates more just results in accordance with Rule 102. Because Rule 606 furthers the goals set forth in Rule 102, it should be retained.

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197. FED. R. EVID. 604 (Interpreter).

198. FED. R. EVID. 605 (Judge's Competency as a Witness).

199. 28 U.S.C. § 455(b)(1) (2017) (requiring disqualification where a judge has "personal knowledge of disputed evidentiary facts concerning the proceeding").

200. FED. R. EVID. 606 (Juror's Competency as a Witness).

201. FED. R. EVID. 606(a).

202. FED. R. EVID. 606(b) (generally prohibiting jurors from testifying about statements made or incidents occurring during deliberations, effects on jurors' votes, or a juror's mental processes concerning the indictment, but allowing testimony concerning 1) "extraneous prejudicial information . . . improperly brought to the jury's attention," 2) "an outside influence" on jurors, or 3) a mistake on the verdict form).

Rules 607 through 609 are each exceptions to the general prohibition of propensity evidence in Rule 404(a)(1), allowing the admission of certain evidence concerning a witness's character for truthfulness or untruthfulness. Rule 607 supersedes the "voucher rule"—a rule that once existed at federal common law prohibiting a party from impeaching his own witness because the proponent has already vouched for the witness's credibility. [203] Rule 607 streamlines traditional trials by allowing parties to impeach their witness's character for truthfulness[204] if it becomes necessary. Rule 608 limits the form in which evidence of a witness's character for truthfulness may be introduced.[205] It adds a great deal of complexity to the Federal Rules of Evidence that necessarily slows the litigation process by allowing the introduction of otherwise inadmissible propensity evidence. But, in an effort to rein in its potential expansiveness, Rule 608 does include limitations on the introduction of extrinsic evidence of a witness's truthfulness or untruthfulness.[206] Ultimately, Rule 608 exchanges efficiency for the goal of achieving truth and, in this way, partly advances the goals of the Federal Rules of Evidence articulated in Rule 102.

Rule 609 is a mandatory rule that describes the circumstances under which a witness's prior conviction is admissible to impeach his character for truthfulness.[207] It represents a departure from the common law, which would have deemed the witness wholly incompetent by virtue of his prior conviction.[208] Like Rule 608, Rule 609 is complex and makes available otherwise inadmissible evidence that may slow the pace of trial, in the name of truth. Nonetheless, the

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203. *See* Chambers v. Mississippi, 410 U.S. 284, 296 (1973) (discussing the voucher rule's origin in English common law, but condemning the rule as "archaic, irrational, and potentially destructive of the truth-gathering process," particularly in criminal trials) (citations omitted). Rule 607 went into effect merely four months after the *Chambers* opinion, completing federal rejection of the voucher rule in both civil and criminal settings.

204. FED. R. EVID. 607 (Who May Impeach a Witness).

205. FED. R. EVID. 608 (A Witness's Character for Truthfulness or Untruthfulness).

206. FED. R. EVID. 608 (allowing a witness' credibility to be attacked by reputation or opinion testimony, but limiting the use of extrinsic evidence of specific conduct attacking a witness' credibility to criminal convictions already proven in court).

207. FED. R. EVID. 609 (Impeachment by Evidence of a Criminal Conviction).

208. *See* WEISSENBERGER & DUANE, *supra* note 3, § 609.1 ("Under modern practice, this blanket disqualification has been universally abandoned, and instead, the matter of convictions has been transformed to issues of credibility and impeachment.").

drafters of Rule 609 expressly noted that the admissibility of prior convictions for crimes other than *crimen falsi* are always at least subject to the balancing test of Rule 403[209] and, when the conviction sought to be admitted is that of a criminal defendant taking the stand, to the more stringent balancing test prescribed in Rule 609(a)(1)(B).[210] Rule 609 provides flexibility in its application through the discretion implicit in the balancing tests[211] and thus strikes a balance between the competing goals of the Federal Rules of Evidence.

Rule 610 excludes evidence of a witness's religious beliefs on the issue of his credibility.[212] This reflects a public policy already protected by other means. Specifically, the probative value of a witness's religious beliefs is almost always nearly non-existent, if it is even relevant at all; thus, such evidence would usually be excluded by Rules 402 and 403. Moreover, it is generally believed that this rule developed at common law from the First Amendment's protection of the free exercise of religion.[213] Thus, this rule is unnecessary. However, the current political climate, in which religious beliefs may be used more as a sword than shield against the witness to prey on the prejudices of some jurors against certain religions, may caution against deleting this rule.

