FRINGES: EVIDENCE LAW BEYOND THE FEDERAL RULES

JOHN LEUBSDORF*

During recent decades, the teaching and discussion of Evidence law have come to focus almost entirely on the topics covered by the Federal Rules of Evidence and their state equivalents.[1] Just as the Federal Rules of Civil Procedure caused teachers and scholars to focus on what they cover,[2] the Federal Rules of Evidence have come to define our understanding of what Evidence law is about. That has relegated to the shadows a considerable number of evidentiary rules, some of them recognized in many U.S. jurisdictions including the federal courts. This Article seeks to reclaim these rules for study and critique by surveying and classifying them, and by considering the causes and possible justifications of their eclipse.

Having staked my claim with the usual exaggeration, I proceed to the usual qualifications. There can be no claim that Evidence teachers and scholars have looked at nothing but the Federal Rules. Of course, we have all attended to the Constitution when it invaded the terrain of the Federal Rules, whether under the banner of the Confrontation Clause[3] or that of the Due Process Clause.[4] The Federal Rules themselves require reference to the state or common law of privilege[5] and of competence to be a witness,[6] as well as inviting comparison to state variants of other rules, such as those in the California Evidence Code. Sometimes the Rules have been read to carry forward,[7] or to modify,[8] older law,

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* Distinguished Professor of Law and Judge Lacey Scholar, Rutgers Law School. I appreciate the helpful comments of Michael Ariens and my colleague David Noll.

1. *See* casebooks cited note 16 *infra*.

2. *See generally* Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 399 (1998) (noting that procedural courses and casebooks increasingly included the Federal Rules once the rules were enacted). For a somewhat different view, see generally Bruce A. Kimball & Pedro Reyes, *The "First Modern Civil Procedure Course" as Taught by C.C. Langdell, 1870-78*, 47 AM. J. LEGAL HIST. 257 (2005).

3. U.S. CONST. amend. VI; *see, e.g.*, Crawford v. Washington, 541 U.S. 36, 61 (2004) (finding that the Confrontation Clause bars un-confronted "testimonial" statements); Olden v. Kentucky, 488 U.S. 227, 231-32 (1988) (allowing use of complaining witness' sexual history to impeach her testimony in rape case based on the Confrontation Clause right to cross-examine a witness).

4. U.S. CONST. amend. XIV; *see, e.g.*, Holmes v. South Carolina, 547 U.S. 319, 319-20 (2006) (rejecting exclusion of evidence of another's guilt because such exclusion violates constitutional rights); Rock v. Arkansas, 483 U.S. 44, 51 (1987) (noting that due process requires the right of the accused to testify); Chambers v. Mississippi, 410 U.S. 284, 301-02 (1973) (finding that excluding prosecution witness' out-of-court confessions and prohibiting a defendant from cross-examining a witness violates the defendant's due process rights).

5. FED. R. EVID. 501.

6. FED. R. EVID. 601. The statement in text somewhat overstates the extent to which this rule requires the use of state law. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.2 (5th ed. 2012) (noting that only certain state competency rules should govern).

7. United States v. Abel, 469 U.S. 45, 50-51 (1984) (interpreting a federal rule as a

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which must then be consulted to understand current law. Likewise, Evidence teachers and scholars have devoted ample attention to interdisciplinary and theoretical matters including probability theory,[9] the theory of proof,[10] economic[11] and psychological[12] perspectives, and legal history.[13] Indeed, as will appear, some of the rules to be discussed here have received occasional scholarly attention as isolated subjects.

Nevertheless, it remains true that the *topics* covered by the Federal Rules, including their constitutional and state law aspects, have come to define the scope of Evidence law, to the neglect of whole groups of other rules that also govern what evidence jurors and judges may hear. At the least, consideration of those rules will provide a more complete view of the subject. That view might also change our understanding of what the Federal Rules cover, just as artists enlighten their vision by looking not only at people and things, but also at the "negative space" between them.[14] Evidence scholars should know that what people do not mention may be at least as important as what they say.[15]

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continuation of the case law allowance of impeachment for witness bias established before the Federal Rules were adopted).

8. *E.g.*, Tome v. United States, 513 U.S. 150, 160 (1995) (relying on common law to construe FED. R. EVID. 801(d)(1)(B)); Stoddard v. State, 887 A.2d 564, 693 (Md. 2005) (discussing whether MD. R. EVID. 801(a) and FED. R. EVID. 801(a) modify the common law treatment of implied assertions).

9. *See generally* PROBABILITY AND INFERENCE IN THE LAW OF EVIDENCE: THE USES AND LIMITS OF BAYESIANISM (Peter Tillers & E. Green eds., 1988); *see, e.g.*, DAVID H. KAYE, THE DOUBLE HELIX AND THE LAW OF EVIDENCE (2010) (discussing DNA science used as evidence in the courtroom in the context of probability theory).

10. *See generally* Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491 (2001); KEVIN M. CLERMONT, STANDARDS OF DECISION IN LAW: PSYCHOLOGICAL AND LOGICAL BASES FOR THE STANDARD OF PROOF, HERE AND ABROAD (2013); L. JONATHAN COHEN, THE PROBABLE AND THE PROVABLE (1977) (discussing theory of proof and probability concepts in a judicial context).

11. *See generally* Dan M. Kahan, *The Economics—Conventional, Behavioral, and Political—of "Subsequent Remedial Measures" Evidence*, 110 COLUM. L. REV. 1616 (2010); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999); Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227 (2001) (discussing character evidence from the perspective of a primary incentive approach).

12. *See generally* MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW (2016).

13. *See generally* C.J.W. ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND (2011); George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575 (1997); Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 VA. L. REV. 1723 (2001).

14. *See* BETTY EDWARDS, DRAWING ON THE RIGHT SIDE OF THE BRAIN 110-35 (The Definitive, 4th ed. 2012) (discussing the use of negative space as one of the major components of drawing).

15. *E.g.*, Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831, 831 (1991) (analyzing

This survey will cover the following categories of neglected evidentiary doctrines: those requiring corroboration of certain evidence, those creating a special regime for sexual offenses, and those relying on adversary system concerns to modify the usual rules. These doctrines are not found in the Federal Rules or, with rare exceptions, in standard Evidence casebooks, and most of them have received little scholarly attention.[16] I will include some thoughts on how Evidence law came to exclude these various rules from its usual domain, and on what this tells us about the constitution of the field as an intellectual academic subject. But I will be contented if this discussion simply makes more people aware that the landscapes of Evidence law are wider and more varied than many of us have recognized.

This discussion is based on an understanding of what Evidence law might cover that is pragmatic, flexible, and perhaps disorganized. Whether a rule should be treated as part of Evidence law—which does not preclude it from also being treated in another category—depends on factors that include: whether it deals with the admission, exclusion, or treatment of evidence in formal proceedings; whether it involves, perhaps among other concerns, concerns about the impact on the reliability of a trier's findings and the fairness and efficiency of procedures for submitting materials to the trier; whether it is usefully considered in interaction with rules already recognized as evidentiary; and whether the learning and modes of analysis of Evidence scholars make them able to contribute to its discussion. Admittedly, this pretense of definition lends itself to imprudent stretching, but I doubt that a better one is available.[17]

I. CORROBORATION REQUIREMENTS

Requiring two witnesses to sustain a judgment dates back to Biblical,[18] Roman,[19] and Islamic[20] law. A standard overgeneralization is that, starting in the

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"the problem of missing evidence[;]" that is, information which is relevant in a given case but is not presented in court).

16. I have scanned the following: *See generally* RONALD J. ALLEN ET AL., EVIDENCE: TEXT, CASES AND PROBLEMS (5th ed. 2011); RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES (7th ed. 2013); GEORGE FISHER, EVIDENCE (3d ed. 2012); RICHARD LEMPERT ET AL., A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES (5th ed. 2013); DAVID P. LEONARD ET AL., EVIDENCE: A STRUCTURED APPROACH (4th ed. 2016); DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM (3d ed. 2014); PAUL R. RICE & ROY A. KATRIEL, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE (6th ed. 2009); JON R. WALTZ ET AL., EVIDENCE: CASES AND MATERIALS (11th ed. 2009).

17. For a discussion of another definition, see text *infra* notes 63-67.

18. See *Deuteronomy* 17:6 for the two-witness requirement in capital cases. The requirement was later expanded to civil and criminal matters generally. *See, e.g.*, 14 The Code of Maimonides, The Book of Judges ch. 5 (Abraham M. Hershman trans. 1949) (stating rule and exceptions).

19. DIG. 22.5.12 (Ulpian, Ad Edictum 34) (requiring two witnesses unless otherwise

eighteenth century, Continental law rejected this principle in favor of the free evaluation of evidence, and that English law never accepted it.[21] But as will appear, English law did require more than one witness in some situations, and U.S. law continues to do so surprisingly often. These requirements are not remnants of a medieval two-witness rule;[22] each was created separately, in almost all instances, within the last two hundred years.

As this section will explain, situations in which corroboration is required may be categorized as those defined by the crime in question, those defined by the witness in question, and those defined by the type of evidence in question. They come in different strengths concerning the type of corroboration that is required, and many have been diluted over the years. In general, they are based on doubts concerning the reliability of the evidence to be corroborated, supplemented by a felt need for more persuasive proof in the circumstances, but their grounds differ from instance to instance. With a few exceptions, they are limited to criminal prosecutions. They might unkindly be described as a hodge-podge of ad hocery—but then, so might the rest of Evidence law.[23]

A. Requirements for Specific Offenses

The Constitution provides that "[n]o person shall be convicted of [t]reason unless on the [t]estimony of two [w]itnesses to the same overt [a]ct, or on

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specified); CODE JUST. 4.20.8 (Constantine, 334).

20. *See* Wael B. Hallaq, SHARĪʿA: THEORY, PRACTICE, TRANSFORMATIONS 350 (2009) (listing theft and drinking alcohol as two crimes requiring two witnesses to testify in Sharīʿa law); John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C.L. REV. 1635, 1688-89 (1999) (discussing that the Qur'an requires at least two witnesses).

21. *See* John H. Wigmore, *Required Numbers of Witnesses; A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83, 93-96 (1901) (describing English rejection of two-witness rules except for treason and perjury). Scotland does require, with some exceptions, more than a single witness in criminal cases. *See* Beggs v. HM Advocate (2010) HCJAC 27 (101), (2010) SCCR 681 (Scot.) (quoting Al Megrahi v HM Advocate (2002) JC 99, (2002) SCCR 509 (Scot.)) (noting that "(with certain statutory exceptions) a person cannot be convicted of a crime on the uncorroborated testimony of one witness however credible").

