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Minimizing the Jury Over-Valuation Concern (Visions of Rationality in Evidence Law Symposium)

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MINIMIZING THE JURY OVER-VALUATION CONCERN

Richard D. Friedman

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INTRODUCTION

A great deal of the rhetoric of evidence discourse concerns the supposed cognitive inadequacies of the jury. In various contexts we are told that although an item of evidence is probative, it must be excluded because the jury will give it too much weight. I believe this approach has played far too great a role in evidentiary law, and that it is an interesting project to see whether we can construct a satisfactory body of law without relying at all on the cognitive inadequacy argument. I think that, at least to a large extent, we can. In some settings, where the cognitive inadequacy argument now causes the exclusion of evidence, we might instead articulate other grounds for exclusion. In some other settings we might instead decide that the best result is admission of the evidence.

I will focus on three substantive areas of evidentiary law: hearsay, character and prior misconduct—used both substantively and to impeach—and

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expert evidence. In each of these areas, a large part of the reason usually given for exclusion of evidence, when it is excluded, is fear that the jury will overvalue the evidence. In each, I will contend that this argument should be put aside. With respect to hearsay, the law may be vastly improved by the Supreme Court's recent articulation of a strong sense of the confrontation right independent of hearsay law. Such a right yields a categorical rule excluding an important but relatively narrow segment of hearsay. Hearsay that does not fit within this right might yet be excluded because of best evidence considerations, but if neither the confrontation right nor best evidence considerations call for the exclusion of hearsay, it probably should be admitted.

With respect to evidence of character and prior misconduct, I believe that in many settings the misconduct does indeed have very substantial probative value. If it is to be excluded, as often it should be, the reason should not be the cognitive inadequacy of the jury. A better reason is that the evidence would likely cause the jury, and perhaps any fact-finder, to decide the case on an improper basis. In particular, when such evidence is offered against a criminal defendant, its impact is often to cause the fact-finder, in essence, to lower the standard of persuasion it applies to the case. This is true even with respect to evidence of misconduct offered against an accused for impeachment purposes. Such evidence does not, I believe, have substantial probative value and I doubt that juries give it much value for the purpose for which it is supposedly offered.

With respect to expert evidence, the situation is somewhat more complicated. I believe that the Daubert standard is too rigorous, addressing at the admissibility stage questions that should be dealt with in making sufficiency determinations.\(^1\) When evidence is to be excluded, I do not think it should be so much because the court believes that the evidence, while probative, is likely to over-persuade the jury. Rather, I believe the reason should be either a best evidence ground—that exclusion may induce the production of better evidence—or that the court has determined that the evidence is affirmatively misleading or of so little probative value as not to be worth the costs of presenting it.

Before addressing these specific doctrinal areas, I will discuss in general the nature of the over-valuation concern, and then other reasons for exclusion.

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I. THE OVER-VALUATION CONCERN

Most evidence scholars avoid reductionism and recognize that when the exclusion of evidence is warranted it may be for one or more of a variety of reasons. My basic thesis is that one reason often given, that the jury will likely over-value the evidence, should play little or no role in evidentiary law.

Here is the over-valuation concern: Although a given piece of evidence has probative value, enough to warrant admission if there were an ideal fact-finder, the jury is likely to give the evidence too much weight, and the excess weight means that the truth-determination process is better off if the evidence is excluded than if it is admitted. Several points about this concern warrant emphasis and counsel against it causing the exclusion of evidence.

First, so far as I am aware, this concern was never, or hardly ever, mentioned until near the turn of the 19th century. Of course, before that time, the law of evidence had not gelled in anything like its modern form, but there were enough writings on evidence in the 18th century that one might have expected more emphasis on this point had it seemed salient then.

Second, given the emphasis that has been placed on this concern, it has not been sufficiently subjected to empirical study. At least in the hearsay context, empirical studies appear to demonstrate that the concern is not a very weighty one.

Third, the nature of the concern must be clearly understood. It is not merely that the jurors will over-value the evidence, but that they will over-value the evidence by so much that the truth-determination process is worse if the jurors hear the evidence than if they do not. However valuation of evidence is measured, that is over-valuation to a significant degree. It essentially means that the over-valuation exceeds the “appropriate” valuation—or, put another way, that the jury is according more than double the appropriate weight to the evidence.

2. See Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 181-83 (1948); Berkeley Peerage Case, 4 Camp. 401, 415; 171 Eng. Rep. 128, 134-35 (1811); Model Code of Evid. 217, 221 (1942) (introductory note) (“[N]ot the jury system, but rather the adversary theory of litigation, coupled with then currently accepted notions as to the value of the oath, accounts for the hearsay rule as it was at the opening of the nineteenth century”).

3. The best known, and overstated, characterization is the one made by Edmund Burke in 1794 that the rules of “the law of evidence . . . [were] very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half hour, and repeat them in five minutes.” 12 William Holdsworth, A History of English Law 509 n.7 (1938). See also Richard D. Friedman & Bridget McCormack, Dial-In Testimony, 150 U. Pa. L. Rev. 1171, 1208 n.138 (2002).