While Rules 607 through 610 do all relate to the credibility of witnesses, they also relate to an important independent topic in the evidence rules: character evidence. As explained in Section III.D. of this article, I propose creating a separate article in the Federal Rules

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209. FED. R. EVID. 609(a)(1)(A).

210. FED. R. EVID. 609(a)(1)(B) ("if the probative value of the evidence outweighs its prejudicial effect to that defendant").

211. *But see* FED. R. EVID. 609, notes of Conference Committee, H.R. Rep. No. 93-1597 ("The admission of prior convictions involving dishonesty and false statement *is not within the discretion of the Court.* Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. *Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.*") (emphasis added).

212. FED. R. EVID. 610 (Religious Beliefs or Opinions).

213. *See generally* WEISSENBERGER & DUANE, *supra* note 3, § 610.1 ("The principle of inadmissibility contained in Rule 610 rests upon grounds of unfair prejudice and minimal probative value, and it is likely derived, at least obliquely, from the federal constitutional guarantees of the free exercise of religion.") (citing 6 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (1976); WEINSTEIN, *supra* note 3, §610.02; 3 MUELLER & KIRKPATRICK, *supra* note 3, § 290; 2 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 518 (1979); 3A JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 936 (1970)).

of Evidence devoted to character evidence.[214] I would include Rules 404 through 406, Rules 412 through 415, and Rules 607 through 610, moving them from their current locations in the Federal Rules.

Rule 611 governs the presentation of evidence and the methods and order for questioning witnesses within a trial.[215] Rule 611(a) confers upon the court the discretion to control the mode and order of calling witnesses and presenting evidence.[216] It is the basis of all objections to form and entirely discretionary. It offers exactly the kind of flexibility needed for the Federal Rules of Evidence to remain relevant.[217] Many of the more specific rules listed throughout the Federal Rules already fall within the court's broad discretion laid out in Rule 611(a).

Rule 611(b) permissively limits the scope of cross-examination,[218] which affects the timing, but not the substance, of admitting evidence. Congress adopted Rule 611(b) in its current form in 1975.[219] Prior to that, however, the Supreme Court had promulgated a draft that included a competing approach known as "wide open cross," in which the scope of cross-examination is not limited to the scope of the direct.[220] In contrast to the current Rule 611(b), "wide open cross" simplifies the trial process and increases efficiency by allowing the witness to give all pertinent testimony at once. Over the past forty years, state approaches to evidence have evolved to embrace wide open cross while the federal rules have stubbornly adhered to the current rule.[221] It may be time to heed the longstanding call of leading

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214. *See supra* Section III.D (eliminating Rule 407 and Rule 411, and moving Rule 404–406 and Rule 412–415 to a new section on admissibility of character evidence).

215. FED. R. EVID. 611 (Mode and Order of Examining Witnesses and Presenting Evidence).

216. FED. R. EVID. 611(a) (granting discretionary control so that the court can "(1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment").

217. Sabatino, *supra* note 1, at 1343–44 ("At civil trials, litigants also ought to be afforded greater flexibility.").

218. FED. R. EVID. 611(b) (advising that while "[c]ross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility," still "[t]he court may allow inquiry into additional matters as if on direct examination").

219. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

220. *See generally* WEISSENBERGER & DUANE, *supra* note 3, § 611.1 (citing Draft of November 1972, 56 F.R.D. 183, 273 (1972)).

221. *See, e.g.*, TENN. R. EVID. 611(b) ("A witness may be cross-examined on any matter relevant to any issue in the case . . . ."); N.C. R. EVID. 611(b) ("A witness may be cross-examined on any matter relevant to any issue in the case."); ARIZ. R. EVID. 611(b) ("A witness may be cross-examined on any relevant matter."); TEX. R.

scholars to amend Rule 611(b) to adopt the practice of wide open cross.[222]

Rule 611(c) limits use of leading questions to elicit evidence in specific circumstances, but provides the court discretion to allow leading questions.[223] The limitations placed on the use of leading questions relate to the form of the inquiry, rather than the substance of the evidence. All other objections to form are considered under Rule 611(a), and I suggest eliminating subsection (c) to allow leading questions to be covered by subsection (a), as well. Some may suggest that leading questions ought to be expressly prohibited on direct examination to prevent the proponent of the evidence from putting words in the witness's mouth. However, any litigator can make an end run around Rule 611(c) by asking a leading question to put the witness on notice of the desired answer. If the opposition successfully objects, the examining attorney can follow up with a non-leading question to elicit the same desired answer. Moreover, a good litigator knows that a witness loses credibility every time counsel suggests the answer to the witness on direct examination. The strategy of a strong advocate would include non-leading questions on direct even if such a pattern were not required by Rule 611(c). I suggest eliminating Rule 611(c) from the Federal Rules of Evidence and leaving leading questions to the proponent's use at his own risk.