22. Because Chancery procedure was based on Continental law, Wigmore, *supra* note 21, at 90-91, that law may have influenced the former equity rule that more than a single witness was required to controvert a defendant's sworn answer. For courts referencing this equity rule, see Southern Dev. Co. of Nev. v. Silva, 125 U.S. 247, 249 (1888); Greenfield v. Blumenthal, 69 F.2d 294 (3d Cir. 1934); and 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 1528, 771-72 (12th ed. 1877 Jairus W. Perry rev.). This rule fell into desuetude along with sworn answers and was abolished in the federal courts in 1938 by FED. R. CIV. P. 11. 5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1004, 1339 (3d ed. 2017); *see* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 114 (1913) (noting that answers were almost always waived).

23. *See generally* John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209 (2006) (seeking to trace the logic of Evidence law).

[c]onfession in open [c]ourt."[24] This derives from the English Treason Act of 1695-96,[25] which in turn restored earlier legislation.[26] It reflects the special gravity of a treason conviction—even now, though treason convicts are no longer hung, drawn, and quartered—and a history of dubious prosecutions, typically driven by government pressure.[27]

The constitutional provision is stronger than a mere corroboration rule because it requires two direct witnesses to the same act; but it does not require two witnesses to the defendant's intent.[28] Moreover, Congress can avoid the two-witness requirement by criminalizing behavior that is similar but not identical to treason.[29] Perhaps for this reason, I have found no reported treason prosecutions since those arising from World War II, and few before those. Nowadays, most treason accusations are voiced by politicians, not prosecutors, and then no witnesses at all are required.[30]

Perjury is another crime requiring corroborating evidence under federal[31] and state[32] law. The rule's traditional rationale that "oath against oath" does not adequately prove guilt[33] makes no sense because now a single sworn witness can support conviction for all other crimes, even against the defendant's sworn

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24. U.S. CONST. art. III, § 3.

25. Treason Act 1695, 7 & 8 Will. 3 c. 3, § 2, *available at* http://www.legislation.gov.uk/aep/Will3/7-8/3 [https://perma.cc/C68D-4D3X].

26. *See* L.M. Hill, *The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law*, 12 AM. J. LEGAL HIST. 95, 95 (1968). The two-witness rule also applied to petty treason, the murder of a husband by his wife. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *203-04 (1979).

27. *See* Cramer v. United States, 325 U.S. 1, 15-22 (1945) (noting that the members of the Constitutional Convention who crafted the treason requirements feared governmental abuse in treason trials as well as treason itself); *see also* FISHER, *supra* note 16, at 615-24 (describing seventeenth century abuses in treason trials).

28. Kawakita v. United States, 343 U.S. 717, 736 (1952).

29. *Cramer*, 325 U.S. at 45-47; *see, e.g.*, United States v. Rahman, 189 F.3d 88, 111-14 (2d Cir. 1999) (finding that the two-witness requirement did not apply to a seditious conspiracy violation of 18 U.S.C. § 2384 because seditious conspiracy was different from treason).

30. *See, e.g.*, Carlton F.W. Larson, *Five myths about treason*, WASH. POST (Feb. 17, 2017), https://www.washingtonpost.com/opinions/five-myths-about-treason/2017/02/17/8b9eb3a8-f460-11e6-a9b0-ecee7ce475fc_story.html [https://perma.cc/H68D-RKVB]; Mary Papenfuss, *Trump Calls FBI Agent's Critical Text Messages 'Treason,'* HUFFPOST (Jan. 12, 2018, 11:04 AM), https://www.huffingtonpost.com/entry/trump-treason-fbi-strzok_us_5a5845e3e4b0720dc4c5c9a4 [https://perma.cc/UPW3-QZ4V].

31. Weiler v. United States, 323 U.S. 606, 607 (1945).

32. *E.g.*, State v. Sanchez, 528 A.2d 373, 376 (Conn. 1987); Hale v. State, 648 So. 2d 531, 536 (Miss. 1994); State v. Olson, 595 P.2d 1337, 1339 (Wash. 1979). England follows the same rule. ADRIAN KEANE & PAUL MCKEOWN, THE MODERN LAW OF EVIDENCE 242-43 (11th ed. 2016).

33. *See, e.g.*, R. v. Muscot (1714), 88 Eng. Rep. 689, 690; Fanshaw's Case (1693), 90 Eng. Rep. 146.

testimony. The requirement arose before criminal defendants could testify under oath, so that conflicting oaths were unlikely in trials of other crimes,[34] and in an era when a vindictive private prosecutor could put the alleged perjurer in the position of a defendant, unable to testify in defense of his own previous sworn testimony.[35]

These circumstances are no longer present to justify the rule. The rationale that witnesses should be encouraged to testify by being protected "from hasty and spiteful retaliation in the form of unfounded perjury prosecutions"[36] is more plausible but hard to reconcile with other rules tending to discourage criminal defendants from taking the stand.[37] In any event, the rule survives. It is, however, less stringently applied than the two-witness treason rule.[38]

An odd contrast to treason and perjury is a third kind of behavior for which, in a few states, corroboration is required: grounds for granting a contested divorce.[39] Being forced to divorce is hardly a criminal sanction requiring special judicial caution, and the fear of collusion, expressed in some opinions,[40] makes little sense in an era in which no-fault consensual divorce is freely available. To the extent that it is more than a historical survival, the corroboration in these cases must reflect either the protection of marriages or (since the contemporary cases usually involve wives' claims for alimony)[41] protection of husbands.

B. Questionable Witnesses

Several of the most important and frequently used corroboration requirements concern types of witnesses in criminal cases who are viewed with distrust. At

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34. *See* FISHER, *supra* note 16, at 624-56 (contending that eighteenth century English courts strove to avoid rejecting sworn testimony).

35. *See* WENDIE ELLEN SCHNEIDER, ENGINES OF TRUTH: PRODUCING VERACITY IN THE VICTORIAN COURTROOM 25-40 (2015) (discussing an overview of perjury prosecutions during the Victorian period).

36. *Weiler*, 323 U.S. at 609.

37. *E.g.*, United States v. Dunnigan, 507 U.S. 87, 96-97 (1993) (upholding a judge's discretion to enhance sentences when she finds that defendant lied).

38. *See, e.g.*, *Weiler*, 323 U.S. at 608-09; *see also, e.g.*, People v. Rosner, 493 N.E.2d 902, 903-04 (N.Y. 1986) (stating the two-witness rule is inapplicable when state relies entirely on circumstantial evidence of falsity); Donati v. Commonwealth, 560 S.E.2d 455, 457 (Va. Ct. App. 2002) (holding the two-witness rule is inapplicable when state relies on authenticated videotape of act defendant denied).

39. ARK. CODE ANN. § 9-12-306 (2017); OHIO CIV. R. 75(M); VA. CODE ANN. § 20-99(1) (2017); *see*, *e.g.*, Allen v. Allen, 53 So. 3d 960, 964 (Ala. Civ. App. 2010) (holding that wife's testimony that husband admitted adultery is insufficient without corroboration).

40. Jacobi v. Jacobi, 56 Va. Cir. 164, 2-3 (Va. Cir. Ct. 2001) (stating that spouses might collude to establish separation required for no fault divorce and therefore requiring sufficient corroboration); Mick-Skaggs v. Skaggs, 766 S.E.2d 870, 874 (S.C. Ct. App. 2014) (holding corroboration is not required when lack of collusion is clear).

41. *E.g.*, *Allen*, 53 So. 3d at 964-65.

least since the eighteenth century, courts have refused to accept the uncorroborated testimony of an accomplice as sufficient to convict.[42] This is no doubt because of an accomplice's incentives to benefit from implicating someone else and the dubious credibility of an admitted criminal. The rule exists in many states,[43] while in the other states and in the federal courts it has been replaced by a customary instruction to the jury.[44] There is much law on who counts as an accomplice,[45] what counts as corroboration,[46] and whether a cautionary instruction should be given when an accomplice testifies in the defendant's favor rather than for the prosecution.[47]

The rule that a defendant's own uncorroborated confession will not support conviction, often called the corpus delicti rule, dates from the nineteenth century[48] and is more widely established than the accomplice rules.[49] Some jurisdictions

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42. J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 369-73 (1986); HENRY FIELDING, AN ENQUIRY INTO THE CAUSES OF THE LATE INCREASE OF ROBBERS, ETC.: WITH SOME PROPOSALS FOR REMEDYING THIS GROWING EVIL 84-87 (2d ed. 1751) (discussing the general law in England for conspiracy to raise wages across the Kingdom); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 209-17 (2005).

43. *See*, *e.g.*, CAL. PENAL CODE § 1111 (West 2018); N.Y. CRIM. PROC. LAW § 60.22 (McKinney 2017); NEV. REV. STAT. § 175.291 (West 2017); TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2017); *see* Robert J. Norris et al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1348-49 (2010-11) (citing other authority).

44. *See*, *e.g.*, United States v. Bernal, 814 F.2d 175, 183-84 (5th Cir. 1987) (holding that "it is reversible error to refuse to give a cautionary accomplice instruction in appropriate cases if an accomplice testifies against a defendant and if the defendant properly requests such instruction"); United States v. Laing, 889 F.2d 281, 287 (D.C. Cir. 1989) (holding it may be a reversible error if defendant requests jury instruction for an accomplice testimony and court refuses); People v. Zambrano, 64 N.E.3d 639, 645 (Ill. App. Ct. 2016) ("The instruction should be given when there is probable cause to believe the witness, not the defendant, was responsible for the crime as a principal or as an accessory under an accountability theory, despite his denial of involvement."); *see also* Sheldon R. Shapiro, *Necessity of, and Prejudicial Effect of Omitting, Cautionary Instruction to Jury as to Accomplice's Testimony Against Defendant in Federal Criminal Trial*, 17 A.L.R. Fed. 249 (1973). In England, the instruction is no longer compulsory. KEANE & MCKEOWN, *supra* note 32, at 244-50.

45. *See*, *e.g.*, Gordon v. State, 533 P.2d 25, 29-30 (Alaska 1975); People v. Brooks, 315 N.E.2d 460, 461-63 (N.Y. 1974).