4. See infra Part III.A.
Fourth, given this calculus, there is a significant informational demand on rule-makers or on the court, depending on whether exclusion is determined on the basis of a broad rule or on the basis of an assessment of the facts in the particular case. Thus, exclusion on this ground requires rule-makers, or the court, to assess with some confidence both the appropriate valuation and the valuation that the jury will accord to the evidence, or at least the ratio of the two. While judges may as a group be better than jurors as a group in assessing the appropriate valuation of evidence, it is a great understatement to say they are far from perfect; judges are “susceptible to the usual cognitive biases that afflict most people.”

In one recent study, while approximately forty percent of a group of participating judges appear to have analyzed an evidentiary problem correctly—better than among other groups studied—the rest did not, and forty percent appear to have fallen prey to the “inverse fallacy,” failing to recognize the lack of identity between probabilities with transposed conditionals. “[J]udicial decision making, like the decision making of other experts and laypeople, is influenced by . . . cognitive illusions.”

Fifth, when a jury sits, it is the fact-finder designated by law; indeed, generally it sits because one party or the other has exercised a constitutional right to have it do so. Only with reluctance should a court restrict the jury’s fact-finding ability. It goes particularly against the grain of the jury right to exclude evidence of substantial probative value because of fears that the jury will accord it too much weight. If sometimes a piece of evidence causes the jury to reach a factual conclusion that the court would not have reached—well, what else can we expect if we designate the jury, or any entity other than the court itself, as fact-finder? Excluding evidence for fear of jury over-valuation strikes me as more pernicious than granting judgment as a matter of law on the grounds that the evidence would not, or did not, support a given finding. In granting a motion for judgment as a matter of law, the court is essentially saying, “The jury could reach (or could have reached) a given factual finding only by doing its job poorly—probably by ignoring its instructions. There is no reason to allow a judgment to stand on such a basis.” Excluding evidence because of the over-valuation concern effectively says, “Although a reasonable fact-finder could use this evidence in a helpful way, it is so likely that the jury will overuse it that the evidence must be excluded.”

Sixth, even assuming the adjudicative system can—whether through general rules or through individualized determination by the trial

7. Id. at 816.
judge—identify evidence that the jury is likely to over-value by so much as to make exclusion better than simple admission for truth determination, exclusion would ordinarily be too stringent a remedy. The judge has the power to comment on the evidence, and if a particular item of evidence raises dangers of over-valuation it would seem appropriate for the judge to call the jury’s attention to that fact. The judge can give an instruction to the following effect: “This item of evidence may have some probative value, and you should give it such value as you deem appropriate. Be aware, however, that this evidence may have less probative value than you are inclined to give it, because. . . .” Though in some contexts instructions designed to limit the impact of evidence are quite ineffectual, there is no reason to suppose that would be true in this context. Some instructions tell the jurors, for reasons of legal policy that might not appeal to them, to put out of mind probative evidence that they have heard; others ask them to perform a mental gymnastic by using evidence for a limited purpose but not using it with respect to a given proposition for which it has high probative value, but the commentary in this context is not of those sorts. Instead it tells the jury: “Here is information you may not have had, and you should take that into account in assessing the probative value of the evidence offered by a party.” Conscientious jurors may be expected to listen to and absorb such a message from the judge, who gives it from a position of neutrality. Comment of this sort thus acts as a less restrictive alternative to exclusion. It allows the evidence to come in, because it may have significant probative value, and minimizes the chance that the jurors will so over-value the evidence that exclusion would be the optimal alternative.

Given all these considerations, I believe there should be a rather strong presumption against invoking the over-valuation concern to exclude evidence. At the least, this would mean that the concern should not be invoked unless there is a well demonstrated reason to conclude that the jury is particularly likely to over-value the particular type of evidence involved, even in the face of judicial commentary. In some cases, this reluctance to invoke the over-valuation concern would mean that evidence that is now excluded should be admitted, but I do not believe that the principal effect of this approach would be to cause more evidence to be admitted. Rather, I believe the principal impact would be to cause us to rely more on other considerations in articulating the reasons for exclusion. I now turn to a catalog of such other reasons.
II. OTHER REASONS FOR EXCLUSION

There are various valid reasons to exclude evidence. One is that admission of evidence might inhibit socially desirable behavior. For example, to take two obvious examples, introduction of compromise offers and of remedial measures taken after an accident might cause parties to be wary of engaging in such behavior. A second valid reason for exclusion is that introducing the evidence might violate some right or interest of a party or other person. The confrontation right (which I shall discuss further below) and the interest in confidentiality that underlies many privileges are two obvious examples.

For now, though, I will focus on three other considerations that might warrant exclusion and that might be confused with the over-valuation concern. I will describe each of these and explain why I believe each one stands on stronger ground than the over-valuation concern.