EVID. 611(b) ("A witness may be cross-examined on any matter relevant . . . ."); ALA. R. EVID. 611(b) ("The right to cross-examine a witness extends to any matter relevant to any issue and to matters affecting the credibility of the witness, except when a party calls an adverse party or an officer, a director, or a managing agent of a public or private corporation or a partnership or association that is an adverse party, or a witness identified with an adverse party. In those excepted situations, cross-examination by the adverse party may be only upon the subject matter of the witness's examination-in-chief or upon the witness's credibility."); MISS. R. EVID. 611(b) ("Cross-examination shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness."); MICH. R. EVID. 611(c) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination."); OHIO EVID. R. 611(b) ("Cross-examination shall be permitted on all relevant matters and matters affecting credibility."); *see also* 1 MCCORMICK, *supra* note 162, § 21.

222. 1 MCCORMICK, *supra* note 162, § 23; 6 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §1888 (1976); 3 MUELLER & KIRKPATRICK, *supra* note 3, §§ 300–05.

223. FED. R. EVID. 611(b) (granting the court discretion to "allow leading questions (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party").

Rule 612 explains the options of the adverse party when a witness uses a writing to refresh his recollection.[224] While some have argued that the concept of refreshing a witness's memory is a fiction that should be set aside,[225] Rule 612 does not set forth the practice itself. Instead, the rule details the options of an adverse party once a witness's memory has been refreshed. This is essentially a rule of fairness and, as such, is already covered by Rule 611(a)'s grant of judicial discretion over witnesses.[226] Rule 612 sets forth details which needlessly complicate the federal rules and the trial process. Instead, Rule 611(a) would simply put discretion in the hands of the trial court to deal fairly during the refreshing of a witness's recollection. Thus, Rule 612 should be deleted from the Federal Rules of Evidence.

The mandatory process for disclosing a witness's prior statement to an adverse party's counsel is covered by Rule 613,[227] which deviates from the common law in procedure only.[228] Rule 613(a) is codified in the federal rules to create some uniformity where it had been lacking. Prior to Rule 613, federal courts had been applying the common law rule requiring disclosure of the prior inconsistent statement to the witness before questioning the witness about the inconsistency, known as the Rule in Queen Caroline's Case.[229] Rule 613(a) dispensed with this common law rule, preferring the benefits of surprising a witness with a prior inconsistent statement in ascertaining the truth while also discarding an arcane, burdensome rule.[230] Unfortunately, the uniformity Rule 613(a) sought to achieve remains elusive, as many federal judges unnecessarily restrict the examination process by applying the Rule in Queen Caroline's Case.[231] For these reasons, I suggest maintaining Rule 613(a) as a continuing reminder to courts tempted to apply the common law rule. Rule 613(b), which sets strict limits on how far a party can go down

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224. FED. R. EVID. 612 (Writing Used to Refresh a Witness's Memory).

225. *See* WEISSENBERGER & DUANE, *supra* note 3, § 612.1 ("It is obvious that the process of refreshing recollection invites a compliant witness to embrace as testimony anything the witness sees or reads in the document, picture, recording, etc.").

226. *See supra* notes 218–21 and accompanying text (discussing the broad discretion of Rule 611(a)).

227. FED. R. EVID. 613 (Witness's Prior Statement).

228. *See generally* Katharine T. Schaffzin, *Sweet Caroline: The Backslide from Federal Rule of Evidence 613(b) to the Rule in Queen Caroline's Case*, 47 U. MICH. J.L. REFORM 283 (2014) (elaborating on the development, usage, and state of the common law rule of requiring disclosure of a prior inconsistent statement).

229. *Id.* at 285.

230. *Id.*

231. *Id.*

the rabbit hole to prove a witness is lying, should also be retained.[232] By precluding all extrinsic evidence concerning a witness's prior inconsistent statement, Rule 613(b) prevents the devolution of a trial into a three-ring circus.

Rule 614 describes the court's discretion to call its own witnesses or to question witnesses whom the parties call and sets forth the process for exercising either option.[233] The substance of this rule is easily covered by the broad reach of Rule 611(a),[234] rendering Rule 614 unnecessary. It should be deleted, although an Advisory Committee Note to Rule 611 recognizing the practice is likely warranted.