46. *See*, *e.g.*, State v. Stone, 216 P. 3d 648, 649-51 (Idaho Ct. App. 2009); People v. Wilson, 624 N.Y.S.2d 718, 719-20 (N.Y. App. Div. 1995).

47. Clifford S. Fishman, *Defense Witness as "Accomplice": Should the Trial Judge Give a "Care and Caution" Instruction?*, 96 J. CRIM. L. & CRIMINOLOGY 1, 3-15 (2005).

48. Allen v. Commonwealth, 752 S.E. 2d 856, 859 (Va. 2014) (citing Perry's Case (1660), 14 Howell St. Tr. 1312, 1312-24 (Eng.)).

49. *See*, *e.g.*, Wong Sun v. United States, 371 U.S. 471, 488-89 (1963); Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confession*s,

require evidence independent of the confession that a crime has been committed.[50] Others are satisfied by evidence supporting the reliability of the defendant's confession.[51] Although some jurisdictions have substantially diluted the requirement,[52] noncompliance can still invalidate a guilty verdict.[53] Indeed, recent revelations about false confessions support insistence on corroboration.[54]

Several other kinds of criminal evidence have also garnered judicial suspicion. A significant number of jurisdictions continue to caution juries against convictions based exclusively on circumstantial evidence.[55] Even the justly rejected requirement that testimony of sexual assault victims be corroborated[56] survives in diluted forms in some jurisdictions.[57] Meanwhile, some states have

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1984 WIS. L. REV. 1121, 1226 n.18 (citing authority from all states but Massachusetts); David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 829-32 (2003); *compare* Commonwealth v. Forde, 466 N.E.2d 510, 513 (Mass. 1984) (adopting the corpus delicti rule), *with* State v. Suriner, 294 P.3d 1093, 1098-1100 (Idaho 2013) (abrogating the corpus delicti rule).

50. *E.g.*, People v. Crew, 74 P.3d 820, 837 (Cal. 2003); State v. Reddish, 859 A.2d 1173, 1211-13 (N.J. 2004); *compare* Commonwealth v. Reyes, 681 A.2d 724, 728 (Pa. 1996) (holding that the court must find by preponderance of evidence that crime was committed before admitting confession), *with* State v. Fundalewicz, 49 A.3d 1277, 1279 (Me. 2012) (holding that evidence is sufficient if it creates subjective belief that crime occurred).

51. *E.g.*, Opper v. United States, 348 U.S. 84, 93-95 (1954); People v. LaRosa, 293 P.3d 567, 579-80 (Colo. 2013).

52. *E.g.*, State v. Dern, 362 P.3d 566, 581-84 (Kan. 2015).

53. *E.g.*, State v. Nieves, 87 P.3d 851, 856 (Ariz. Ct. App. 2004); People v. Sargent, 940 N.E.2d 1045, 1055 (Ill. 2010); Grimm v. State, 135 A.3d 844, 863 (Md. 2016); State v. Smith, 669 S.E.2d 299, 308 (N.C. 2008); State v. Dow, 227 P.3d 1278, 1283 (Wash. 2010).

54. DALE A. NANCE, THE BURDENS OF PROOF: DISCRIMINATORY POWER, WEIGHT OF EVIDENCE, AND TENACITY OF BELIEF 214 (2016); Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 399 (2015); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1107-108 (2010); Boaz Sangero, *Miranda Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession*, 28 CARDOZO L. REV. 2791, 2923-84 (2007); *see also* Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871, 890 (2008) (proposing that prosecutors be encouraged to look for other evidence by reducing the possible sentence when they rely on confessions).

55. *E.g.*, Hampton v. State, 961 N.E.2d 480, 484-92 (Ind. 2012); State v. Germain, 79 A.3d 1025, 1032-34 (N.H. 2013); Irene Merker Rosenberg & Yale L. Rosenberg, *"Perhaps What Ye Say is Based Only on Conjecture"—Circumstantial Evidence, Then and Now*, 31 HOUS. L. REV. 1371, 1411-22 (1995); Caroll J. Miller, *Modern Status of Rule Regarding Necessity of Instruction on Circumstantial Evidence in Criminal Trial—State Cases*, 36 A.L.R. 4th 1046 (1985). *Contra* Eyal Zamir et al., *Seeing Is Believing: The Anti-Inference Bias*, 89 IND. L.J. 195 (2014).

56. State v. Daniels, 388 N.W.2d 446, 447-48 (Neb. 1986); *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972).

57. MODEL PENAL CODE §§ 213.1- 213.6 recommendations to strike the current procedural provisions (AM. LAW INST., Discussion Draft 2013) (Thirteen states have limited rape corroboration rules); GA. CODE ANN. § 16-6-3 (2017) (corroboration needed for statutory rape); N.Y. PENAL LAW § 130.16 (McKinney 2017) (corroboration required when lack of consent results from mental defect

invented new corroboration requirements.[58] Even outside the criminal law, corroboration is sometimes required.[59] In short, courts and legislators continue to decree that, as a matter of law, a verdict cannot be supported by uncorroborated testimony of certain kinds of witnesses.

C. Types of Statements

Students of the Federal Rules are already familiar with two kinds of statements that are inadmissible into evidence unless corroborated, a requirement based on the circumstances in which they were made. One conspirator's statements can be used against others under the coconspirator exception to the hearsay rule only if evidence outside the statements themselves helps show that they were made in the course of a conspiracy involving the defendant.[60] And a declaration against penal interest may be introduced in a criminal case only if "supported by corroborating circumstances that clearly indicate its trustworthiness."[61] Whatever the value of these rules, they are no more justifiable

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or incapacity); TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 2017) (requiring corroboration in certain circumstances if victim did not complain within one year); *see* N.Y. FAM. CT. ACT § 1046 (McKinney 2017) (certain child statements about abuse); *see also,* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017) (arguing that uncorroborated evidence of rape victims continues to be suspected).

58. GA. CODE ANN. § 16-11-37 (2017) (victim's testimony of "terrorist threat"); OHIO REV. CODE ANN. § 4511.091(c)(1) (West 2017) (officer's unaided visual estimate of car speed in speeding prosecution); TEX. CODE CRIM. PRO. ANN. art. 38.075 (West 2017) (jailhouse informant's testimony about defendant's alleged admissions); Brooks v. People, 975 P.2d 1105, 1114-1115 (Colo. 1999) (dog scent evidence; citing authority); State v. Giant, 37 P.3d 49, 57-59 (Mont. 2001) (prior inconsistent statement admitted as substantive evidence); State v. McCallum, 561 N.W.2d 707, 708-09 (Wis. 1997) (motion for new trial based on prosecution witness' recantation).

59. *See* 8 U.S.C. § 1158(b)(1)(B)(ii) (2016) (asylum seeker's testimony must be corroborated in certain cases); Medichem, S.A. v. Rolabo, S.L., 437 F.3d 1157 (Fed. Cir. 2006) (inventor's testimony of prior invention must be corroborated); Morgan v. Morgan, 183 So. 3d 945 (Ala. Civ. App. 2014) (in contested divorce, spouse's testimony that other spouse admitted adultery must be corroborated).

60. FED. R. EVID. 801(d)(2), which also applies to parallel exceptions. The usual rationale is that hearsay cannot "lift itself by its own bootstraps to the level of competent evidence[;]" Glasser v. United States, 315 U.S. 60, 75 (1942), *abrogated by* Bourjaily v. United States, 483 U.S. 171 (1987). But the requirement does not apply to other hearsay exceptions. *See*, *e.g.*, Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 356 (2012) (arguing that present sense impressions should not be admitted without corroboration).

61. FED. R. EVID. 804(b)(3)(B). The requirement is usually attributed to fear "that third parties would falsely confess, perhaps with the idea of helping the defendant, or that a defense witness would fabricate a plausible confession" by an absent person. MUELLER & KIRKPATRICK, *supra* note 6, § 8.74 (noting these concerns seem equally applicable to declarations against non-

than other corroboration requirements that did not make it into the Federal Rules. They were included, not because of their special merit, but because they are incorporated in hearsay exceptions that the rule makers sought to delineate.[62]

Indeed, the rule requiring corroboration of declarations against penal interests in criminal cases, rooted as it is in the fear of false or fabricated third party confessions, is closely tied to much broader resistance to allowing a criminal defendant to introduce evidence that someone else committed the crime. Although the Supreme Court struck down an extreme embodiment of this resistance,[63] many states continue to exclude evidence tending to show another's guilt unless it establishes a "direct connection" to the commission of the crime.[64]

In practice, this can be another corroboration requirement, but one burdening the defendant rather than the prosecution. Courts exclude evidence of the third person's motive and opportunity to commit the crime, even though it might raise a reasonable doubt of the defendant's guilt, because it is not supported by any "direct" evidence that the third person committed the crime.[65] Judicial resistance also recalls the traditional suspicion of convictions resting solely on circumstantial evidence.[66] Ironically, although that suspicion has ebbed for the evidence *against* a defendant, it thrives when a defendant relies on circumstantial evidence of another's guilt. The simple explanation is that judges are just more suspicious of criminal defendants and their lawyers than of prosecutors.

In civil actions, fear of fabrication has led a few states to preserve "Dead Person Statutes" barring persons suing estates from introducing uncorroborated testimony about their communications with the deceased.[67] Others states bar the

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penal interest and fabrication of hearsay admissible under other exceptions.)

62. Similarly, some state statutes condition admitting certain out of court statements by victims of alleged child abuse on corroboration. N.J. STAT. ANN. § 9:6-8.46(a)(4) (West 2017) (statement admissible but insufficient if not corroborated); WASH. REV. CODE § 9A.44.120 (2017) (hearing conducted to establish if the time, content, and circumstances of the statement provide "sufficient indicia of reliability").

63. Holmes v. South Carolina, 547 U.S. 319, 329-31 (2006) (rejecting rule that court may exclude third party evidence if prosecution evidence is strong when considered by itself).

64. *See* James S. Liebman et al., *The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence*, 98 IOWA L. REV. 577, 668-69 (2013); *see generally* David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WIS. L. REV. 337 (discussing the direct connection doctrines and arguing that they are unconstitutional).

65. *E.g.*, Troxel v. State, 875 N.W.2d 302 (Minn. 2016); State v. Cameron, 721 A.2d 493, 499 (Vt. 1998); State v. Wilson, 864 N.W.2d 52 (Wis. 2015).

