University of Richmond Law Review

Volume 47 | Issue 4 Article 2

5-1-2013

Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters

Kenneth S. Klein
California Western School of Law

ARTICLES

WHY FEDERAL RULE OF EVIDENCE 403 IS UNCONSTITUTIONAL, AND WHY THAT MATTERS

Kenneth S. Klein *

I. INTRODUCTION

It might seem at best quixotic, and at worst absurd, to assert that Federal Rule of Evidence 403—an iconic evidentiary exclusionary[1] rule providing that relevant evidence can be excluded if it is too time-consuming or distracting—is unconstitutional.[2] Yet, if the Sixth and Seventh Amendments to the Constitution—

* Associate Professor of Law, California Western School of Law; B.A., Rice University; J.D., University of Texas School of Law. The author thanks his spouse and colleague, Professor Lisa Black, for her continuing invaluable assistance (and patience) as an editor. Equally essential was the work of the author's research assistant, Katie Suchman. Kristina Fretwell did the tough duty of surveying fifty state constitutions for me. The author also appreciates the comments, suggestions, and edits of professional colleagues Professors Deborah Merritt, Mario Conte, Larry Benner, Walt Heiser, and Daniel Yeager. The author is grateful for the substantial improvement of this article resulting from the author's participation in the Southern California Junior Law Faculty Workshop, as well as the support of the library staff of California Western School of Law, and the research grant supporting this article from California Western School of Law. This article is dedicated to my family. My parents taught me to think. My siblings taught me to question. My wife taught me to hear. My daughter taught me to see.

1. FRE 403 excludes evidence based on the content of the evidence and balancing the evidence's relevance against the evidence's contribution to or impairment of the advancement of accurate and efficient justice. *See* FED. R. EVID. 403. Other evidentiary exclusionary rules, such as hearsay rules, focus on the source of the evidence. *See e.g.*, FED. R. EVID. 801; FED. R. EVID. 802. Still others, such as privilege rules, derive from promotion of public policies external to a trial. *See e.g.*, FED. R. EVID. 501; FED. R. EVID. 502. When this article refers to evidentiary exclusionary rules, it is focused generally on relevancy rules, and specifically on FRE 403.

2. In my own defense, however, I note that others have gone even further. *See* David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 640–44 (2006).

respectively preserving the right to a criminal jury and a civil jury—are to be taken seriously, that conclusion not only is plausible, but perhaps inescapable. More surprisingly and consequentially, deep thinking about the constitutionality of FRE 403 exposes that there may be constitutional concerns with large swaths of the Federal Rules of Evidence, the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and Supreme Court jurisprudence.

The argument attacking the constitutionality of FRE 403 is simple to state, at least in the first instance. FRE 403 permits the exclusion of "relevant" evidence,[3] which FRE 401 defines as evidence making a fact "of consequence" "more or less probable."[4] If constitutionally a jury is the exclusive fact finder on a particular issue, and if a piece of evidence makes a fact of consequence to that issue more or less likely, then it would seem there is no way constitutionally to keep that evidence from the jury, at least not on a justification of more efficient trials and, in the judge's view, more accurate verdicts. The Supreme Court has held that neither efficiency nor accuracy is a basis for constricting the right to a trial by jury.[5]

Yet, that is the effect and goal of FRE 403: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[6] As the Advisory Committee's Notes to FRE 403 concede, the rule allows and intends the exclusion of "unquestioned" relevant evidence.[7] There is an identical or nearly identical counterpart to FRE 403 in the codes or case law of all fifty states.[8] This raises

3. FED. R. EVID. 403.

4. FED. R. EVID. 401.

5. *See* Blakely v. Washington, 542 U.S. 296, 313 (2004) (stating that "our decision cannot turn on whether or to what degree trial by jury impairs efficiency or fairness").