Rule 615 is a mandatory rule governing the sequestration of witnesses.[235] In drafting the Federal Rules of Evidence, the Advisory Committee viewed witness sequestration as a matter of right.[236] As such it is not appropriately covered by the discretion of the trial court under Rule 611 and must be expressly stated to protect that right. Moreover, the rule adds little in the way of complexity, delay, or expense to the traditional trial.

As explained above, I propose significant changes to Article VI. I would make Rule 611 the lodestar of Article VI, as it provides the kind of flexibility essential to the evolution of the federal rules. Additionally, I would consolidate Rules 601 through 604 into a single rule on competence. I then propose eliminating Rule 605 altogether while maintaining Rule 606. I would move Rules 607 through 610 to a separate article devoted to character evidence. I propose deleting Rules 612 and 614 but maintaining the substance of Rules 613 and 615.

G. Article VII: Opinions & Expert Testimony

Article VII of the Federal Rules of Evidence sets forth six rules governing the admissibility of lay and expert opinions.[237] Rule 701 discusses lay opinions[238] and the remainder of the article is devoted to

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232. FED. R. EVID. 613(b).

233. FED. R. EVID. 614 (Court's Calling or Examining a Witness).

234. *See supra* notes 218–21 and accompanying text (discussing the broad discretion of Rule 611(a)).

235. FED. R. EVID. 615 (Excluding Witnesses).

236. *See* WEISSENBERGER & DUANE, *supra* note 3, § 615.1 ("As the Advisory Committee Note reflects, the use of the term 'must' in the Rule is intended to convey the absence of discretion of the trial judge in response to a separation request.").

237. FED. R. EVID. 701–06.

238. FED. R. EVID. 701.

expert witnesses.[239] As a mandatory rule, Rule 701 limits the admissibility of lay opinions to those within the witness's perception that would be helpful to the jury and which could not be described as expert opinions.[240] This reflects the federal common law in effect well before the Federal Rules of Evidence were enacted in 1975.[241] By permitting witnesses to testify to their rational perceptions, the rule simplifies the trial process, which, in the absence of such a rule, would require witnesses to testify to the minute details that make up their impressions.[242]

Rule 702 affirmatively permits the admission of an expert's opinion where the expert meets the specific qualifications laid out in the rule.[243] This exception to the general rule requiring all witnesses to have personal knowledge is codified in Rule 702 to provide expertise to the jury in understanding subjects beyond the knowledge of the average lay juror.[244] Such assistance is intended to aid the jury in reaching a just result. Rule 703 explains that an expert may rely on inadmissible evidence in forming her opinion and that a court may even admit such evidence under certain circumstances.[245] The Advisory Committee drafted this rule to avoid the undue expense and delay incurred by requiring parties to present numerous witnesses to authenticate the material on which an expert based his opinion, which, in most cases, would ultimately prove admissible anyway.[246] In this way, Rule 703 furthers the efficiency-oriented goals of Rule 102 without sacrificing much in the search for truth and justice.

Rule 704 specifically permits an expert to render an opinion on an ultimate issue in a case, while maintaining an exclusion for opinions concerning mens rea in a criminal case.[247] The Advisory Committee drafted this rule to displace the common-law prohibition on opinions regarding the ultimate issue,[248] while still recognizing the

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239. FED. R. EVID. 702–06.

240. FED. R. EVID. 701 (Opinion Testimony by Lay Witnesses).

241. *See* WEISSENBERGER & DUANE, *supra* note 3, § 701.2 (discussing use of lay opinion before Federal Rules of Evidence were adopted).

242. *Id.*

243. FED. R. EVID. 702 (Testimony by Expert Witnesses).

244. *See* WEISSENBERGER & DUANE, *supra* note 3, § 702.3 (discussing the purpose of Rule 702).

245. FED. R. EVID. 703 (Bases of an Expert's Opinion Testimony).

246. FED. R. EVID. 703, advisory committee's note on 1972 proposed rules. *See* WEISSENBERGER & DUANE, *supra* note 3, § 703.2 (discussing the policy behind Rule 703).

247. FED. R. EVID. 704 (Opinion on an Ultimate Issue).

248. WEISSENBERGER & DUANE, *supra* note 3, § 704.2 ("Courts sustaining the basic prohibition reasoned that allowing the witness to testify to one of the ultimate

difficulty trial courts experienced with consistently determining the difference between a fact and an opinion on the ultimate issue.[249] Because Rule 704 permits parties to present their evidence in a logical manner without arbitrary limits on the substance of expert testimony, it provides a flexibility which is typical of ADR mechanisms and critical to an adaptable evidence code.