66. *See supra* note 55.

67. D.C. CODE ANN. § 14-302(a) (West 2018); TEX. R. EVID. 601(b); VA. CODE ANN. § 8.01-397 (2017); WYO. STAT. ANN. § 1-12-102 (West 2017). These statutes are slightly broader than stated in the text, extending also to actions against persons incapable of testifying for reasons other than death; *see also* N.J. STAT. ANN § 2A:81-2 (West 2018) (testimony allowed, but clear and convincing proof required for some claims); 15 VA. CODE ANN. § 395 (2017) (claim against estate that executor or administrator has rejected).

testimony altogether, regardless of corroboration.[68] These statutes can be traced back to the common law's exclusion of witnesses with a financial interest in the action, but their survival reflects fear that the deceased's inability to testify will encourage those suing his estate to fabricate testimony about their dealings with him.[69] Thus, some states allow the testimony, but also let the estate rebut it with statements otherwise barred by the hearsay rule.[70] Under Federal Rule of Evidence 601, these various Dead Person Statutes apply in federal courts when state law governs the claim or defense being litigated.[71]

D. Why?

The disappearance of corroboration rules from the study of Evidence law is a mystery. Clearly, such rules are not extinct. Some are thriving, others linger in some states, and a few are of recent birth. Wigmore considered them along with the rest of Evidence law,[72] as did his precursors.[73] Their exclusion from Evidence law can probably be traced to James Bradley Thayer's effort to prune back the subject,[74] as implemented by the authors of the Model Code of Evidence (1942), the Uniform Rules of Evidence (1953), the California Evidence Code (1965), and the Federal Rules of Evidence (1975). All of these leave out the corroboration rules.[75] And their exclusions as well as their inclusions have powerfully

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68. *E.g.*, N.Y. C.P.L.R. § 4519 (McKinney 2017); 735 ILL. COMP. STAT. 5/8-201 (2016). *See also* Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 CLEV. ST. L. REV. 75 (2005-06) (discussing the Dead Man Statutes, their weaknesses and plausible alternatives for the statutes).

69. 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 575-78 (3d ed. 1940) [hereinafter WIGMORE ON EVIDENCE].

70. *E.g.*, CAL. EVID. CODE § 1261 (West 2017); CONN. GEN. STAT. § 52-172 (2017).

71. Rosenfeld v. Basquiat, 78 F.3d 84, 88 (2d Cir. 1996); Lovejoy Elecs., Inc. v. O'Berto, 873 F.2d 1001, 1005 (7th Cir. 1989).

72. *E.g.*, JOHN HENRY WIGMORE, WIGMORE'S CODE OF EVIDENCE, rules 182-83 (3d ed. 1942). Wigmore included corroboration requirements not mentioned here, including some offensive ones. *E.g.*, *id.* rule 183, art. 6(c) (testimony of Chinese witness in alien immigration case). *See also* 7 WIGMORE ON EVIDENCE, *supra* note 69, §§ 2045-54 (equity's two witness rule for wills of personality).

73. *E.g.*, 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §§ 217, 255-61, 380-82 (10th ed. 1859); JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 138-40 (2d Amer. ed. George Chase ed. 1879).

74. *See generally* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898); *see* Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437, 2447 (2000).

75. Thayer does mention some of these rules in a historical context, considering them as meant to limit the powers of juries. THAYER, *supra* note 74, at 179, 430. For references to corroboration as a condition to hearsay exceptions, see FED. R. EVID. 801(d)(2), 804(b)(3)(B); CAL. EVID. CODE § 1350(a)(6) (West 2017).

influenced subsequent thinking and teaching.

1. Evidence law versus substantive law. Historically, Thayer's approach echoed efforts of his Harvard Law School colleagues to define the boundaries of their subjects and elucidate their deeper structures.[76] The same process was going on simultaneously among and within many academic disciplines.[77] As the rise of the University led to the development of an academic profession in the United States, its members strove to delineate their jurisdictional borders, to organize their subjects, and to justify their claims to special knowledge and insight. (Admittedly, there could also be a counter-trend toward disciplinary imperialism.)[78]

Thayer's effort to relegate what had previously been treated as rules of Evidence to the substantive law[79] fits this pattern and may have grounded some of the exclusions discussed here. For example, the two witness rules for treason and perjury[80] can certainly be related to the nature and contexts of those crimes, and hence treated as belonging to substantive criminal law rather than Evidence law. Nineteenth century lawyers and thinkers from Bentham on strove to disentangle procedural from substantive law, creating the ideal of tran-substantive procedure familiar to students of Civil Procedure.[81] Indeed, that ideal is reflected in the Rules Enabling Act's prohibition of rules modifying a "substantive right,"[82] which limits the possible scope of the Federal Rules of Evidence. Yet scholars and teachers are not bound by that limit and would benefit from comparing corroboration rules linked to specific crimes with each other and with all the other corroboration doctrines set forth here. Why cannot such rules be considered *both* criminal and Evidence law?

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76. *E.g.*, 2 G. EDWARD WHITE, LAW IN AMERICAN HISTORY 234-38 (2016); Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345, 354-56 (2007); Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1527-32 (2001). For recent discussion of Thayer, focusing on his constitutional writing, see *Symposium*, 88 NW. U.L. REV. 1 (1993).

77. *See generally* DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991); JAMES TURNER, PHILOLOGY: THE FORGOTTEN ORIGINS OF THE MODERN HUMANITIES (2014); Rudolf Stichweh, *History of Scientific Disciplines*, *in* 21 INT'L ENCYC. OF THE SOCIAL & BEHAVIORAL SCIENCES 287, 287 (2d ed. 2011).

78. *E.g.*, Edward P. Lazear, *Economic Imperialism*, 115 Q.J. ECON. 99, 129 (2000).

79. THAYER, *supra* note 74, at 390-483 (arguing that almost all of the parol evidence rule is substantive contract law); Swift, *supra* note 74, at 2447-49. Likewise, JOHN JAY MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE § 37 (3d ed. 1924) insists that corroboration requirements are "founded upon no principle of the law of evidence, but the result of some rule of substantive law." *Id.*

80. *See supra* Part I.A.

81. AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877, 10-12, 49-53, 145-47 (2017). On Tran-substantive Civil Procedure, see Robert M. Cover, *For James Wm Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).

82. 28 U.S.C. § 2072(b) (2016).

Likewise, because most of the corroboration rules are limited to criminal trials, they could be relegated to the law of criminal procedure. Yet even the current boundaries of Evidence law contain a number of provisions concerned only with criminal or civil trials.[83] As David Sklansky and Stephen Yeazell explain, one of the strengths of U.S. Evidence law is precisely that it integrates civil and criminal evidence into a single field.[84] When the corroboration rules are compared to the evidentiary rules applicable to other crimes, their singularity or justification will more easily be appraised.

2. Exclusionary versus weighing rules. Another of Thayer's constrictions of Evidence law's boundaries reappears in the failure of later Evidence reformers to consider such issues as the sufficiency of different kinds of evidence to support a verdict, again supporting the disregard of corroboration rules. Thayer's great book prescribes three functions for Evidence law:

> It prescribes the manner of presenting evidence . . . . (2) It fixes the qualifications and the privilege of witnesses, and the mode of examining them. (3) And chiefly, it determines, as among probative matters, matters in their nature evidential,--what classes of things shall not be received.[85]

Thayer did not always remain within these limits, as witness his analysis of burdens of proof, and how presumptions affect them.[86] Yet for the most part his description fits not only his own work but that of the distinguished reformers whose work led up to and shaped the Federal Rules of Evidence, and the academic subject of Evidence law.

The result was to leave out such rules as those that bar criminal convictions based on uncorroborated confessions or accomplice testimony, or those calling for cautionary jury instructions about certain uncorroborated evidence.[87] Although some of these rules can be stated as limits on the admission of evidence, their basic thrust goes more to its adequacy to support a verdict, which in turn can be viewed as a mere jury issue, incapable or unworthy of scholarly tidying, and in any event to be thrust outside the boundaries of Evidence law. Thayer's definition likewise excludes consideration of what a jury may properly assume on the basis of ordinary experience,[88] and what use it may properly make of a party's failure to introduce evidence.[89]

Excluding corroboration rules from consideration deprives the law of

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83. FED. R. EVID. 301, 302, 404(a)(2), 404(b)(2), 407, 409, 411, 412(b), 413-15, 609(a)(1), 704(b), 803(8), 804(3)(B).

84. David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 Geo. L.J. 683, 728 (2005).

85. THAYER, *supra* note 74, at 264.

86. *Id.* chs. 8, 9.

87. *See supra* Parts I.B-C.

88. John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 414 (1985).

89. *See* authority cited *supra* notes 14-16; *infra* Part III.

Evidence tools it needs to reach its goal, whether that goal be thought of as accurate fact finding, efficient dispute resolution, fair adjudication, or some combination of these. There are compromises between denying the trier access to information and allowing jurors to give it any weight they choose. These include admitting the information but requiring more evidence before allowing the jury to reach a given decision, asking a jury to consider the evidence only if it finds corroboration, and instructing the jury about the strengths or weaknesses of the information. These compromises will repay scholarly consideration as much as the decision to admit or exclude evidence, which indeed cannot be intelligently made if a class of options is barred from the discussion.

Indeed, some of the most promising contemporary developments in trial practice look beyond the admission or exclusion of evidence to consider the whole sequence from its creation to its testing to its presentation to its use. For example, the proper use of forensic science involves validating the science, training and testing its practitioners, presenting it to the judge or jury in ways that are less likely to mislead, and giving jurors information about its strengths and weaknesses.[90] Eyewitness identification testimony calls for a similar approach.[91] When Evidence scholars consider such matters, corroboration rules should be among the relevant options.

3. Weighing versus counting witnesses. Under the scholarly neglect of corroboration rules lies distrust of their value. The major thrust of Evidence reform has been to replace detailed exclusionary rules by reliance on judicial discretion to filter out bad evidence.[92] That was part of a broader trend that also included Civil Procedure reform[93] and Legal Realist rule skepticism.[94] As critics

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90. *See generally* NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf [https://perma.cc/CF8D-XWXA]; PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE & TECHNOLOGY, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016), *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [https://perma.cc/C7L2-2HBB].