6. FED. R. EVID. 403.

7. FED. R. EVID. 403 advisory committee's note.

8. *See* ALA. R. EVID. 403; ALASKA R. EVID. 403; ARIZ. R. EVID. 403; ARK. R. EVID 403; CAL. EVID. CODE 352; COLO. R. EVID. 403; CONN. CODE EVID. § 4-3; DEL. R. EVID. 403; FLA. STAT. § 90.403 (Repl. Vol. 2012); HAW. R. EVID. 403; IDAHO R. EVID. 403; ILL. EVID. R. 403; IND. R. EVID. 403; IOWA R. EVID. 5.403; KAN. STAT. ANN. § 60-445 (Repl. Vol. 2005 & Cum. Supp. 2012); KY. R. EVID. 403; LA. CODE EVID. ANN. art. 403; ME. R. EVID. 403; MD. R. EVID. 5-403; MICH. R. EVID. 403; MINN. R. EVID. 403; MISS. R. EVID. 403; MONT. R. EVID. 403; NEB. R. EVID. 403; NEV. REV. STAT. § 48.035 (West 2013); N.H. R. EVID. 403; N.J. R. EVID. 403; N.M. R. EVID. 11-403; N.C. R. EVID. 1403; N.D. R. EVID. 403; OHIO R. EVID. 403;

the question: If the fact to be determined is "of consequence," and if the evidence at issue "unquestionably" makes the fact "more or less probable," and if the jury is the one constitutionally empowered and required to decide the fact, then shouldn't it follow that constitutionally the judge cannot exclude the evidence from the jury?

In practice, such evidence is kept from juries all the time. Consider the example of *United States v. Crowley*,[9] a case typical of evidence cases decided every day. Francis Crowley and Steven Valjato—both students in the Kings Point Merchant Marine Academy—were charged with sexual assault of fellow midshipman Stephanie Vincent.[10] The defense was permitted to call midshipman Shannon Pender to testify generally that Vincent had made other "accusations" against fellow students that had been "proven" false and that Pender believed Vincent was not a truthful person.[11] The defense wished to cross-examine their accuser, Vincent, about Pender's testimony.[12] During voir dire of Vincent—in other words, under examination outside of the presence of the jury—she denied lying when making each of these past accusations.[13] After hearing the voir dire, the trial judge prohibited the defense from cross-examining Vincent in the presence of the jury about what Pender had described as Vincent's past history of false accusations.[14]

The appellate court, while recognizing that "Vincent's credibility was obviously a critical issue at trial," affirmed the trial court

---

12 OKLA. STAT. tit. 12, § 2403 (Repl. Vol. 2011); OR. R. EVID. 403; PA. R. EVID. 403; R.I. R. EVID. 403; S.C. R. EVID. 403; S.D. R. EVID. 403; TENN. R. EVID. 403; TEX. R. EVID. 403; UTAH. R. EVID. 403; VT. R. EVID. 403; VA. R. EVID. 2:403; WASH. R. EVID. 403; W.VA. R. EVID. 403; WIS. R. § 904.03; WYO. R. EVID. 403. Four states provide the same evidentiary rule by case law rather than code. *See* Dep't of Transp. v. Mendel, 517 S.E.2d 365, 368 (Ga. Ct. App. 1999); Ross v. State, 614 S.E.2d 31, 33 (Ga. 2005); Gath v. M/A-Com, Inc., 802 N.E.2d 521, 528 (Mass. 2003); Commonwealth v. Sylvia, 921 N.E.2d 968, 977–78 (Mass. 2010); Pittman v. Ripley Cnty. Mem'l Hosp., 318 S.W.3d 289, 294 (Mo. Ct. App. 2010); People v. Scarola, 525 N.E.2d 728, 732 (N.Y. 1988); State v. Rosado, 889 N.Y.S.2d 369, 374–75 (N.Y. Sup. Ct. 2009).

9. 318 F.3d 401 (2d Cir. 2003).

10. *Id.* at 404–06.

11. *Id.* at 416. Under FRE 608, the testimony could not go into specific instances of conduct. *Id.* at 417.

12. *Id.* at 416.

13. *Id.* at 416–17. An in camera review of the Academy's files showed the findings of the investigation of the prior accusations were "equivocal." *Id.* at 418.

14. *Id.* at 416–17.

ruling.[15] On what the appellate court characterized as a "critical issue"—the credibility of the accuser—questions to the accuser about whether the accuser had falsely made the same sort of allegations in the past were kept from the jury based on concerns about whether the jury could be trusted to accurately weigh the evidence:

> The voir dire examination established that Vincent would deny making false accusations or lying in connection with Academy investigations of other students. Since the defense would be precluded by Rule 608(b) from attempting to refute Vincent's testimony by offering extrinsic evidence concerning the incidents in question, the only evidence before the jury on the subject would have been Vincent's denial of falsehood.
>
> *Allowing cross-examination before the jury would thus have produced little of probative value.* Certainly, the trial court was well within its discretion in not allowing any broader inquiry into the nature of what Vincent had told the authorities and what the results of their investigations (to the extent Vincent even knew of them) had been. Such broad-ranging inquiry *would at best have produced confusing and distracting sideshows regarding the facts of controversies completely unrelated to the charges against Crowley at trial, and was properly precluded.*[16]

This result, on its face, would seem to repudiate the role of the jury. It simply denies the jury its constitutional role to decide for itself what weight to give Vincent's denial that she had made similar false allegations in the past.