A. Insufficient Probative Value

First is lack of sufficient probative value to warrant admissibility. Even conceding that, under the broad definition of relevance incorporated into Federal Rule of Evidence 401, virtually all evidence is relevant, that does not answer the bottom-line question of admissibility. Suppose the evidence has very slight probative value. In a cost-free world, that might be enough to warrant admissibility, but the real world is not cost-free. The presentation of evidence consumes the time of all participants in the litigation, and might induce the opponent to present rebutting evidence that would consume more time. The probative value of the evidence may simply not be worth the costs of presentation. The problem is not, as with the over-valuation concern, that the jury is likely to give the evidence too much weight and thus make the truth-determination process worse with the evidence admitted than with it excluded; or at least that problem is solvable by the presentation of more evidence. The ineradicable problem is simply a matter of waste.

Note that this concern does not require the court to assume that the jury will misuse the evidence. On the contrary, it assumes that the evidence has insufficient probative value to warrant the costs of admitting it; even assuming

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the jury will give it no more than the appropriate weight. The court unquestionably has a legitimate interest in controlling the proceedings and preventing time from being wasted by virtual irrelevancies. Implementing this interest does not require the delicate informational judgment that the over-valuation concern does.

In at least one type of setting, though, these two concerns have an interesting relationship. Suppose the court believes that, (1) as matters stand, if the evidence in question is introduced the jurors will over-value it because they are unlikely to have enough information at their disposal to value it properly, and (2) with fuller information that could be presented, the jurors would be in a better position to assess the evidence, but (3) the cost of presenting the fuller information would make the presentation of the challenged evidence not worth the trouble. In this circumstance it might make sense for the court to exclude the evidence, saying in effect, “It’s not that I disrespect the jury’s ability to value the evidence; rather, it is that it would be too costly to put the jury into a position to value the evidence well.”

Properly conceived, this type of response does not undermine the argument against excluding evidence based on the over-valuation concern. Think of three possible outcomes: (1) Exclude the proffered evidence; (2) Admit the proffered evidence, without any responsive evidence; (3) Admit the proffered evidence and the responsive evidence. Possibility (2) is not really a viable option, because it would be unfair to the opponent. In comparing possibilities (1) and (3), the problem is not that the jury is likely to over-value the proffered evidence: the responsive evidence should minimize that possibility. Rather, the concern is simply that the net value of introducing the proffered and responsive evidence may not be worth the cost it would entail.

In some settings, the analysis may be somewhat more complex. It may be that the extent to which the court believes the opponent should be allowed to rebut the evidence will depend to a great extent on the perceived probability that absent rebuttal, the jury will significantly over-value the evidence. Suppose, for example, one party wishes to introduce a statement made by his adversary in a superseded pleading. The opponent wants to explain the reasons why he might have made the statement even without believing it to be true. The court agrees that if the proponent is allowed to present the statement then the opponent must have an opportunity to rebut, but because the rebuttal would require some comprehensive understanding of pleading practice and strategy, the court might decide that the matter is not worth pursuing. The court might say,

Unless the jurors were fully educated on the context, they would greatly over-value the statement, and so it would be unfair to the opponent to admit it. If I admit the statement, therefore, I have to allow the opponent a full rebuttal. Given the jurors’ initial level of understanding, that rebuttal would entail a great deal of cost. If that
cost were incurred, the jurors would be able to assess the evidence appropriately, but if they were so educated on the matter, they probably would not attribute very much probative value to the statement—or at least not enough to make admissibility worthwhile.

This type of response should probably be limited to situations in which the court has a clear informational advantage over the jury, and is well able to assess how the jury’s informational deficit can impair its ability to value the evidence.

B. The Best Evidence Concern

The second basis for exclusion to be differentiated from the over-valuation concern is the best evidence concern. This is a specialized application of the concern that admission of some evidence might inhibit socially desirable behavior. Although a given piece of evidence may have more probative value than prejudicial potential, and the difference may make the cost of presentation worth bearing, it may also be that exclusion of the evidence would induce the presentation of better evidence. Better evidence may be more probative, or less likely to be prejudicial, or both, and exclusion may induce the presentation of better evidence in this case, or in other cases in which evidence of the same type as the challenged evidence may be offered, or both. As Dale Nance points out, the best evidence principle is meant to control the lawyers and not the fact-finder. That is a simple and decisive factor making this principle a stronger basis for exclusion than the over-valuation concern. Exclusion on the basis of the best evidence principle reflects no distrust of the jury as fact-finder; rather, it is based on the belief that exclusion will give the fact-finder in this case, or in other similar ones, a better informational base.