Rule 705 allows an expert to offer her opinion and the basis for it without providing the facts or data supporting the opinion.[250] Adopted in 1975, Rule 705 marked a deviation from common practice by simplifying what had been a complex process at common law.[251] Instead of requiring parties to tediously lay a foundation of underlying facts and data first, Rule 705 gives parties control in organizing the presentation of expert testimony by dispensing with the need to provide the basis of the expert's opinion in any particular order.[252] The substance of Rule 705, however, is discretionary in that a court may require an expert to first establish the underlying facts.[253] Further, this discretionary power falls squarely within the general discretion of the court over the mode of examining witnesses and evidence established in Rule 611(a).[254] Therefore, Rule 705 is redundant and should be deleted. An Advisory Committee Note could be added to Rule 611 to maintain modern practice.

Rule 706 creates no standard for the admission or exclusion of evidence; instead, it sets forth the procedures for the court's appointment of an expert witness.[255] In theory, an expert appointed by a neutral judge may help clarify conflicting testimony from two

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issues in the case would invade the province of the jury.") (citing United States v. Zipkin, 729 F.2d 384 (6th Cir. 1984) (excluding a bankruptcy judge's testimony on the status of the law); United States v. Ragano, 476 F.2d 410 (5th Cir. 1973) (recognizing the trend to abandon the rule on ultimate issue testimony, symbolized by the then newly proposed Rule 704)).

249. WEISSENBERGER & DUANE, *supra* note 3, § 704.2 ("As originally adopted, Rule 704 reflected the modern trend to abolish the ultimate issue prohibition.").

250. FED. R. EVID. 705 (Disclosing the Facts or Data Underlying an Expert's Opinion).

251. *See* WEISSENBERGER & DUANE, *supra* note 3, § 705.1 ("The Rule departs from previous practice by allowing a properly qualified expert to testify as to his or her conclusions or opinions straightaway, without first laying a foundation of the facts and data that support the expert's opinion.").

252. *Id.*

253. FED. R. EVID. 705.

254. *See supra* notes 218–21 and accompanying text (discussing the discretion of Rule 611(a)).

255. FED. R. EVID. 706 (Court-Appointed Expert Witnesses).

partisan experts with opposing viewpoints. The court's authority to appoint expert witnesses was an inherent power at federal common law well before the concept was enacted as Rule 706.[256] Despite the apparent lack of necessity for it, Rule 706 was adopted to emphasize this underutilized power.[257] Whether it is codified in Rule 706 or not, a system of court-appointed experts forces the parties to relinquish some control over the trial process. Because the practice will necessarily persist at common law, deleting the explicit rule will not eliminate the practice designed to get closer to the truth. The process laid out under Rule 706 is fairly flexible and should be maintained in any effort to amend the federal rules.

Article VII could further improve the current inefficiencies of trial by implementing some practices used in ADR not currently included in the Federal Rules of Evidence. For example, the Advisory Committee could consider a rule permitting the admission of written expert reports to limit the costs of live testimony where such costs are not justified.[258] Alternatively, the rules could accept pre-filed expert statements and forego direct examination of an expert witness, while still requiring the expert to submit to live cross-examination and redirect examination.[259] To promote the continued relevance of the Federal Rules of Evidence, the Advisory Committee should, at the very least, delete Rule 705.

H. Article VIII: Hearsay

Article VIII of the Federal Rules of Evidence governs the exclusion of hearsay. Rule 801(a)–(c) define hearsay and associated terms,[260] while Rule 801(d) exempts certain statements of declarant-witnesses and those of opposing parties from the reach of the exclusionary rule found in Rule 802.[261] The drafters of the rules themselves understood the fiction in defining these categories, which

256. WEISSENBERGER & DUANE, *supra* note 3, § 706 (citing 3 MUELLER & KIRKPATRICK, *supra* note 3, § 366).

257. *Id.*

258. *See* Sabatino, *supra* note 1, at 1343–44 ("Written reports of qualified experts should be admissible, upon mutual consent, in those cases where the costs of live expert testimony are not justified.").

259. *Id.*

260. FED. R. EVID. 801(a) (defining "statement"); FED. R. EVID. 801(b) (defining "declarant"); FED. R. EVID. 801(c) (defining "hearsay").