Evidentiary exclusionary rules such as these unambiguously are based on a distrust of juries. As the American Law Institute ("ALI"), in promulgating its first Model Code of Evidence, indelicately reported concerning the "common wisdom" of the day, "The low intellectual capacity of the jury is commonly put forward to justify some, if not all, of our exclusionary rules. . . . [J]urors are treated as if they were low grade morons."[17]

In other words, evidentiary exclusionary rules are not attempts to control *all* trials, but rather are attempts to control *jury* trials.[18] Even in the nineteenth century, judges largely ignored ex-

---

15. *Id.* at 416.

16. *Id.* at 417–18 (emphasis added) (citations omitted).

17. Edmond M. Morgan, *Foreward* to MODEL CODE OF EVID., at 8–10 (1942). It should be noted, however, that the ALI asserted that the ALI itself did not share this view. *Id.* at 10.

18. *Accord* Williams v. Illinois, 567 U.S. ___, ___, 132 S. Ct. 2221, 2234–35 (2012)

clusionary rules in bench trials.[19] Typical of judges' views of the role of evidence rules in bench trials were the words of the Honorable Augustus Hand, who in the ALI Proceedings considering the final draft of the Model Code of Evidence said he had "taken pride" that he had tried cases for thirteen years without knowing the technicalities of the rules of evidence.[20]

One might argue that a rule premised on trusting judges more than juries to weigh evidence makes for a better justice system, but such a rule is at odds with the decision enshrined by the Framers—juries, not judges, decide the facts in jury trials. *The Framers made this decision recognizing that jurors have both perceived and actual deficiencies in their decision making.*[21] Conversely, while the role of the jury as the exclusive fact finder is constitutionally enshrined,[22] efficiency and accuracy as system goals are *not* constitutionally enshrined. Thus, FRE 403—explicitly premised on making trials more efficient and accurate—is unconstitutional.

Now one might argue that this cannot be; for example, in an assault that occurs on stage at a music concert, a trial court simply could not allow a defense attorney to call as a witness every single member of the audience, could it? And that is correct if at some point, after admitting sufficiently consistent and cumulative evidence, a fact *is no longer disputable* and so further evidence is no longer "of consequence." But one never reaches a FRE 403 exclusionary balance unless one already has determined that the fact still *is* of consequence and the proffered evidence *does* matter (is "relevant") to that fact.[23] The Constitution would deem it to be

("[I]n *jury trials*, both Illinois and federal law generally bar an expert from disclosing [the basis of the expert's opinion]. In bench trials, however, both the Illinois and the Federal Rules place no restriction on the revelation of such information to the factfinder. When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose.").

19. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 529 (Rothman Reprints, Inc. 1969) (1898).

20. E.M. Morgan, *Discussion of Code of Evidence Proposed Final Draft*, 19 A.L.I. PROC. 74, 225 (1942) (remarks of Augustus Hand).

21. *See infra* Section III.

22. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 308, 313 (2004); Jones v. United States, 526 U.S. 227, 244 (1999).

23. The Supreme Court has held that procedures such as summary judgment or directed verdict can take a case away from a jury if the fact is not of consequence and disputable. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336 (1979); Galloway v. United States, 319. U.S. 372, 388–96 (1943); Fid. & Deposit Co. v. United States, 187 U.S.

the jury's province, not the judge's province, to decide what weight to give that evidence.[24] Or more to the point, if efficiency is not a constitutional value, then there is no constitutional provision that a judge can invoke to exclude from the jury even judge-perceived time-consuming and mind-numbing *yet relevant* evidence, at least not simply on the basis that in the judge's opinion it *is* time-consuming and mind-numbing, albeit relevant.[25]

There are profound implications to the conclusion that the desirability of efficient or accurate trials cannot justify abrogating constitutional rights. Large swaths of federal rules of procedure and evidence are grounded in making trials more efficient or accurate.[26] If efficiency and accuracy are insufficient to overcome the prerogative of the jury, then *many* rules are built on illusory foundations.[27]