91. *See generally* State v. Henderson, 27 A.3d 872 (N.J. 2011); State v. Lawson, 291 P.3d 673 (Or. 2012), *see also* Andrea Roth, *Machine Testimony*, 126 YALE L.J. (2017) (proposing comparable approach for evidence produced by machines).

92. Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 LAW & SOC. INQUIRY 213, 217 (1992); Swift, *supra* note 74, at 2440; *see* WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM & WIGMORE (1985) (discussing Bentham's attack on evidentiary rules).

93. David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Legal Reform*, 44 GA. L. REV. 433, 458 (2010); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 942 (1987).

94. *E.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 835 (1935).

since Bentham have argued, what could be more medieval[95] and mechanical[96] than counting witnesses instead of weighing them?[97]

Yet rules continue to exist in Evidence law, which indeed is based on "creating large, simple, but definite categories under which offered items of proof could be classified accurately and, above all, quickly."[98] Many have criticized rules based on whether evidence fits in this or that category rather than on particularized analysis, most recently Judge Posner.[99] But his proposal to abolish the hearsay rule elicited strong replies,[100] and rules of evidence continue to exist both in the United States and in other common law jurisdictions.[101] While they do, the fact that corroboration rules are indeed rules hardly seems enough to exclude them from consideration. Indeed, while we continue to bar altogether evidence of some value, the milder measure of admitting it if there is corroboration should at least be on the table, especially since the requirement can be both narrow and flexible.[102] In short, some corroboration rules might merit dilution or abolition, but this does not warrant closing one's scholarly eyes to their existence.

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95. *See supra* notes 13-16 and authorities cited there.

96. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 230 (1954) (criticizing rule requiring corroboration of confessions as "measuring the proof according to a mechanical yardstick").

97. *See* CAL. EVID. CODE § 411 (West 2017) (direct evidence of one witness suffices to prove any fact unless statute provides otherwise). For Bentham's critique of two witness rules, see JEREMY BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE 463-500 (J.S. Mill ed. 1827).

98. Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 503 (1930) (criticizing this approach); *see* Leubsdorf, *supra* note 23, at 1227-34.

99. United States v. Boyce, 742 F.3d 792, 799-802 (7th Cir. 2014) (Posner, J., concurring) (proposing abolition of the hearsay rule); Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1465 (2016).

100. Ronald J. Allen, *The Hearsay Rule as a Rule of Admission Revisited*, 84 FORDHAM L. REV. 1395, 1396 (2016); Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1861 (2015).

101. Evidence Act 1995 (Austl.), *available at* http://www5.austlii.edu.au/au/legis/cth/consol_act/ea199580/ [https://perma.cc/5CBM-BZVP]; Evidence Act 2016, pt. 1 (N.Z.), *available at* http://www.legislation.govt.nz/act/public/2016/0044/latest/DLM6488707.html [https://perma.cc/ESJ5-A5DG]; KEANE & MCKEOWN, *supra* note 32 (England); DAVID M. PACIOCCO & LEE STUESSER, THE LAW OF EVIDENCE (7th ed. 2015) (Canada).

102. *E.g.*, 8 U.S.C. § 1158(b)(1)(B)(ii) (2016) (alien seeking asylum: "The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee . . . . Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.").

II. PENUMBRAS OF ABUSE

A second group of neglected evidentiary rules centers around the highly charged subjects of rape, domestic abuse, and child abuse. These crimes themselves have certainly not been neglected by legislators, courts or scholars. On the contrary, they have been the object of much-discussed substantive and procedural reforms that seek to change rules based on disempowering gender stereotypes and to reduce the obstacles to criminal convictions. Some of these reforms fall within the Evidence law set forth in the Federal Rules and included in the standard Evidence course, notably the rape shield provisions that limit cross-examination of complaining witnesses about their sexual history.[103] But lurking in the shadows around such reforms are a number of less studied doctrines, some old and some new. These have shown some tendency to spread from one of these crimes to another, even though rape, domestic abuse, and child abuse also raise differing problems. All in all, they constitute a remarkable knot of rules treating these crimes differently from all others.

The old common law doctrine of fresh complaint[104] survives in a number of states[105] and has been written into legislation in others.[106] It has weathered the decline of the belief on which it was traditionally based that, because it is "normal" for victims of rape to complain promptly, jurors will expect evidence that this occurred.[107] In theory, the evidence is admitted only to accommodate such expectations, not to show that the rape actually occurred, and thus does not constitute hearsay.[108] But that use would not be allowed for other crimes.[109] And when there was no fresh complaint, the prosecution may be allowed to show why not.[110]

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103. *E.g.*, FED. R. EVID. 412; CAL. EVID. CODE §§ 782, 1103(c) (West 2017); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2017).

104. 4 WIGMORE ON EVIDENCE § 1135 (James H. Chadbourn rev. 1972).

105. *E.g.*, Robles v. United States, 50 A.3d 490, 496 (D.C. 2012); State v. W.E., 142 A.3d 265, 278-79 (Conn. 2016); Commonwealth v. Mayotte, 56 N.E.3d 756, 762 (Mass. 2016); State v. R.K., 106 A.3d 1224, 1233 (N.J. 2015); People v. Rosario, 958 N.E.2d 93, n.4 (N.Y. 2011).

106. *E.g.*, 725 ILL. COMP. STAT. 5/115-10 (2016); LA. CODE EVID. ANN. art. 801(D)(1)(d) (2017); MD. R. EVID. 5-802.1(d); OR. REV. STAT. § 40.460(18)(a) (2017); VA. CODE ANN. 19.2-268.2 (West 2017). In England, the doctrine has been expanded to include other crimes. KEANE & MCKEOWN, *supra* note 32, at 343-44.

107. *E.g.*, State v. Hill, 578 A.2d 370, 377 (N.J. 1990) (criticizing the belief but maintaining the doctrine).

108. *See* People v. Brown, 883 P.2d 949, 957-60 (Cal. 1994) (seeking to reconcile admission of fresh complaint evidence with generally applicable evidence rules); State v. Madigan, 122 A.3d 517, 528-30 (Vt. 2015).

109. The argument in 4 WIGMORE ON EVIDENCE, *supra* note 69, § 1142 that fresh complaint evidence should be admitted in robbery and larceny cases has not been followed.

110. *E.g.*, Commonwealth v. Washington, 549 N.E.2d 446, 447-48 (Mass. Ct. App. 1990) (complaining witness' fear of African-Americans); People v. Jones, 2004 Mich. App. Lexis 2030, 6-9 (Mich. Ct. App. 2004) (defendant's previous violence); State v. Grandberry, 1994 Ohio App.

In child abuse prosecutions, most states have recently gone further, allowing the victim's hearsay statements to be used for the truth of what they assert in specified circumstances.[111] Some jurisdictions have reached similar results by stretching the hearsay exception for statements made for medical diagnosis or treatment[112] to include statements by children too young to be likely to appreciate the need to be honest with doctors[113]; and statements identifying the perpetrator of abuse, on the theory that the child will realize that this is relevant to treatment.[114] Such decisions respond to the importance of securing convictions when victims refuse or are unable to testify in court. The Supreme Court has likewise responded to this concern in its Confrontation decisions, though not as much as some would wish.[115]

As it has become easier to introduce out of court statements by complaining witnesses, it has also become easier to impeach those who do testify in ways unavailable for other witnesses. Under a common law rule continued by Federal Rule of Evidence 608(b) and its state equivalents, a witness may not be impeached by "extrinsic" evidence that he has acted dishonestly in the past.[116] The impeaching party may cross-examine the witness on such matters, but not introduce other evidence of his past dishonesty.[117]

Lexis 4503, 7-12 (Ohio Ct. App. 1994) (rape trauma syndrome expert); State v. Panduro, 197 P.3d 1111, 1118 (Or. Ct. App. 2008) (defendant's uncharged misconduct).

111. FLA. STAT. § 90.803(23) (West 2017); KAN. STAT. ANN. 60-460 (dd) (West 2017); WASH. REV. CODE ANN. § 9A.44.120 (West 2017); Christopher T. Fell, *Crying Out for Change: A Call for a New Child Abuse Hearsay Exception in New York*, 76 ALB. L. REV. 1853, 1879-80 & n.248 (2012-13) (citing statutes from thirty states); *see also* CAL. EVID. CODE § 1370 (West 2017) (statements by unavailable declarant about infliction or threat of physical injury to declarant).

112. *E.g.*, FED. R. EVID. 803(4).

113. *E.g.*, State v. Massengill, 62 P.3d 354, 365-66 (N.M. Ct. App. 2002) (two-and-a-half year old); People v. Duhs, 947 N.E.2d 617, 619-20 (N.Y. 2011) (three-year-old); State v. Gordon, 952 S.W.2d 817, 821-23 (Tenn. 1997) (three-year-old).

114. *E.g.*, State v. Mendez, 242 P.3d 328, 341-43 (N.M. 2010); Estes v. State, 487 S.W.3d 737, 755-57 (Tex. Ct. App. 2016); *see generally* Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 76 LAW & CONTEMP. PROBS. 47 (Winter 2002).

115. Ohio v. Clark, 135 S. Ct. 2173, 2182 (2015) (allowing use of child's statement to teacher); Giles v. California, 554 U.S. 353, 367-68, 377 (2008) (defendant forfeits Confrontation Clause protection against hearsay statement by witness defendant prevented from testifying only if defendant intended this prevention; but that intent can often be inferred in domestic abuse cases); Davis v. Washington, 547 U.S. 813, 823-29 (2006) (allowing use of out of court statements resulting from interrogation intended to meet ongoing emergency). One good critique is Deborah Tuerkheimer, *Confrontation and the Re-Privatization of Domestic Violence*, 113 MICH. L. REV. FIRST IMPRESSIONS 32 (2014).

116. 3 WIGMORE ON EVIDENCE, *supra* note 69, § 979; ROGER PARK & TOM LININGER, THE NEW WIGMORE: A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 3.3 (2012).