261. FED. R. EVID. 801(d) (setting the conditions under which a declarant-witness's prior statement or an opposing party's statement are not hearsay).

otherwise meet the definition of hearsay, as non-hearsay.[262] Indeed, Rule 806 treats the non-hearsay statements of Rule 801(d) the same as hearsay.[263] Rule 802 excludes hearsay as defined by Rule 801.[264] Rules 803 and 804 describe a total of twenty-eight exceptions to the exclusionary rule of Rule 802.[265] In other words, these rules determine when otherwise inadmissible hearsay should be admitted. Hearsay within hearsay is addressed in Rule 805, which provides for the admissibility of multiple parts of a combined statement as long as they each conform to a hearsay exception.[266] This rule adds nothing substantively to the law of evidence; it merely confirms that the hearsay rule and its exceptions still apply when multiple hearsay statements combine in one statement. Rule 806 calls on a court to treat a hearsay declarant as a witness for purposes of impeaching the declarant's credibility.[267]

Known as the Residual Exception, Rule 807 is the lodestar of Article VIII in terms of flexibility and discretion. It is a catchall exception to the exclusionary hearsay rule. It allows a court to admit any hearsay statement not otherwise admissible if it offers sufficient guarantees of trustworthiness, is more probative than other evidence, and will further the purpose of the rules or the interests of justice.[268] Thus far, the evidence rules have failed to adapt to novel communication forms that have continually evolved, and Rule 807 could be the key to such adaptation. As Professor Jeffrey Bellin wrote:

> When communication norms change, it follows that evidence doctrine, and particularly the hearsay rules that control the admission of out-of-court statements, must change as well. New methods of communicating and manners of speaking require renewed assessment of the categories of statements traditionally excepted from the hearsay prohibition. In the coming years,

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262. *See* FED. R. EVID. 801 advisory committee's notes on 1975 proposed rules (recognizing that "[s]everal types of statements which would otherwise literally fall within the definition [of hearsay] are expressly excluded from it").

263. FED. R. EVID. 806 ("When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence . . . .").

264. FED. R. EVID. 802 (The Rule Against Hearsay).

265. FED. R. EVID. 803 (listing exceptions to the rule against hearsay existing regardless of witness availability); FED. R. EVID. 804 (listing exceptions to the rule against hearsay existing when the witness is unavailable).

266. FED. R. EVID. 805 (Hearsay Within Hearsay).

267. FED. R. EVID. 806 (Attacking and Supporting the Declarant's Credibility).

268. FED. R. EVID. 807 (Residual Exception).

> venerable hearsay exceptions will need to be revised to better suit the modern era.[269]

Seventh Circuit Judge Richard Posner has contributed to this dialogue by suggesting that Rule 807 should be rewritten to "swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee."[270] Although the legislative history of Rule 807 suggests that it should be exercised "only in exceptional circumstances,"[271] there is no reason that it must remain so. Conscious revision of Article VIII to highlight Rule 807 as the only standard for admitting hearsay could alter evidentiary analysis to render Rule 807 the norm, rather than the exception.

In light of the foregoing, I proposed revising Rule 801 by deleting subsection (d), while maintaining the substance of Rule 802, but incorporating it into Rule 801. Such a rule would provide as follows:

> **Rule 801. The Rule Against Hearsay**
>
> **(a)** Hearsay is not admissible unless any of the following provides otherwise:
>
> - a federal statute;
> - these rules; or
> - other rules prescribed by the Supreme Court.
>
> **(b) Definitions that Apply to this Article**
> **(1) Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
> **(2) Declarant.** "Declarant" means the person who made the statement.
> **(3) Hearsay.** "Hearsay" means a statement that:

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269. Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PENN. L. REV. 331, 332–33 (2012) (proposing an update to the present sense impression exception to the hearsay rule).

270. United States v. Boyce, 742 F.3d 792, 802 (7th Cir. 2014) (Posner, J., concurring) (further noting the hearsay rule is "too complex, as well as being archaic").

271. S. REP. NO. 93-1277, at 7066 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7066.

> **(A)** the declarant does not make while testifying at the current trial or hearing; and
> **(B)** a party offers into evidence to prove the truth of the matter asserted in the statement.

I then suggest deleting Rules 803 through 805. As explained above, Rule 805 adds no substance to the rules; it simply states the obvious. The residual exception can be revised as follows, as a new Rule 802 replacing the substance of the current Rules 801(d), 803, and 804:

> **Rule 802. Residual Exception**
>
> Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay:
>
> **(a)** it is offered as evidence of a material fact;
> **(b)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;
> **(c)** admitting it will best serve the purposes of these rules and the interests of justice; and
> **(d)** one of the following circumstances apply:
> **(1)** the statement has sufficient circumstantial guarantees of trustworthiness; or
> **(2)** traditional notions of fair play or substantial justice require its admission.