C. Bias

Finally comes bias. Like the over-valuation concern, and unlike the concern about whether the evidence has sufficient probative value to warrant admissibility or the best evidence concern, this is a concern that focuses on the possibility of fact-finder misuse of the evidence. But the concern is not a cognitive one. It is not that the fact-finder will attribute too much probative value to the evidence. Rather, it is that the evidence will cause the fact-finder to favor or disfavor one party more than it should. In effect, the evidence will cause the fact-finder to apply to the case a different standard of persuasion.

from the one that is prescribed by law. Exclusion on this basis does not reflect any disrespect for the jury as fact-finder. It merely reflects recognition that jurors will have difficulty putting out of mind information that might bias them for or against a party. To reach this conclusion, it is not necessary to believe that jurors are less able than judges to put the information out of mind, and indeed some empirical evidence suggests that they are not. It is only necessary to believe that such compartmentalization is a difficult feat for people, and that the bifurcation of trial roles when there is a jury, with a judge able to act as a screen for the jury as fact-finder, means that we need not demand that the jury attempt the feat. Even if we are still tempted to believe that judges are more likely than jurors to perform the feat, this is not because of any cognitive inability on the jury's part. Rather, it is likely because the jury is less likely than the judge to accord sufficient weight to the long-term considerations that make it inappropriate, as a matter of law, to allow the biasing factor to alter the standard of persuasion.

My thesis, then, is that the over-valuation concern is generally not an appropriate reason to exclude evidence, but that several other considerations often are. If we greatly reduce the significance of the over-valuation concern in the way we talk about evidence, what would the result be? Sometimes it would be to admit evidence that is now excluded. More often, though, I suspect it would be to articulate a better reason for exclusion. Thus, the effect of greatly reducing reliance on the over-valuation concern would not be drastic in terms of results, but it would lead to greater clarity and candor in evidentiary law. I think we should attempt to construct evidentiary doctrine with as little reliance as possible on the over-valuation concern. In the next part of this essay I will show how such an approach might work in three significant areas of the law.

III. APPLICATIONS

A. Hearsay

We are often told that it is because of the jury that we have a rule against hearsay. The elimination of the civil jury is the reason given for the

10. See Stephen Landsman & Richard F. Rakos, A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation, 12 BEHAV. SCI. & L. 113, 125 (1994) (discussing an experiment yielding data that "suggest that judges and jurors in civil cases react similarly when exposed to material that is subsequently ruled inadmissible," in this case evidence of a subsequent remedial measure, and noting: "[w]ere this finding to be confirmed by a substantial body of social science research, it would draw into question the law's insistence on treating judges and jurors in radically different ways").
elimination of the civil hearsay rule in Britain. The reason is supposedly that without the benefits of cross-examination, demeanor evidence, and the oath, the jury is not in a good position to evaluate the dangers created by hearsay – the chances of misperception, failed memory, insincerity, and failure of communication. Thus, the jury will over-value the evidence – except in those exceptional circumstances in which the hearsay is so reliable that it may be safely admitted, cross-examination and the other guarantees being of only marginal value.

The theory is pernicious rubbish. It excludes some hearsay that should be admitted, fails to provide a sound justification for excluding hearsay that should be excluded, and gravely over-complicates the entire area. It has no empirical foundation. The empirical evidence does not reveal over-valuation of hearsay and even suggests the possibility of under-valuation.\(^{11}\) Bear in mind that much hearsay has very substantial value; if the jurors are giving it great weight, they are acting rationally.

The beginning of wisdom in the hearsay realm is recognition that with respect to a certain type of evidence, a criminal defendant (I put aside the case of civil litigants) ought to have a categorical right of exclusion, not because the evidence is too unreliable or because the jury is likely to over-value it, but because introduction of the evidence would violate his right to confront the witnesses against him. Confrontation is an essential aspect of Anglo-American trials. It emerged in contradistinction to systems in which witnesses testified apart from trial and out of the presence of the parties. The essence of the right, I believe, is this: if one makes a testimonial statement (basically, one made in circumstances in which a person would reasonably anticipate that it would be used as testimony) she is acting as a witness, and if the statement is not made under the conditions under which we require testimony to be given—principally, cross-examination under oath—an adverse party has a right to exclude it. I believe the Constitution requires this right to be applied absolutely in favor of a criminal defendant. The only qualification should be that if the inability of the defendant to cross-examine the witness is attributable to the witness’s own wrongdoing, the right is forfeited.\(^{12}\)

\(^{11}\) Roger Park has made this point in this conference. See Roger C. Park, Visions of Applying the Scientific Method to the Hearsay Rule, 2003 MICH. ST. L. REV. 1149, 1152-55.

\(^{12}\) I have expressed this view in numerous places, among them Friedman & McCormick, supra note 3; Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 GEO. L.J. 1011 (1998); and an amicus curiae brief on behalf of eight other law professors and myself in Crawford v. Washington. Brief of Amicus Curiae Sherman J. Clark et al., Crawford v. Washington, ___U.S.____, 124 S. Ct. 1354 (2004) (No. 02-9410).
Once this right is recognized—and, since this article has been in print proof, essentially this right has been recognized, in *Crawford v. Washington*—what are the grounds for excluding hearsay that is not covered by the right? To emphasize that I am now putting the confrontation right out of the picture, I will concentrate on a civil case. The empirical research suggests that we should operate on the basis that, at least as a presumptive matter, if live testimony of the declarant to a given proposition would be more probative than prejudicial, so too would be a hearsay report of the declarant’s assertion of that proposition. This means that if the live testimony would be admissible, then presumptively the hearsay should be, too. There might nevertheless be good reasons to exclude the hearsay, but these reasons do not depend on an assumption that the jury will over-value the hearsay.