In the end, this article argues for two initially startling propositions. The constitutional right to trial by jury largely prevents a trial judge from regulating the presentation of evidence to ensure a rationally efficient trial and accurate verdict. And no academic, lawyer, or judge has evaluated the argument before now. To make these arguments, Section II of this article will trace the surprisingly recent lineage of evidentiary exclusionary rules and the rationales advanced by them, all of which post-date the constitutional enshrinement of jury trial rights, and none of which takes that enshrinement into account. Section III of this article will review the increasingly forgotten history of the Sixth and Seventh Amendment guarantees of a right to trial by jury, with particular focus on the recognition by the Framers that jurors had, at best, flawed capabilities, yet still were preferred to judges as decision makers at trial. In other words, the Framers chose ju-

---

315, 318, 322 (1902). It does bear noting, however, that at least one scholar questions the constitutionality of these procedures as well. Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 761 (2009); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 140 (2007).

24. As a practical matter, of course, this circumstance would never happen. An attorney would never be so foolish as to risk angering a jury in this way. The risk would be too high of a consequent price to be paid by his or her client.

25. But this does highlight another point: The clauses of FRE 403 do not necessarily share a single constitutional fate. Cumulative evidence might still be constitutionally excludable (because, for example, the testimony of the 499th person is no longer of consequence), while presumed "too emotional" or "confusing" evidence might not. The focus of this article is on exclusion of evidence despite it meeting FRE 401's definition of relevance.

26. *See infra* Section VI.

27. This broader point will be developed more fully in my anticipated next article.

ries over judges with their eyes open. Section IV of this article then turns specifically to the jurisprudence recognizing the jury not just as the trial fact finder, but as the *exclusive* fact finder. Section V of this article then will evaluate the constitutionality of FRE 403. Section VI of this article will address, in overview, the question of why it matters.

II. THE SURPRISINGLY RECENT HISTORY IN WESTERN JURISPRUDENCE OF EXCLUDING EVIDENCE FROM THE JURY

For the majority of western legal history, the structure of and presumptions underlying trials were very different from today, and as a consequence evidentiary exclusionary rules would have been foreign to jurisprudential doctrine. But as trial practice evolved, the "proper" sources of evidence became more crimped, judges had fewer tools to directly mandate a particular jury verdict, and exclusionary rules emerged as a means to control jurors. Thus, evidence rules evolved from a presumption of no exclusion, to exclusion of tangential evidence, to exclusion of unquestioned relevant evidence. And while that journey traced a path of increasing distrust of the competency and attention span of juries,[28] it was never tempered by concerns that it encroached on constitutional prerogatives or even included apparent cognizance that it might.

A. *Pre-Code Views of Excluding Evidence*

The conceptual and jurisprudential history of FRE 403 entirely post-dates the constitutional guarantees of a right to trial by jury.

When the ALI published the Model Code of Evidence in 1942, the bound volume republished an article from the *Iowa Law Review* by Dean Mason Ladd, a member of the ALI's Evidence Committee.[29] In that article, Dean Ladd summarized the journey in the evolution of trial practice that had led to exclusionary rules:

---

28. *See generally* Kenneth S. Klein, *Unpacking the Jury Box*, 47 HAST. L.J. 1325 (1996).

29. Mason Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213 (1942), *reprinted in* MODEL CODE EVIDENCE 329 (1942).

> The law of evidence is not ancient in origin. . . . From the twelfth through the sixteenth centuries the inquisitorial system was the most common method of trial and was the forerunner of trial by jury as we know it today.
>
> During this formative period there was no need for the law of evidence. . . . Even as late as 1670, in Bushell's case, Chief Justice Vaughn permitted the jury to rely upon their own knowledge to nullify the evidence of witnesses given in court. It was not until the later part of the eighteenth century that the practice of using independent juries to decide upon facts gained through witnesses presented before them was firmly established. . . . The law of evidence as we think of it today began to emerge with the advent of the adversary system under which juries decided solely upon the knowledge of witnesses.
>
> The jury is frequently spoken of as the parent of the rules of evidence. The nineteenth-century textwriters and judges regarded the rules of evidence as being established to keep from the jury unreliable persons and misleading testimony. Thus arose the law of incompetency and the exclusionary rules. . . . By the beginning of the nineteenth century most of the rules were established. . . . [M]any new exclusionary rules were created in this period when limitation and restriction flourished at the expense of a great loss of evidence which would materially assist in the determination of factual disputes. . . .
>
> The twentieth century may be looked upon as creating an open door policy in the law of evidence.
>
> . . . .
>
> A model code must presuppose a competent judge, intelligent triers-of-fact, and a society in which honest people outnumber the degraded, the deceitful, and the false-swearing. It must also assume ability on the part of lawyers through cross-examination and other legal methods of testing the credibility of witnesses to be able in the majority of situations to expose the false and discover the true.[30]