An Advisory Committee Note could be added to Rule 802, listing the deleted exceptions and exemptions as examples which may demonstrate sufficient circumstantial guarantees of trustworthiness or traditional notions of fair play and substantial justice. Finally, I would amend Rule 806, now Rule 803, as follows:

> **Rule 803. Attacking and Supporting the Declarant's Credibility**
>
> When a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct,

> regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Such a significant amendment to the hearsay rules would be in line with arbitration formats, which tend to admit more hearsay than would be admitted in a traditional trial.[272] In the interests of a smoother, less complicated presentation of evidence, parties to arbitration often agree to relax hearsay rules by stipulation.[273] If it is interested in allowing the rules of evidence to evolve, the Advisory Committee should seriously consider heeding Judge Posner's advice and amend the Residual Exception to swallow all more specific hearsay exceptions.

I. Article IX: Authentication & Identification

Article IX of the Federal Rules of Evidence covers the authentication of evidence. Rule 901(a) sets forth the general rule that authentication is a prerequisite to admissibility.[274] This requirement that a foundation be laid demonstrating that evidence is what its proponent claims it to be is a necessary prerequisite to determining the relevance of the evidence.[275] Rule 901(a) is extremely flexible in that no specific method for laying such a foundation is required. Rule 901(b) includes a non-exhaustive list of ten acceptable methods for satisfying the general requirement of Rule 901(a), including witness testimony.[276] Because Rule 901(b) sets forth no standard and simply sets forth examples, it is truly not necessary. This subsection should be deleted from the rule itself and the examples should be referenced in an Advisory Committee Note to Rule 901.

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272. Sabatino, *supra* note 1, at 1332 ("Overall, the quantum of hearsay allowed in most arbitrations will exceed that which would be admissible in a jury trial. Despite that difference of degree, arbitration and the trial system share a fundamental concern about the reliability of out-of-court assertions. Even if hearsay is admitted, the arbitrator still may discount its weight. That prospect creates incentives for litigants in arbitration to offer certain testimony in live form, particularly where the case turns on credibility issues.").

273. *Id.* at 1344.

274. FED. R. EVID. 901 (Authenticating or Identifying Evidence).

275. *See* WEISSENBERGER & DUANE, *supra* note 3, § 901.1 ("The function of authentication or identification is to establish . . . a connection between the evidence offered and the relevant facts of the case.").

276. FED. R. EVID. 901.

Rule 902 provides a list of twelve methods for authenticating evidence that do not even require any proof of authentication at all.[277] Essentially, these twelve methods function as exceptions to the requirements of Rule 901(a). As such, Rule 902 could be incorporated into Rule 901 as subsection (b). Rule 902 relieves the proponent of evidence of the burden of authenticating that evidence. It removes an obstacle to an efficient trial presentation and so its substance should be retained.

Rule 903 limits the admissibility of a very narrow category of documentary evidence when the subscribing witness does not testify to authenticate her signature and such testimony is required by the jurisdiction validating the document.[278] The most common document required by state law to be verified by testimony of the subscribing witness is a will.[279] Because the probate of wills is beyond the limited subject-matter jurisdiction of the federal courts, their validity will rarely be raised in federal court to trigger this rule.[280] Although the rule, if triggered, would be quite cumbersome at trial, interrupting the flow of the proponent's case and adding to the expense and delay of the proceedings, the rule does necessarily defer to state law on the issue. Because the circumstances in which such a rule would be utilized are exceedingly rare, the Advisory Committee should keep Rule 903 intact during any amendment process.

277. FED. R. EVID. 902 (Evidence That Is Self-Authenticating).

278. FED. R. EVID. 903 (Subscribing Witness's Testimony).

279. *See* WEISSENBERGER & DUANE, *supra* note 3, § 903.3 (discussing the scope and application of Rule 903).

280. *Id.*

J. *Article X: Contents of Writings, Recordings, & Photographs*

Article X addresses acceptable methods for proving the content of a writing, recording, or photograph. From this perspective, the rules contained therein are overwhelmingly procedural. Rule 1001 provides definitions for terms which appear later in Article X and should be considered in conjunction with Rule 1002.[281] The heart of Article X is found in Rule 1002, explaining the "best evidence rule" requiring the production of an original writing, recording, or photograph to prove its contents.[282] The best evidence rule, however, is really a "rule of preference under which the original is preferred to secondary evidence."[283] In fact, the next five rules make clear the narrow reach of Rule 1002's limits by providing a number of exceptions permitting the admission of evidence other than an original to prove the content of a writing, recording, or photograph. Because Rule 1002 is a rule of preference only, one may argue that the rule and its exceptions should be deleted from the Federal Rules altogether, allowing courts to decide such issues pursuant to Rule 611(a).[284] The alternative is to maintain Rules 1001 and 1002, recognizing that they are discretionary rules inviting flexibility in the trial process.