For example, assume the proponent is significantly better able than the opponent to produce the declarant as a live witness. Live testimony, perhaps supplemented by the hearsay, is better evidence than the hearsay by itself. Accordingly, it might make sense in some cases to threaten exclusion of the hearsay to induce the proponent either to produce the declarant or to improve the opponent’s ability to do so (as by providing crucial information concerning the declarant’s whereabouts).

Making the declarant his own witness is less favorable to the opponent than having an opportunity to cross-examine the declarant after direct examination by the proponent. Accordingly, in some settings it might make sense to provide that if the opponent timely produces the declarant ready, willing, and able to testify, the proponent must either present the live testimony of the declarant or forgo use of the hearsay.

Furthermore, in some settings the truth-determination process will be significantly aided if the proponent gives notice of his intention to introduce hearsay. Doing so may give the opponent an opportunity not only to rebut the hearsay but also to produce the declarant. In some cases, therefore, it might make sense to exclude the hearsay if the proponent did not give adequate notice of his intention to offer it.

Translating these principles into a workable body of law is a complex enterprise and I will not attempt it here. My point is that if we set aside the over-valuation concern, we will still exclude some hearsay, but on different grounds from the ones we recite now. The confrontation right will categorically exclude testimonial statements offered by the prosecution unless

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at some point the accused has an adequate opportunity to confront the witness, or he waives or forfeits such an opportunity. Assuming the confrontation right is not at stake, then most hearsay should be admitted, but exclusion might still be appropriate because of procedural concerns. Such concerns are raised, and in some cases might be sufficient to warrant exclusion, when the proponent is significantly better able than the opponent to produce the declarant, when the opponent has produced the declarant but the proponent declines to present live testimony, and when the proponent has failed to give adequate notice of intention to introduce the hearsay. These principles can lead to a sound and sensible body of doctrine, one that fosters truth determination and is consistent with traditional rights, but that does not rely on the over-valuation concern.

B. Character and Prior Bad Acts

1. Used Substantively

Subject to exceptions, evidence of a person’s character may not be admitted to show that the person acted in conformity with the character on a particular occasion.15 Nor may acts of a person that are not otherwise material to the action be introduced to prove that the person acted in a similar manner on the occasion in question.16 These rules have been based in significant part on the over-valuation concern. Thus, the Supreme Court has said, “The inquiry [into character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.”17

What basis is there for concluding that the evidence will over-persuade the jury? The fact is that evidence of prior misconduct is highly probative of misconduct on the occasion in question.18 A man who has raped in the past may be unlikely to rape on any given occasion, but he is far more likely to do so than is a person who has never raped before. It is for this reason that recidivism rates are significant. True, people’s conduct on a given occasion is strongly affected by the particular context, but it cannot be seriously questioned that people have consistency of character that makes one person more likely than another to respond in a given way to a particular set of

15. See Fed. R. Evid. 404(a).
stimuli.\textsuperscript{19} If this were not true, it would usually not be worthwhile for employers to solicit references for potential employees.

I conclude, then, that evidence of character and prior misconduct is often highly probative, and a jury giving such evidence substantial weight is acting perfectly rationally. Absent a convincing empirical demonstration to the contrary—and so far as I know, none has been made—there is no basis for concluding that jurors are likely to over-value such evidence systematically, much less that they are likely to do so to such a degree as to make the evidence more harmful than beneficial to the search for truth. Furthermore, though evidence of character and prior misconduct takes time to present and rebut, its probative value is often sufficiently great that a reasonable juror could often find it to be decisive of the case. Consumption of time therefore does not weigh heavily in favor of excluding the evidence.

These considerations do not mean that evidence of character and prior misconduct ought to be admitted, however. The bias concern is very powerful in this context. A juror learning that an accused is a bad person might be inclined to lower the effective standard of persuasion that she applies in the case. She might in effect decide that it is not so bad if the accused is convicted even though there is substantial doubt as to his guilt on the occasion in question because he deserves punishment anyway, ought to be disabled in the future, and perhaps was not sufficiently punished in the past.\textsuperscript{20} But as a matter of deeply rooted policy, that is not how our adjudicative system is supposed to operate: The accused is supposed to be convicted only if he acted criminally on the occasion charged, not because he acted criminally on other occasions or is generally a bad person. Perhaps judges are significantly more likely than jurors to adhere to the principle, but even they may find it too tempting in a particular case not to do so.

In my view, this bias concern is sufficient to justify the \textit{per se} rule excluding the accused’s character and prior bad acts when offered to show that he acted in a given way on the occasion in question. But it is by no means self-evident that this is so. A plausible argument can be made that the

\textsuperscript{19} See Richard Friedman, \textit{Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul}, 38 UCLA L. REV. 637 (1991) (reviewing extensively the literature on this subject) [hereinafter Friedman, \textit{Impeachment}].