As alluded to by Dean Ladd, in the early centuries of western trial practice, there would be no reason for exclusionary rules of any sort to keep evidence out of trials, as there was not even a restriction limiting verdicts to the evidence presented at trial.[31] The early English system was one of self-informing juries,[32] and so, it "hardly had any place for a law of evidence."[33] Simply put, be-

---

30. *Id.* at 332–34, 339 (footnote omitted) (citations omitted).

31. *Id.* at 333.

32. *See generally* JAMES OLDHAM, THE VARIED LIFE OF THE SELF-INFORMING JURY (2005). Self-informing juries were ones expected to bring their external knowledge of facts to bear in reaching a verdict, and often the jurors were chosen because they were well-situated to do so. *See id.* at 4.

33. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1170 (1996) (quoting 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I

cause the jury did, and was expected to, both find and consider evidence *external* to the trial, there was no purpose to restricting the evidence presented *at* trial. At least as late as the mid-sixteenth century, there are records of English trials where jurors permissibly used their own outside knowledge in reaching verdicts.[34]

What was happening in England matters for several reasons. England was the root system of each court structure in the Colonies.[35] England was the most mature and populated source of precedent and experience during the early years of the United States.[36] And late eighteenth century England is still today, by United States Supreme Court holding, the benchmark for measuring American jury trial rights in federal civil trials.[37]

It was roughly the middle of the eighteenth century in England when "evidence presented at trial became the exclusive basis for the jury's decision."[38] In 1764, Lord Mansfield wrote, "A juror should be as white paper and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him."[39] This is an important historical juncture, as it is precisely the juncture when the then-Colonies were shaping the soon-to-be United States court system.[40]

Nonetheless, English courts of the mid-eighteenth century had no jurisprudential counterpart to today's FRE 403. In the eight-

---

660 (2d ed. 1898)).

34. THAYER, *supra* note 19, at 120–21.

35. Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 361–62 (2003); *see* ROSCOE POUND, ORGANIZATION OF COURTS 58–63 (1940).

36. *See generally* POUND, *supra* note 35, at vi–ix.

37. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (quoting Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 656–57 (1935)) ("[W]e have understood that '[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.'"); Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1005–06 (1992).

38. Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 457 (2004).

39. Mylock v. Saladine, (1764) 96 Eng. Rep. 278 (K.B.) 278. Although, as will be detailed below in this article, in the soon-to-be-formed United States, shadows of the self-informing jury continued through the vicinage jury.

40. For examples of how civil jury practice looks to historic practice in England, rather than in the United States, as the reference point for determining the procedural and evidentiary parameters of the jury right, see *Dimick v. Schiedt*, 293 U.S. 474, 476–77 (1935) and *Thompson v. Utah*, 170 U.S. 343, 350 (1898).

eenth century, exclusionary rules focused on excluding classes of witnesses, rather than excluding pieces of evidence.[41] The transition to excluding "particles" of evidence was a nineteenth century evolution.[42]

To the extent that eighteenth century English practice addressed particles of evidence at all, the concerns were akin to hearsay, not jury competence. The focus of mid-eighteenth century English evidence law was on the admissibility of writings; Professor Gallanis undertook to read every reported English decision from the year 1755, and found only one civil case excluding oral evidence at all, and only six cases—civil or criminal—where there was even a reported objection on the basis of hearsay.[43] An early evidence commentator described the possibility in eighteenth century England of excluding evidence from the jury in instances such as a dubiously truthful witness[44] but argued against it because it was for the fact finder to weigh the credibility and weight of all evidence.[45]

As this discussion suggests, the eighteenth century was transformative for jury trials.[46] In the sixteenth and seventeenth centuries, jurors could be fined or imprisoned for reaching a verdict at odds with the one the judge determined to be correct.[47] Evidentiary exclusionary rules emerged as these methods of controlling

41. *See* John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1213 (2006).