117. There are exceptions when the past dishonesty is evidenced by a criminal conviction, see

Yet many courts allow just such extrinsic evidence to show that a complaining witness made false charges of rape in the past, on the theory that credibility disputes are especially important in such cases.[118] These courts likewise get around their states' rape shield rules by holding that a false charge of rape does not constitute evidence of past sexual behavior within the meaning of those rules.[119] Yet except in New Jersey and Missouri,[120] in cases not involving sexual assault extrinsic evidence of past false charges continues to be excluded by states adhering to the traditional rule, regardless of the centrality of a credibility dispute or the absence of the policies supporting rape shield rules. The most plausible explanation for the willingness of some courts to admit extrinsic evidence of past false rape accusations is that they are counteracting recent evidentiary changes cutting against rape defendants.[121]

One of those changes, which allows the use of previous similar misconduct by rape and child abuse defendants to show a propensity to offend again in the same way, has penumbras of its own. Some states have adopted statutes or rules like Federal Rules of Evidence 413-15 to allow this.[122] Others admit evidence of similar previous conduct to show the defendant's "lustful disposition" or under similar theories of recurring behavior.[123] This legislation and caselaw conflict with Evidence law's usual principle that a party's past acts cannot be introduced

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FED. R. EVID. 609(a)(2), and when it has another bearing on the case besides impeaching the witness for dishonesty, see United States v. Abel, 469 U.S. 45, 52-53 (1984) (that both witness and defendant belonged to prison organization requiring members to lie for each other showed witness' bias).

118. *E.g.*, Morgan v. State, 54 P.3d 332, 338 (Alaska Ct. App. 2002); State v. Long, 140 S.W.3d 27, 31 (Mo. 2004); Abbott v. State, 138 P.3d 462, 477 (Nev. 2006); People v. Diaz, 988 N.E.2d 473, 476-77 (N.Y. 2013).

119. *E.g.*, *Ex parte* Loyd, 580 So. 2d 1374, 1375-76 (Ala. 1991); *see* WIS. STAT. ANN. § 972.11(2)(b)(3) (West 2016) (rape shield exception for past false charges).

120. State v. Guenther, 854 A.2d 308, 318 (N.J. 2004); State v. Long, 140 S.W.3d 27, 31 (Mo. 2004).

121. *See* Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof that the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry With the Rape Sword Laws*, 47 U. PAC. L. REV. 709 (2016) (adopting a similar rationale).

122. Michael L. Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 AM. CRIM. L. REV. 321, 323-24, 330-32, 344-47 (2015) (listing sixteen such states, but goes on to report that courts in four of them have struck down their states' statutes).

123. *Ex Parte* Register, 680 So. 2d 225, 226-28 (Ala. 1994); State v. DeJesus, 953 A.2d 45, 79-81 (Conn. 2008); Roberson v. State, 761 S.E.2d 361, 364 (Ga. Ct. App. 2014); State v. Zeliadt, 541 N.W.2d 558, 560-52 (Iowa Ct. App. 1995); State v. Couch, 2016 Minn. App. Unpub. Lexis 1106, at *8-11 (Minn. Ct. App. 2016); Gore v. State, 37 So.3d 1178, 1183-87 (Miss. 2010); State v. Reeder, 413 S.E.2d 580, 583 (N.C. Ct. App. 1992); State v. Tobin, 602 A.2d 528, 532 (R.I. 1992); State v. Timothy C., 787 S.E.2d 888, 900-02 (W. Va. 2016); Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U.L. REV. 397 (2015) (exploring and criticizing these and other theories).

into evidence simply to show his propensity to behave similarly on the present occasion.[124] Their supporters, although also concerned to overcome barriers to the conviction of perpetrators of rape, domestic abuse, and child abuse, typically rely on the assertion that those who commit such crimes are driven by a continuing obsessional motive likely to lead to repetition.[125] Whether in fact past rape or abuse constitutes stronger evidence of subsequent repetition than past robbery or drug dealing is open to question[126]; but rules premised on the belief that they do now prevail in many jurisdictions.

Why is the Evidence law concerning rape, domestic abuse, and child abuse so anomalous? The various doctrines clearly reflect at least three waves of changing and conflicting beliefs about those offenses. First, older doctrines premised on suspicion of complainants have been rejected by many but continue to survive with modifications in many states. Second, a more recent wave of reform, promoted by feminists and prosecutors, seeks to dismantle old rules and add new ones meant to counter that same suspicion. Sometimes old and new intertwine: the call for evidence that victims complained about their attacker, elevated to a legal requirement as recently as the Model Penal Code of 1962,[127] supported the hearsay exception for fresh complaint evidence.[128] Third, a countercurrent now seeks to protect defendants against aspects of the recent reforms. Thus, many courts allow extrinsic evidence of a complainant's past false accusations.[129] Likewise, some decisions tend to turn rape shield rules, written to

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124. *E.g.*, FED. R. EVID. 404(a)(1), (b)(1).

125. *E.g.*, *DeJesus*, 953 A.2d at 79-80; Collins, *supra* note 123, at 21-24 (citing authorities).

126. MIKE REDMAYNE, CHARACTER IN THE CRIMINAL TRIAL 16-25 (2015); MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW 173-75 (2016); Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741 (2008); Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795 (2013); Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 756-74 (1998)**;** *but see* U.S. DEP'T OF JUST., OFFICE OF SEX OFFENSES, SENTENCING, MONITORING, APPREHENDING, REGISTERING AND TRACKING, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE 98-100, 102 (2014), *available at* https://smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf [https://perma.cc/F9QH-Y3JS] (recidivism higher among child molesters than among other sex offenders). England treats all crimes equally by authorizing the court to allow evidence of similar past crimes to show the defendant's propensity to commit whatever crime may be in question. KEANE & MCKEOWN, *supra* note 32*,* at 525-34; *see generally* REDMAYNE, *supra*.

127. MODEL PENAL CODE § 213.6(4) (AM. LAW INST., 2007) (making prompt complaint a precondition of prosecution); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1139-40 (1986). The American Law Institute is currently revising the Code's provisions on sexual assault and related offenses.

128. *See supra* text accompanying notes 89-95.

129. See *supra* text accompanying notes 103-06. As with the corroboration rules discussed in Part I, *supra*, Wigmore continued to include the rules discussed in this part in Evidence law, in this

exclude all evidence of a complainant's past sexual history except for narrowly defined uses, into "forbidden inference" rules that allow such evidence so long as it supports an inference not based on a supposed general propensity to consent.[130]

Although the law of rape, domestic abuse and child abuse, both substantive and evidentiary, has received intensive scholarly attention from feminists and others, and although a few of its evidentiary components have entered mainstream Evidence law, many remain outside. One reason is that Evidence law focuses on the Federal Rules and Confrontation Clause, which cover only some of the doctrines unique to these offenses. That necessarily leads to a distorted view, particularly since the vast bulk of prosecutions occur in state courts, where specialized legislation and doctrines thrive.[131]

In addition, the Thayer-ian drive to narrow and purify Evidence law[132] has made it easier to regard the rules considered here as part of the law of rape, domestic abuse, and child abuse, not as Evidence law. The Model Penal Code exemplified and fostered this tendency by incorporating several evidentiary rules in its treatment of sex offenses.[133] The tendency might even be considered an example of treating women's and children's matters as a sideline to the important stuff. And yet the attempted repression has not succeeded: again and again the principles supposedly applicable to all claims and crimes are set aside when it comes to rape and child abuse.

Explaining the rules outlined here, individually and as a complex, might require the combined talents of a feminist, an historian, and a psychiatrist. In any event, those rules obviously reflect both substantive and evidentiary concerns. They belong in Evidence law as well as in the law of rape, domestic abuse and child abuse. Moreover, these rules interact with rules that are studied, forming a pattern that should be considered as a whole. Both they and Evidence law as a whole would benefit from including them.

III. AFFECTING AN OPPONENT'S RIGHTS

Sometimes, acts by one party to a proceeding can entitle another party to introduce evidence that would otherwise be inadmissible. Introducing one sort of

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instance with his own sexist slant. WIGMORE, *supra* note 72, rules 35, 51, 111, 127.

130. Leubsdorf, *supra* note 23, at 1220 (citing cases).

131. *Compare* U.S. DEPT. OF JUST., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES, Table 1.1 (2006) (33,200 sexual assault convictions in state courts), *with* same author, FEDERAL JUSTICE STATISTICS 2006—STATISTICAL TABLES, Table 4.2 (2006) (457 violent sexual abuse cases in federal courts, 91.5% leading to conviction).

132. *See supra* text accompanying notes 74-90.

133. MODEL PENAL CODE § 213.6 (AM. LAW INST., 2007) (defense for certain offenses of victim's sexual promiscuity; prompt complaint requirement; corroboration requirement). These provisions will not survive the current reconsideration of this part of the Model Penal Code. *See* MODEL PENAL CODE §§ 213.1- 213.6 (AM. LAW INST., Discussion Draft 2013).

evidence may entitle an opponent to reply in kind.[134] Destroying evidence may make substitutes admissible.[135] But the examples found in the Federal Rules are only the tip of the iceberg. One might call the category to which they belong secondary Evidence law: its rules modify the usual default Evidence rules because of acts of the parties.

A. Adversarial Retaliation

A tangle of overlapping doctrines allows a party to take advantage of an opponent's imprudence. (1) By using evidence that injects a new issue into a case, a party makes responsive evidence relevant and thus "opens the door" to contradicting evidence that would otherwise have been irrelevant[136]—and even unfairly prejudicial.[137] Lexis reports 1,629 opinions using the phrase "open the door" during 2016 alone, though many of these concern other doors and other doctrines. (2) When one party introduces inadmissible evidence, courts can invoke the doctrine of "curative admissibility," so named by Wigmore.[138] This allows the opposing party to counter the inadmissible evidence with more inadmissible evidence,[139] at least to the extent needed to cure prejudice from the original evidence.[140] (3) In Arkansas, a litigant may "fight fire with fire" under a doctrine which is more or less the curative admissibility principle under a more inflammatory name.[141] That name is surprisingly recent.[142]

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134. FED. R. EVID. 404(a) (criminal defendant's introduction of character evidence); FED. R. EVID. 608(a) (impeaching witness with character evidence of untruthfulness). Another example is the law on waiver of the attorney-client privilege. *E.g.*, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 79, 80 (AM. LAW INST. 2000).

135. Giles v. California, 554 U.S. 353, 359-61 (2008) (forfeiture exception to Confrontation Clause); FED. R. EVID. 804(b)(6) (forfeiture exception to hearsay rule); FED. R. EVID. 1004(a-c) (despite Best Evidence Rule, party may introduce secondary evidence of the contents of a document that an opponent destroys or fails to produce).

136. *E.g.*, Glenn v. Union Pac. R.R., 262 P.3d 177, 184-91 (Wyo. 2011).