\textsuperscript{20} See, e.g., 1 MCCORMICK ON EVIDENCE § 185, at 645 (John W. Strong ed., 5th ed. 1999).

\[E\]vidence of convictions for prior, unrelated crimes might lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as would otherwise be the case. A juror influenced in this fashion may be satisfied with a somewhat less compelling demonstration of guilt than should be required.

\textit{Id.} (citations omitted).
probative value of evidence of character and prior bad acts is so great in some circumstances that it justifies admissibility of the evidence notwithstanding the possibility of bias. In any event, I believe we can have a more candid discussion of the issue if we recognize that while bias is a problem in this realm, there is no reason to suspect that over-valuation is also a problem.

One consequence of such a candid discussion would bear on the “end runs” that are allowed around the exclusionary rule—that is, the use of prior bad acts to prove not a propensity to act in a given way on the occasion in question, but some other proposition, such as the accused’s motive or capacity. The courts have sometimes manipulated these alternative bases of admissibility, countenancing flimsy arguments offered by the prosecution that the evidence is necessary for it to prove not the accused’s propensity, but some other aspect of the case. It may be that courts would be less likely to accept such arguments if their view of the situation were not cluttered by the perception that the argument against admissibility rested to a significant extent on the over-valuation concern. Because that concern is in fact so weak, any focus on it may diminish a court’s attachment to the exclusionary rule. Concentrating instead on the real danger of bias would assist sound analysis.

Additionally, perhaps candor would lead to further consideration of whether the exclusionary rule should be applied with full force in the civil context. Given that propensity evidence may have substantial probative value and that there is no good reason to suppose that jurors systematically attribute greatly excessive value to it, the question arises whether the danger of bias in civil cases, together with the costs of presenting and rebutting evidence, are sufficient to justify a per se exclusionary rule. I do not have any particular sense as to what the best answer to that question is, but it is a question worth asking.

2. For Impeachment

Similar, though not identical, considerations apply when evidence of character or prior bad acts is introduced for impeachment rather than for substantive purposes. I believe such evidence is more probative with respect to the credibility of a witness than is often recognized. Willingness to flout other social norms, by violating criminal law, for example, may be indicative

21. See Fed. R. Evid. 404(b) (offering examples of such alternative bases for admissibility).

22. See, e.g., United States v. Hadley, 918 F.2d 848 (9th Cir. 1990) (holding that trial court did not abuse its discretion in admitting evidence of repeated homosexual molestation, including anal intercourse, to prove intent to commit sexual assault, principally anal intercourse, on the occasion in question).
of willingness to flout the norm requiring truthful testimony in judicial proceedings.\footnote{See Friedman, Impeachment, supra note 19, at 651-54.} Therefore, a juror according substantial probative value to such impeachment evidence would not generally be acting irrationally, and the over-valuation concern does not justify excluding the evidence.

When the witness is a criminal defendant, other considerations do justify exclusion—indeed, a much broader rule of exclusion than we have now. The witness's incentive to lie in his own defense is obvious from the nature of the situation. Moreover, the key question in assessing the witness's credibility with respect to a given assertion is this: How probable is it that, if the assertion were not true, the witness would nevertheless testify to it? When an accused testifies to his innocence, the assumption that his testimony is false implies that he in fact committed the crime. This means that the key credibility assessment involves the hypothetical assumption that the accused committed at least one crime, the very one being tried. Proof of other misconduct will not have significant probative value supporting the proposition that he was willing to lie in his own defense. I have summarized this argument by contending that the use of character impeachment evidence against a criminal defendant requires the assumption that jurors would draw an inference like the following:

At first I thought it was very unlikely that, if Defoe committed robbery, he would be willing to lie about it. But now that I know he committed forgery a year before, that possibility seems substantially more likely.\footnote{See id. at 637. This paragraph of text summarizes the main argument of the earlier article.}

However, this kind of inference is utterly lacking in logic and common sense. It is unlikely that jurors use it to assess the credibility of the accused testifying in his defense. Inevitably though, they are tempted to use the evidence for a purpose for which they are not supposed to consider it—in this case, determining that the accused is a bad person. This means that the impeachment evidence has a serious biasing effect—and because of that, the threat of such evidence often intimidates a defendant from exercising his fundamental right to testify in his own defense for reasons unrelated to the over-valuation concern. Thus, character impeachment evidence of criminal defendants ought to be forbidden.

With respect to other witnesses, however, the situation is considerably different. Even if a prior crime did not in itself involve dishonesty, was not particularly serious, and occurred rather remotely in the past, it may still have substantial probative value with respect to the witness's inclination to tell the truth under oath. Not only the nature of the prior crime, but also other factors,
such as the relationship of the witness to the case, should determine admissibility.\textsuperscript{25} In some cases, the impeachment value of the evidence will outweigh the costs of presenting and rebutting it as well as any danger that it creates bias against the party favored by the witness, and in others not.\textsuperscript{26} The key for present purposes is that in any event the over-valuation concern does not enter into the picture.