42. *See id.* at 1213–14.

43. T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 509–15 (1999); *see also* Langbein, *supra* note 33, at 1186. Because hearsay, while a recognized basis for exclusion, was so infrequently invoked, it is difficult to know what the Framers thought of it. The Framers did not mention hearsay. Because of Confrontation Clause rights, however, hearsay requires a different analytical approach than other rules of exclusion.

44. *See* GEOFFREY GILBERT & JAMES SEDGWICK, THE LAW OF EVIDENCE 1 (7th ed. 1805) ("[T]he first thing to be treated of, is the evidence that ought to be offered to the jury . . . ."); *id.* at 3 ("The first, therefore, and most signal rule, in relation to evidence, is this; that a man must have the utmost evidence . . . ."); *id.* at 106 ("[I]t is also easy for persons who are prejudiced and prepossessed, to put false and unequal glosses for what they give in evidence, and therefore the law removes them from testimony, to prevent their sliding into perjury . . . .").

45. *See id.* at 126–29.

46. *See generally* John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 201–03 (1988).

47. *See* THAYER, *supra* note 19, at 164–66.

juries and verdicts disappeared.[48] This was the world in which the United States courts were born.[49]

B. *Exclusionary Rules from the American Revolution Through to the Proposed Model Code of Evidence*

It is a slightly slippery matter to pin down precisely when the exclusionary concepts that became FRE 403 first emerged. It certainly, however, was well after the ratification of the Constitution and the adoption of the Sixth and Seventh Amendments.

Professor Andrew Dolan, writing in the immediate wake of the adoption of the Federal Rules of Evidence, traced FRE 403 back to the first half of the nineteenth century, arguing that Greenleaf's 1842 *A Treatise on the Law of Evidence* "was the first to introduce the considerations which would ultimately find their way into [FRE 403], such as undue prejudice and a tendency to mislead the jury."[50] However, at that point Greenleaf's proposal was to exclude "collateral" or irrelevant evidence rather than prejudicial but relevant evidence.[51] The authors of the Federal Rules of Evidence cite Professor M.C. Slough,[52] who in turn states that the iconic James Bradley Thayer was the first to explicitly develop the thesis that relevant evidence could be excluded by other 403-like principles of law.[53]

---

48. *See id.* at 174–81.

49. At the time of the formation of the United States, evidence law and the province of the jury looked different from the way these matters look today. For example, judges still would occasionally seek outside knowledge to inform judicial decisions. *See* J.H. Beuscher, *The Use of Experts by the Courts*, 54 HARV. L. REV. 1105, 1108–12 (1941). Juries, while limited to consideration of trial evidence, still were expected to bring local knowledge to decision making in evaluating that evidence. *See* Daniel D. Blinka, *Trial By Jury On The Eve of Revolution: The Virginia Experience*, 71 UMKC L. REV. 529, 569–70 (2003). As another example of how different jury trial practice looked, there were even occasional instances of the United States Supreme Court empanelling juries. *See, e.g.*, Camberling v. McCall, 2 U.S. (2 Dall.) 280, 28–81, 284–85 (1797); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 5 (1794); David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935, 957–58 (1997) (discussing Minutes of *Cutting v. South Carolina*, Feb. 8, 10, Aug. 8, 11, 1797 (U.S.), *reprinted in* 1 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 285–87, 291–94 (Maeva Marcus et al., eds., 1985)).

50. Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 222 n.5 (1976).

51. *See id.*

52. *See* FED. R. EVID. 403 advisory committee's note.

53. *See* M.C. Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 1, 1–2 (1956). Langbein argues that the development of adversarial criminal procedure in the later eighteenth century is the basis of modern exclusionary rules of evidence. Langbein, *supra* note 33, at

Accepting the Rules Advisory Committee's self-described lineage then, FRE 403 conceptually began, at least explicitly, in 1898. In 1898, Thayer asserted, without citation, a position very similar to that codified today in FRE 403: "[Evidence] must not unnecessarily complicate the case, or too much tend to confuse, mislead, or tire the minds of that untrained tribunal, the jury, or to withdraw their attention too much from the real issues of the case" and that "in the application of such standards as these, the chief appeal is made to sound judgment; to what our lawyers have called, for six or seven centuries at least, the discretion of the judge."[54] Three caveats should be kept in mind when revisiting the Thayerian position now over a century later. First, Thayer's ideas recognized evidentiary exclusionary rules but largely saw them as matters of substantive law, rather than matters of certain types of evidence being beyond the ken of the jurors.[55] Second, Thayer was concerned only with the means of excluding evidence of tangential relevance, as contrasted with the reach of FRE 403 today, which purports to permit exclusion of evidence of "unquestioned relevance."[56] Third, Thayer never addressed or even considered whether the Constitution *permitted* exclusion of relevant evidence.