Rules 1003 through 1007 are all exceptions to Rule 1002. Rule 1003 notes that duplicates are as admissible as original documents.[285] Rule 1004 permits other evidence to prove content where the original is out of the reach of the proponent.[286] Rule 1005 exempts from the reach of Rule 1002 certified copies of official public records.[287] Pursuant to Rule 1006, parties may introduce summaries of original writings, recordings, or photographs to prove their contents where the originals are too numerous for convenient admission at trial.[288] Finally, Rule 1007 permits proof of the contents of a writing, recording, or photograph through the testimony or other statement of the party against whom the writing, recording, or photograph is being offered.[289] If Rules 1001 and 1002 are maintained in the Federal Rules

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281. FED. R. EVID. 1001 (Definitions That Apply to This Article).

282. FED. R. EVID. 1002 (Requirement of the Original).

283. WEISSENBERGER & DUANE, *supra* note 3, § 1001.1.

284. *See supra* notes 218–21 and accompanying text (discussing the broad discretion of Rule 611(a)).

285. FED. R. EVID. 1003 (Admissibility of Duplicates).

286. FED. R. EVID. 1004 (Admissibility of Other Evidence of Content).

287. FED. R. EVID. 1005 (Copies of Public Records to Prove Content).

288. FED. R. EVID. 1006 (Summaries to Prove Content).

289. FED. R. EVID. 1007 (Testimony or Statement of a Party to Prove Content).

of Evidence, Rules 1003 through 1007 could be maintained in substance to simplify the presentation of evidence at trial. These exceptions could be combined, however, into a single rule listing the exceptions to Rule 1002. An alternative to retaining or combining Rules 1003 through 1007 would be to revise Rule 1002 as follows:

> **Rule 1002. Preference for Original Evidence**
>
> The court should exercise reasonable control over the admission of an alternative to an original writing, recording, or photograph to prove its content so as to:
>
> **(a)** preserve the accuracy of the original writing, recording, or photograph;
> **(b)** avoid unnecessary delay or expense; and
> **(c)** permit alternative evidence where the original writing, recording, or photograph is beyond the reach of the proponent of the evidence.

Rule 1008 divides the roles of judge and jury; the judge is charged with determining the admissibility of evidence under Article X and the jury is responsible for weighing such evidence.[290] It "is a specialized application of the court's power to determine preliminary matters under Rule 104."[291] As I recommended deleting Rule 104 above because it is redundant of constitutional protections or covered by Rule 611(a),[292] I similarly recommend deleting Rule 1008.

K. Article XI: Miscellaneous Rules

Article XI is entirely procedural. Rule 1101 describes the applicability of the Federal Rules of Evidence.[293] Rule 1102 allows for the amendment of the Federal Rules of Evidence[294] and Rule 1103 provides the rules with their title.[295] These rules are appropriately placed at the end of the Rules where they will not complicate the reader's understanding of the substantive rules. They do not really advance any of the goals stated in Rule 102 of the Federal Rules of

290. FED. R. EVID. 1008 (Functions of the Court and Jury.)
291. WEISSENBERGER & DUANE, *supra* note 3, § 1008.1.
292. *See supra* notes 96–97 and accompanying text.
293. FED. R. EVID. 1101 (Applicability of the Rules).
294. FED. R. EVID. 1102 (Amendments).
295. FED. R. EVID. 1103 (Title).

Evidence, but nor do they pose any hindrance. As such, Article XI should remain in its entirety.

V. CONCLUSION

Despite trends demonstrating that fewer cases make it to trial today than did before the Federal Rules of Evidence were enacted in 1975, evidentiary rules will never be fully obsolete. As long as societal values continue to prioritize truth and justice, the Federal Rules of Evidence will have some relevance. Nonetheless, with fewer cases going to trial, the rules are exercised less than if all actual disputes were resolved via a traditional trial.

For the reasons explored in Part IV above,[296] the Advisory Committee on Evidence Rules should consider substantively revising the Federal Rules of Evidence to simplify the code. The rules should be amended to achieve the purpose of the federal rules: "to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[297] Such an extensive revision should aim for a smoother, faster, and less costly presentation of evidence at trial, while balancing the sometimes competing goals of ascertaining truth and arriving at a just outcome.

296. *See supra* note 22 and accompanying text (discussing the preference of litigants for a faster, less costly form of dispute resolution).

297. FED. R. EVID. 102.