C. Expert Evidence

Much of the rhetoric addressing expert evidence revolves around the possibility that jurors will over-value the evidence. In some cases this seems to be an undeniable possibility. The very point of expert evidence is to inform the jury\textsuperscript{27} on matters that the jury is unlikely to be able to assess without assistance. This leaves the jury vulnerable to persuasion by evidence that, properly understood, would not have much value. Such evidence is likely to be presented to them because the generation and selection of expert evidence is, in the first instance, in the hands of the parties.

Nevertheless, I believe the over-valuation concern as such should not generally cause trial judges to exclude expert evidence. Often the problem with expert evidence should be dealt with as a matter of sufficiency rather than of admissibility. Assuming that sufficiency is not a problem, there are reasons other than the over-valuation concern to exclude much expert evidence. If a given item of expert evidence clears each of these hurdles and seems likely to be over-valued, the best result is to admit it subject to judicial comment. I have made the argument at some length elsewhere\textsuperscript{28} and will merely sketch it out here.

First, in many cases in which the courts have treated the admissibility of expert evidence as a problem, the real issue has not been whether the given item of expert evidence should be admitted, but whether the evidence taken as a whole was sufficient to support a verdict for the proponent. I believe this was true in each of the trilogy of cases recently decided by the U.S. Supreme Court on the standards governing admissibility of expert evidence: \textit{Daubert}

\textsuperscript{25} Thus, I contend that the flexible standard of \textit{FED. R. EVID. 608} for impeachment by bad acts should apply as well to impeachment by prior convictions with respect to witnesses other than a criminal defendant, a topic now covered by \textit{FED. R. EVID. 609}.

\textsuperscript{26} See Friedman, \textit{Impeachment, supra} note 19, at 680-87 (explaining these considerations in depth).

\textsuperscript{27} I should say more broadly to inform the trier of fact. For ease of reference, though, I will speak of the jury.

In each of these cases, the evidence in question was offered by the plaintiff, and in each it was dubious whether, even including that challenged evidence, there was enough proof to support a finding in favor of the plaintiff. But in each, if the plaintiff had introduced enough evidence to support a finding in his favor, I think the challenged evidence definitely ought to have been admitted as part of the body of information to be considered by the jury. Treating the question in these cases as one of admissibility, instead of sufficiency, distorts the admissibility issue, forcing the admissibility standard to be overly rigorous because it is doing the work that should be done by a sufficiency determination. Moreover, as I have pointed out in Part I, judging the evidence insufficient as a matter of law does not reflect disrespect for the jury in the way that a ruling of inadmissibility for fear of over-valuation does. The ruling of admissibility provides that, because there is too great a chance that the jurors will over-value the evidence, they will not even be allowed to learn of it, even though the evidence might in fact have significant probative value. The ruling of law, by contrast, is based on the perception that given all the evidence, the jurors could reasonably come out only one way on a given issue. Therefore, if the jurors come out the other way, they must not be doing their job right. Perhaps they over-valued the evidence, but not necessarily. It may be that jurors decided the case on the basis of grounds, such as mere sympathy for the plaintiff, that the law does not countenance.

Now let us assume that the evidence as a whole is sufficient to reach the jury (or perhaps the proponent of the evidence in question does not bear the burden of producing evidence). Thus, whether the evidence in question is admitted or not, the jury will decide the facts. In some cases, the challenged expert evidence should be excluded as a matter of law, not because it is likely to be over-valued by the jury though it has significant probative value, but because it has no substantial probative value at all, or too little to warrant the time it would take to present and rebut, or because it is affirmatively misleading. Often the problem is that, though the evidence describes a phenomenon that may have some scientific bearing on the case, the expert’s description draws misleading inferences. With respect to such matters as microscopic hair comparison and DNA evidence, for example, experts frequently overstate the significance of a match between a sample taken from the accused and one found at the crime scene. The problem in such cases is not that the jury will likely over-value the expert’s testimony, rather the

problem is that the testimony is wrong, and wrong in a way that may be damaging to the search for truth. Detecting such inaccuracies is not always easy, but when courts put in the effort they are often better than the experts themselves at analyzing the situation logically. When they detect a significant logical error in presentation, the evidence should be excluded as a matter of law. One advantage of treating the matter as one of law is that this fully engages the appellate process, which tends more than trial-level procedure to ensure deliberate consideration of logical problems.

There are other reasons why the admissibility of some expert evidence should be excluded as a matter of law. If the proponent insists that his testimony is based on a scientific proposition, then by definition that proposition is applicable beyond the bounds of the particular case and will probably be one that will recur from case to case. Ideally, the identical proposition of scientific fact should not be deemed to be true in one case and not true in another. Even if the proposition is in dispute, a ruling that runs across cases may be appropriate. Such a ruling must be made by the courts, and ultimately by the court of last resort in the jurisdiction. The result of such a ruling may be exclusion of a class of expert evidence, but the ruling is not based on the fear of jury over-valuation of the evidence. Indeed, the predicate for such a ruling is not that the courts are better able than jurors to evaluate scientific evidence, but that the courts are better able to make rules for a run of cases.