In summary, in English legal practice just before the American Revolution—which was the legal system of the American Colonies—essentially no evidence other than hearsay was ever excluded, and even hearsay rarely was excluded.[57] By the late nineteenth century, an American trial judge could exclude evidence, but not if the evidence had more than a "remote" relevance to the issues.[58] And "[a]lthough the 19th Century codifiers recognized the discretion of the trial judge in rulings on evidence, they pro-

---

1172.

54. THAYER, *supra* note 19, at 516.

55. *See* Edmund M. Morgan, *The Future of the Law of Evidence*, 29 TEX. L. REV. 587, 589 (1951). These were exclusions for reasons such as the parol evidence rule.

56. *Compare* THAYER, *supra* note 19, at 516–18, *with* FED. R. EVID. 403 advisory committee's note.

57. As late as 1827, Bentham argued that a fact finder should weigh even defective evidence. *See* 3 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 536–42 (John S. Mill ed., 1827).

58. 22A CHARLES ALAN WRIGHT & KENNETH GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5211 n.18 (2012) (quoting 2 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 458 (1873)).

duced nothing like Rule 403. That rule finds its roots in Rule 303 of the Model Code of Evidence . . . ."[59]

C. *Exclusionary Rules in the ALI's Proposed Model Code of Evidence*

The Model Code sought to codify a "clear, concise, and complete" presentation of the "best of modern thought" on evidence doctrine and practice.[60] That thought apparently *did* include discussion on the relative competencies of judges and juries and the necessity for efficient and accurate trials.[61] That thought did *not* include the possible intersection of evidence rules with the Sixth and Seventh Amendment guarantees of a right to trial by jury.

The ALI promulgated the Model Code in 1942.[62] Less than a decade earlier, the Supreme Court, without considering constitutional concerns, had explicitly defined the role of evidence rules as seeking more accurate and efficient trials:

> It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.[63]

In stating this, the Court made no mention of the constitutional right to trial by jury.

In light of this verbiage from the Court, it should not be surprising that the Model Code included a rule explicitly aimed at excluding time-consuming or confusing evidence. Rule 303 of the Model Code states, in pertinent part:

> The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial

---

59. *Id.* § 5211.

60. Ladd, *supra* note 29, at 335–36.

61. *See, e.g.*, J. Russell McElroy, *Some Observations Concerning the Discretions Reposed in Trial Judges by the American Law Institute's Code of Evidence*, *in* MODEL CODE EVIDENCE 356–64 (1942); Dolan, *supra* note 50, at 231–33, 243–44; Jack B. Weinstein & Margaret A. Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 43, 81, 83–85, 92, 108 (1969).

62. MODEL CODE EVIDENCE VII (1942).

63. Shepard v. United States, 290 U.S. 96, 104 (1933) (citing THAYER, *supra* note 19, at 266, 516; 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1421, 1422, 1714 (1923)).

> danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.[64]

The ALI reporter asserted that the Model Code anticipated excluded relevant evidence would be evidence of only "slight" relevance.[65] The Model Code and those writing in support of it made no analysis of whether this was constitutional.

When proposed, Model Code Rule 303 "served as the lightning rod for a large part of the abuse which the Model Code drew, ultimately contributing to the legislative defeat the code suffered in every jurisdiction."[66] The reporter for the Model Code accused the legal community of trying to "have it both ways"—"judges not being the kind of people we could trust" and "juries being such very bad instrumentalities for the determination of fact."[67] For example, Rule 303 of the Model Code permits exclusion of relevant evidence if admission would cause undue consumption of trial time; yet, in the ALI Proceedings considering adoption of the final draft of the Model Code, Judge Van Voorhis called this a "dangerous provision" because some judges, given this level of discretion, simply "would close the case and go fishing."[68] Neither the federal courts nor any state adopted the Model Code.[69]