137. Stansbury v. Commonwealth, 454 S.W.3d 293, 300-01 (Ky. 2015); Escobedo v. State, 987 N.E.2d 103, 116-17 (Ind. Ct. App.), *aff'd in relevant part,* 989 N.E.2d 1248, 1248 (Ind. 2013).

138. 1 WIGMORE ON EVIDENCE § 15 (1st ed. 1904). The phrase first appeared in a judicial opinion in 1942. Biener v. St. Louis Pub. Serv. Co., 160 S.W.2d 780, 785-86 (Mo. Ct. App. 1942) (citing WIGMORE); *see* State v. Slane, 41 P.2d 269, 272-73 (Wyo. 1935) (using the phrase in argument of counsel).

139. *E.g.*, People v. Aghchay, 2007 Cal. App. Unpub. LEXIS 9227, at *10-16 (Cal. Ct. App. 2007) (admitting past administrative findings); Commonwealth v. Reed, 831 N.E.2d 901, 907-08 (Mass. 2005) (overcoming hearsay rule); *see* United States v. Robinson, 485 U.S. 25, 33-34 (1988) (allowing prosecutorial comment on defendant's failure to testify).

140. *E.g.*, Furr v. United States, 157 A.3d 1245, 1248-54 (D.C. 2017); State v. Vandeweaghe, 827 A.2d 1028, 1033 (N.J. 2005); Judge Rotenberg Educ. Ctr. v. Comm'r, 677 N.E.2d 127, 148-49 (Mass. 1997).

141. King v. State, 999 S.W.2d 183, 187-88 (Ark 1999); Delatorre v. State, 471 S.W.3d 223,

Three other doctrines overlap with these three and have a similar tit-for-tat form. (4) The principle of invited error can bar a party from challenging the admission of evidence responding to his own comparable evidence or invitation.[143] (5) The doctrine of completeness, embodied as to documents in Federal Rule of Evidence 106 but continuing to exist also as a free-floating doctrine, provides among other matters that, when a party introduces part of a statement, the opponent may introduce other parts of the same statement that in fairness should be considered together.[144] (6) When a witness makes a statement (relevant or not) while testifying, the doctrine of specific contradiction enables the opposing party to challenge the witness's truthfulness by showing (at least through cross-examination) that the statement was false.[145] As a result, the opponent may be able to put before the trier of fact evidence that would otherwise be irrelevant or otherwise inadmissible.[146]

Are these indeed different doctrines? The overlap among them is obvious, and indeed the few scholars who have studied them have devoted considerable attention to trying to distinguish them.[147] Some courts join this effort,[148] but others

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226 (Ark. Ct. App. 2015) (defendant counsel's attack on prosecutor warrants prosecutor's attack on defense counsel).

142. The first reference in this evidentiary connection that I have found is *Connelly v. Nolte*, 21 N.W.2d 311, 319 (Iowa 1946) (rejecting the theory). The first favorable use is *Commonwealth v. Smith*, 172 N.E.2d 597, 601 (Mass. 1961). *But see* Commonwealth v. Buzzell, 759 N.E.2d 344, 370 (Mass. Ct. App. 2001) (referring to "the now essentially discredited 'fight fire with fire' theory").

143. *E.g.*, People v. Replogle, 2014 Cal. App. Unpub. LEXIS 1339, at *80-84 (Cal. Ct. App. 2014); State v. Barnett, 2013 Ohio App. LEXIS 2459, at *22-23 (Ohio Ct. App. 2013). The invited error principle is not limited to the erroneous admission of evidence but also includes other errors, for example in the court's instructions. *E.g.*, Henderson v. State, 2017 Ala. Crim. App. LEXIS 11, at *19-27 (Ala. Crim. App. 2017). For attempts to distinguish between invited error and waiver, see People v. Rediger, 2015 Colo. App. LEXIS 344, at *52-53 (Colo. Ct. App. 2015); Prystash v. State, 3 S.W.3d 522, 531-32 (Tex. Crim. App. 1999); Pickering v. People, 66 V.I. 276, 284-86 (2017).

144. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171-74 (1988); Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825 (1995) [hereinafter Nance, *Theory of Verbal Completeness*]; Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 TEX. L. REV. 51 (1996). As Nance explains, the completeness doctrine concerns not only the admissibility of other parts of a statement but also the timing of admission and the statement's discoverability.

145. *E.g.*, MUELLER & KIRKPATRICK, *supra* note 6, §§ 6.43-48.

146. *E.g.*, Walder v. United States 347 U.S. 62, 65-66 (1954) (previous possession of heroin).

147. Francis A. Gilligan & Edward J. Imwinkelried, *Bringing the "Opening the Door" Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 SANTA CLARA L. REV. 807, 822-29 (2001) (distinguishing specific contradiction from curative admissibility and opening the door); Nance, *Theory of Verbal Completeness*, *supra* note 144, at 869-76 (distinguishing completeness from curative admissibility).

148. *E.g.*, State v. Huser, 894 N.W.2d 472, 506-10 (Iowa 2017) (distinguishing opening the

are content to stir together different doctrines—or at least different names.[149] Whatever the extent to which useful distinctions are possible, these doctrines clearly arise from the same goals: remedying falsehoods and half-truths; restoring the equality between parties (even if it is only the equality of opposite prejudices); allowing parties to define the scope of their dispute and even its evidentiary rules;[150] and discouraging parties from evidentiary excess. These goals reflect the tension, common to most procedural law, between the search for truth and the pulls of adversarialism.[151]

Tidying the doctrinal boundaries is one subject calling for academic attention; another is clarifying when and to what extent whatever doctrines may exist override barriers to admissibility other than relevance. Courts have invoked various doctrines to overcome various barriers.[152] Dale Nance has considered with his usual thoroughness when this should be allowed under the completeness doctrine,[153] but more analysis is called for when other doctrines and policies come into play.

Another subject bridging these various doctrines is how a party's failure to object when evidence is introduced should affect her right to rebut or reply in kind. Following the approach of the usual contemporaneous objection rules,[154] some courts say that failure to object bars a party from invoking its right to respond with otherwise inadmissible evidence.[155] Other courts say that failure to

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door, curative admissibility, and completeness); Trintis v. State, 2016 Md. App. LEXIS 668 (Md. Ct. Spec. App. 2016) (distinguishing curative admissibility and invited error); State v. Morrill, 914 A.2d 1206 (N.H. 2006) (distinguishing curative admissibility and specific contradiction).

149. *E.g.*, Stevenson v. Felco Indus. Inc., 216 P.3d 763 (Mont. 2009); Jezdik v. State, 110 P.3d 1058 (Nev. 2005).

150. *See generally* United States v. Mezzanatto, 513 U.S. 196 (1995).

151. *Compare* Nance, *Theory of Verbal Completeness*, *supra* note 144, at 860-69 (grounding the completeness doctrine in the "Best Evidence Principle"), *with* Edward J. Imwinkelried, *Clarifying the Curative Admissibility Doctrine: Using the Principles of Forfeiture and Deterrence to Shape the Relief for an Opponent's Evidentiary Misconduct*, 76 FORDHAM L. REV. 1295 (2007) (grounding curative admissibility on the initial party's forfeiture of the right to object to the opponent's response).

152. *E.g.*, Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 174-75 (1988) (completeness doctrine allowed introduction of nonexpert opinion); Walder v. United States, 347 U.S. 62, 65-66 (1954) (past crime could be shown as specific contradiction); Hall v. State, 36 N.E.3d 459, 471 (Ind. 2015) (prosecutor opened door to evidence about complaining witness otherwise barred by Rape Shield Statute); State v. Armentrout, 8 S.W.3d 99, 111 (Mo. 1999) (curative admissibility allowed use of hearsay); State v. Wamala, 972 A.2d 1071, 1078 (N.H. 2009) (hearsay could be used as specific contradiction).

153. Nance, *Theory of Verbal Completeness*, *supra* note 144, at 876-97.

154. FED. R. EVID. 103; FED. R. CIV. P. 46; FED. R. CRIM. P. 51.

155. *E.g.*, Bearden v. J.R. Grobmeyer Lumber Co., 961 S.W.2d 760, 762-64 (Ark. 1998); Wright v. Commonwealth, 473 S.E.2d 707, 710-11 (Va. 1996); MCCORMICK ON EVIDENCE § 57 (Kenneth S. Broun ed., 6th ed. 2006) (but noting that, even without objection, judge has discretion

object is no bar, and may even be a prerequisite, to responding.[156] The arguments for this position include that the first party's introduction of evidence waived his right to challenge evidence of the same character regardless of whether the other party objected,[157] and—Wigmore's view—that if the second party *did* object, his rights should usually be limited to pursuing that objection on appeal rather than seeking to counteract it.[158] This has usually been discussed in connection with curative admissibility,[159] and whatever view is adopted should not necessarily carry over to other doctrines. For example, when *admissible* evidence opens the door to otherwise inadmissible evidence, an objection to the original evidence would have been fruitless. But in other situations, there could have been a valid objection, for example when a party seeks to contradict a witness's irrelevant or prejudicial or privileged evidence. So comparing the role of objections under each doctrine may be useful.

Whatever may be the solutions to these doctrinal puzzles, the doctrines considered here are not only important in themselves, but also shape and modify the operations of the other evidentiary rules. They reveal that trials occur, not in some neutral Euclidean space, but between the poles of a powerful adversarial magnet whose lines of force pervade and sway developments in the courtroom—including the other rules of evidence. And they reveal that trials are not simply confrontations between two opposing stories but developing dialogues whose scope and rules evolve through interactions between the parties. These perceptions alone would justify our recognizing these doctrines as indispensable frames for our view of Evidence law.

It may be just these important characteristics that have fostered academic disregard—with some exceptions[160]—of these doctrines. The doctrines are secondary—parasitic as it were—on standard Evidence law, modifying that law in response to the parties' more or less dubious acts. Moreover, although some of them can be defended as contributing to the search for truth, or at least the fight against half-truth and falsehood,[161] their main source is the spirit of adversarialism. Trial lawyers are naturally drawn to considerations of equality between parties, but scholars[162] may be more likely to relegate them to a

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to allow a response).