Furthermore, such recurrent matters tend to involve repeat players—most notably, in criminal cases, prosecutors, defense counsel, laboratory technicians and testifying forensic experts—in the creation of forensic evidence. This factor makes it especially appropriate to apply best evidence rules going beyond the individual case—that is, rules excluding even evidence that would assist truth determination in this case—because exclusion would likely induce the creation of better evidence not only in this case but in others. For example, the proffered evidence might be excluded on the grounds that the procedures used in creating it were sub-optimal; such a ruling would encourage repeat players to adopt optimal procedures. Or perhaps with sufficient effort—and the incentive provided by a threat of exclusion—the proponent could make a showing of such matters as proficiency by the testing laboratory, so that the jury could better assess the probative value of the evidence. Such rules of exclusion are based on significant policy determinations, which should be made as matters of law. They do not depend on a determination that the jury is likely to over-value the proffered evidence by so much that the jury is better able to find the truth in the particular case without that evidence than with it.

Now suppose that the challenged expert testimony has cleared all these hurdles. The evidence taken as a whole is sufficient to go to the jury; the
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challenged testimony has significant probative value; the court cannot say that the testimony misstates the inference to be drawn from a scientific phenomenon or that it depends on an inaccurate scientific proposition; there is no reason to exclude this testimony in hopes of inducing the presentation of better evidence. It is beginning to sound as if the challenged testimony is good evidence that might play a useful role in the determination of the facts. Nevertheless, suppose the trial court is afraid that, although the testimony has significant probative value, the jury is likely to so over-value it that admission of the evidence will hurt rather than help the quest for truth. Even in this situation, I do not believe the over-valuation concern should lead to exclusion of the evidence.

First, we may well doubt the court’s ability to make the assessments necessary to exclude the evidence on this basis. To conclude that the jury will over-value the evidence by so much as to hurt truth determination requires both the judge’s best assessment of the probative value of the evidence and her assessment of how much probative value the jury actually will give to the evidence. The first of these assessments requires the judge to do essentially what the jury must do when it is presented with the evidence, but judges, as well as juries, have difficulty with scientific evidence. Anyone who believes that trial judges understand perfectly well all the expert testimony presented in their courtrooms has not spent very much time in trial courtrooms or reading trial court decisions. The second assessment requires the judge to understand the psychology of the jury. In some cases, the judge may have an adequate basis in the psychological literature to make such an assessment, but that is not true as a general matter.

Suppose that despite these considerations the judge is confident after analyzing the matter carefully that, if left to its own devices, the jury will be inclined to over-value the expert testimony to a substantial degree, perhaps by so much that exclusion is preferable to admission of the testimony. Even in

32. I say “essentially” because the court’s determination of the probative value of the evidence may be guided or constrained by law, thus, federal courts, in attempting to determine whether expert evidence is “reliable,” must satisfy the standards of Daubert and may be inclined to use the criteria that it suggested.

33. For a review of some of the empirical evidence bearing on the question of judges’ ability to assess scientific evidence, see Sanders, supra note 5. As indicated in Part I, Sanders concludes that judges are susceptible to the usual cognitive biases. One study discussed by Sanders indicates that most state court judges have a great deal of difficulty explaining – not to mention applying – the falsifiability and error rate criteria of Daubert. See Sophia I. Gatowski et al., Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World, 25 LAW & HUM. BEHAV. 433 (2001). Sanders presents some preliminary evidence indicating that federal judges are becoming more sophisticated in applying the Daubert criteria.
this circumstance, exclusion would not ordinarily be the optimal solution. A less restrictive alternative is to comment adversely on the evidence. And, as I have argued above in Part I, there is no reason to suppose that such comment would be ineffective.

In sum, a sound approach to expert evidence can be developed without relying on the prospect of jury over-evaluation as a basis for excluding evidence. Sometimes the court should rule as a matter of law that the evidence does not support a judgment in favor of the proponent, but that is a much different matter. Sometimes the evidence should be excluded because it has too little probative value to justify the time it takes to present and rebut, or because it is affirmatively misleading; often, that is the type of decision courts should make as a matter of law. And sometimes also courts should exclude expert evidence, even though it would advance the search for truth in the particular case, to induce the proponent to produce better evidence. If expert evidence bearing on a material matter passes all these obstacles, it probably should be admitted. If the trial judge nevertheless is concerned that the jury will likely over-value the evidence, she probably should explain to the jurors why, although the evidence may have significant probative value, it may not have as much value as they are inclined to believe. That is a better resolution than simple exclusion.

CONCLUSION

I have painted with a broad brush because this is a brief article, but my intellectual aspiration in this piece is not small. I believe we should alter significantly the way we view evidentiary decisions. Fear that the jury will over-value evidence should play little role in determining whether evidence should be admitted. Ending our reliance on the over-valuation concern will presumably result in the admissibility of some evidence that is now excluded. Probably more significantly, however, doing so would foster candor in evidentiary discourse. Thus, it would help focus our attention on alternatives to exclusion, such as rulings of insufficiency and comment on the evidence. Finally, it would cast in a clearer light the various factors that sometimes do make exclusion of evidence appropriate.