156. *E.g.*, State v. Miller, 824 N.W.2d 562 (Iowa Ct. App. 2012) ("with or without objection"); Clark v. State, 629 A.2d 1239, 1240 (Md. 1993) (court has discretion to allow curative admissibility despite failure to object); Arnold v. Ingersoll-Rand Co., 1991 Mo. App. LEXIS 1691, *22 (Mo. Ct. App. 1991); Daniels v. Dillinger, 445 S.W.2d 410, 416-19 (Mo. Ct. App. 1969).

157. State v. Reavis, 700 S.E.2d 33, 38 (N.C. Ct. App. 2010).

158. 1 WIGMORE, EVIDENCE § 15 (Peter Tillers rev. 1983).

159. *E.g.*, Imwinkelried, *supra* note 151.

160. *See* books and articles cited *supra* notes 144, 145, 147, 151.

161. Nance, *Theory of Verbal Completeness*, *supra* note 144, at 860-62.

162. And not just scholars: consider the Supreme Court's attempt to portray the exclusion of coconspirator statements from the hearsay rule as based on their peculiar reliability, United States v. Inadi, 475 U.S. 387, 394-96 (1986), when the historic ground was theories of estoppel by agent; *see generally* Joseph H. Levie, *Hearsay and Conspiracy: A Reexamination of the Coconspirators'*

peripheral position, almost beyond sight. Indeed, Edmund Morgan's heretical suggestions that trials are more about resolving disputes than finding the truth helped to doom the Model Code of Evidence.[163]

B. Litigation Behavior as Evidence

A party may, in appropriate circumstances, prove that an opposing party failed to produce evidence to support an inference that the evidence would have undermined the case of the party failing to produce it.[164] Because discovery is now available in civil cases, failure to produce in those cases typically results either from disregarding a discovery request or from destroying evidence that the possessor should have preserved.[165] But even in criminal cases, evidence of destruction or suppression can be introduced against the government[166] or defendant.[167] Much case law focuses on when the court should instruct the jury on the propriety of an adverse inference,[168] but of course an instruction can only be proposed if evidence of the destruction or nonproduction has been admitted.[169]

It has long been recognized that allowing jurors to consider destruction of evidence and other misconduct has more than one rationale.[170] *First*, a party's destruction or withholding of evidence permits a rational inference that the party believes that evidence to be harmful, from which one can infer that it is indeed harmful.[171]

Second, allowing the trier to infer the content of evidence that is not before

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Exception to the Hearsay Rule, 52 MICH. L. REV. 1159 (1954).

163. Ariens, *supra* note 92, at 234-36, 242-45.

164. *E.g.*, MCCORMICK ON EVIDENCE, *supra* note 155, at § 265; Richard D. Friedman, *Dealing with Evidentiary Deficiency*, 18 CARDOZO L. REV. 1961, 1963-66 (1997).

165. *See generally* William Hubbard, *The Discovery Sombrero and Other Metaphors for Litigation*, 64 CATH. U.L. REV. 867 (2015).

166. Cost v. State, 10 A.3d 184 (Md. 2010); People v. Handy, 988 N.E.2d 879 (N.Y. 2013).

167. United States v. Kuehne, 547 F.3d 667, 691-92 (6th Cir. 2008) (attempted destruction of evidence); United States v. Werner, 160 F.2d 438, 441 (2d Cir. 1947) (L. Hand, J.) (fabrication of evidence); Tamme v. Commonwealth, 973 S.W.2d 13, 29-32 (Ky. 1998) (complicity in witness perjury).

168. Shira A. Scheindlin & Natalie M. Orr, *The Adverse Inference Instruction after Revised Rule 37(e): An Evidence-Based Proposal*, 83 FORDHAM L. REV. 1299, 1308-15 (2014) (citing authorities).

169. *Id.* at 1305-07.

170. 2 CHARLES FREDERIC CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE §§ 1070c, 1078a, 1078b (1911); John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 230 (1935).

171. *E.g.*, Mali v. Federal Ins. Co., 720 F.3d 387, 392-94 (2d Cir. 2013). Similar inferences can be based on other litigation misconduct. *E.g.*, David Harrison, *Admissibility and Effect, on Issue of Party's Credibility or Merits of his Case, of Evidence of Attempts to Intimidate or Influence Witness in Civil Action*, 4 A.L.R. 4th 829 (1981) (trying to bribe or threaten adverse witness).

it can be considered rough compensation for the destroying party's having made better evidence inaccessible.[172] Courts sometimes speak of this as leveling the playing field,[173] or describe the destroying party as estopped from objecting to the inference,[174] showing the same concern for adversarial fairness that supports the doctrine of curative admissibility.[175]

Third, telling the trier about the destruction or concealment tends to make the trier regard those responsible as scoundrels who deserve defeat, or at least to use their imaginations about what the missing evidence would show, and is thus among the various punitive and deterrent sanctions that can be invoked against spoliation of evidence.[176] Especially when accompanied by a jury instruction about the permissibility of an adverse inference, this sanction is widely regarded as almost certainly fatal to the party against whom it is deployed,[177] leading to calls for caution in its use.

This mixed pedigree of the inference from spoliation provides some reason for analyzing it through other perspectives than the law of Evidence, even though the evidentiary use of evidence spoliation has long been covered by Evidence treatises[178] and continues to draw attention from Evidence scholars.[179] In practice, the inference is just one of the sanctions for spoliation, which may also lead to court fines and attorney fee awards, dismissal or default judgment, civil or criminal liability, and other remedies.[180] It makes some sense to consider these together, as alternative remedies from which victims and courts may choose, regardless of whether the remedy is based on the law of Evidence, Civil

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172. *See* Giles v. California, 554 U.S. 353, 372-73 (2008) (defendant who wrongfully and intentionally makes a witness unavailable forfeits right to confront witness, making witness' hearsay statements admissible); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265-66 (1946) (when antitrust violator's wrong makes more precise calculation impossible, reasonable estimate of damages acceptable).

173. *E.g.*, Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995); Rosenblit v. Zimmerman, 766 A.2d 749 (N.J. 2001); *see* Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidentiary Damage Actionable*, 18 CARDOZO L. REV. 1891, 1956-59 (1897) (using similar reasoning to argue for making spoliators liable for damages).

174. *E.g.*, Boeken v. Philip Morris Inc., 26 Cal. Rptr. 3d 638, 671-72 (Ct. App. 2005); Turnbo by Capra v. City of St. Charles, 932 S.W.2d 851, 857 (Mo. Ct. App. 1996); State v. Fisher, 2001 Iowa App. LEXIS 668, 13-14 (Iowa Ct. App. 2001).

175. *See* text at *supra* notes 138-40.

176. *E.g.*, John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621, 1650-56 (2010) (citing authorities).

177. Zubulake v. UBS Warburg, L.L.C., 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

178. 1 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 487-91 (1824); GREENLEAF, *supra* note 84, at § 37; 2 WIGMORE, EVIDENCE §§ 278, 291 (James H. Chadbourn rev. 1979).

179. *E.g.*, Friedman, *supra* note 164; Nance, *supra* note 15.

180. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE (1989 & Supp. 2017); MARGARET M. KOESEL ET AL., SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION (3d ed. 2013).

Procedure, Torts, Criminal Law, or Professional Responsibility.

Yet the inference remedy, unlike others, also raises Evidence issues. In many instances, the inference from the destruction of evidence to its probable contents is weak, and the inference is allowed primarily for reasons other than probative value, notably adversarial fairness and punishment. That is why courts recognize the inference only against the destroying party—I have not found parties invoking a third person's destruction of evidence to support an inference about what that evidence would have shown.[181] Even when destruction reliably shows that the destroyer was afraid of what the evidence would show, just what that would have been is often no more than a matter for speculation. And often it is unclear what factual basis the destroyer had for his fears, or whether that basis duplicated evidence already introduced. Faced with all these uncertainties, the jury is like a Henry James character seeking to puzzle out what lies behind someone else's actions. All this goes to the probative force of destruction, before one even begins to consider how presenting it to the jury will bias them against the spoliator.

In short, whatever its use as an equalizer or sanction, an inference from spoliation will often (not always) be of little use in ascertaining the underlying facts. In a sense, this supports excluding that inference from the purview of Evidence law. But it is also true that lawyers, judges and scholars need to analyze precisely this problem before deciding whether to approve evidence of spoliation or an inference instruction rather than alternative sanctions. For example, when the adverse inference is a dubious one, which the jury might reject entirely or might overweight, it might be better to require the jury to assume the truth of the allegation in dispute, not because that can persuasively be inferred from the destruction of evidence, but because the party that destroyed the evidence prevented the truth from being ascertained. In any event, it is not enough just to ask, as many courts do, whether the evidence might have been relevant and whether destruction was negligent, grossly negligent, bad faith or whatever,[182] however relevant that is to the need for one of the possible sanctions. A sanction that proceeds by way of jury inferences about the content of missing evidence cannot help but fall within the proper concerns of Evidence law.

CONCLUSION

So what? The Federal Rules and the main Evidence course may leave out the matters discussed here, but they could hardly be expected to include or reject every evidentiary quirk that a few states might adopt. And if our goal is to improve trials, we might well place less emphasis on adding more doctrinal

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181. Use of a third party's destruction would not violate the hearsay rule unless the destruction was intended as an assertion. FED. R. EVID. 801(a). Nor would it contravene the Best Evidence Rule, because the original document no longer exists and the person who destroyed it was not the person introducing it in evidence. FED. R. EVID. 1004(a).

182. *E.g.*, Thurmond v. Bowman, 2016 U.S. Dist. LEXIS 45296 (W.D.N.Y. 2016); Bass-Davis v. Davis, 134 P.3d 103 (Nev. 2006); State v. Engesser, 661 N.W.2d 739 (S.D. 2003).

details to our courses and scholarship, and more on improving the preparation and presentation of forensic evidence[183] or on working to cure the causes of trial error.[184]

But at the very least we should know what we are leaving out. Some of the omitted rules may have greater impact than some of our traditional doctrinal nuggets. Some may open our eyes to possible approaches, such as corroboration requirements, that the Federal Rules disregard. And some may help us understand the goals and limits of the Federal Rules, and contemporary Evidence law in general, by exposing its drives to attain a trans-substantive law almost free of provisions tied to specific claims or offenses[185] and almost blind to the adversarial grounds of much that transpires in courtrooms. The law of Evidence is stranger than it might appear.

183. *See* authorities cited *supra* note 90.

184. *See generally* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2012).

185. Except for rape and child abuse, FED. R. EVID. 412-15, whose singling out itself raises questions.