D. *FRE 403*

FRE 403 has been characterized as the "cornerstone" of the Federal Rules.[70] Where Model Rule 303 died on the altar of granting judges more evidentiary control over the facts that went to ju-

---

64. MODEL CODE EVID. R. 303.

65. Morgan, *supra* note 20, at 223 (remarks of Mr. Morgan).

66. Dolan, *supra* note 50, at 221–22.

67. Morgan, *supra* note 20, at 223; *accord* Eileen A. Scallen, *Analyzing The Politics of [Evidence] Rulemaking*, 53 HAST. L.J. 843, 849 (2002) ("[W]hen the Model Code was finally published in 1942, the opposition became loud and fierce, led by Dean Wigmore who criticized the discretion the Model Code gave to trial judges . . . .").

68. Morgan, *supra* note 20, at 221. The reporter for the ALI responded that if his direction was to draft sufficiently detailed rules that a judge lacked room to abuse discretion, then the ALI would have to find another reporter. *Id.* at 222.

69. For a review of evidence law during the interim period between Model Code and Federal Rules, see Scallen, *supra* note 67, at 851–54.

70. Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 (1983) (quoting Herbert Peterfreund, *Relevancy and Its Limits in the Proposed Rules of Evidence for the United States District Courts: Article IV*, *in* 25 REC. OF THE ASS'N OF THE B. OF THE CITY OF N.Y. 80, 83 (1970)).

ries, FRE 403 codified the same conceptual idea. If "the origin of evidentiary rules is often directly tied to concerns over the jury's ability to render a verdict free of inflamed passions,"[71] then FRE 403 gave full throat to those that distrust,[72] at least if a case was tried in front of a judge inclined to exercise discretionary exclusion.

The mechanics of FRE 403 are to keep from the jury, for extrinsic reasons, evidence that unquestionably is of consequence to a matter properly part of the case. FRE 403 states, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[73] FRE 403 starts with the premise that it only applies to evidence that is "relevant," which the Advisory Committee's Notes explains reaches even to evidence whose relevance is "unquestioned."[74] FRE 401 defines "relevant evidence" to include both the notions of logical relevance and legal relevance.[75] For our purposes, the focus is on legal relevance, which in the language of FRE 401 is evidence "of consequence in determining the action."[76] The Advisory Committee's Note to FRE 401 expands upon this concept, noting that the evidence must bear on a matter "properly provable in the case."[77]

By its terms, FRE 403 seeks to make trials more efficient and verdicts more accurate.[78] FRE 403 identifies three "danger[s]"

---

71. Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 153–54 (2008) (citing JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 123 (1949); Wallace D. Loh, *The Evidence and Trial Procedure: The Law, Social Policy, and Psychological Research*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 13, 15 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 337 (1995)).

72. *See* Teter, *supra* note 71, at 166.

73. FED. R. EVID. 403.

74. FED. R. EVID. 403 advisory committee's note. This clarification by the Advisory Committee makes this article more straightforward, as it avoids an exploration of how relevant evidence must be in order to be admissible. *See generally* George F. James, *Relevancy, Probability and the Law*, 29 CAL. L. REV. 689 (1941).

75. *See* FED. R. EVID. 401 advisory committee's note.

76. FED. R. EVID. 401.

77. FED. R. EVID. 401 advisory committee's note.

78. "[E]liminat[ing] unjustifiable expense and delay" and ascertaining the truth also are set forth in FRE 102 as among the purposes of the Federal Rules of Evidence as a whole. FED. R. EVID. 102.

that justify exclusion of relevant evidence—"unfair prejudice, confusing the issues" and "misleading the jury."[79] All three are concerns about the accuracy of verdicts. FRE 403 lists three "considerations" to account for as a possible reason to exclude relevant evidence—"undue delay, wasting time, or needlessly presenting cumulative evidence."[80] All three are concerns about the efficiency of trials. Indeed, Model Code Rule 303 had a seventh danger/consideration—surprise—which was more of a "fairness" concern, but the advisory committee drafting FRE 403 intentionally omitted surprise because a motion for continuance was considered the more proper solution.[81]

FRE 403 proposed the same balance between judge and jury—and concomitant encroachment of the jury's power—that arguably had doomed the Model Rules. When writing about the then-proposed Federal Rules of Evidence, including 403, commentators Jack Weinstein and Margaret Berger explained the proposed Rule as follows:

> A principle reason for admitting all relevant evidence is that, generally, the probability of ascertaining the truth about a given proposition increases as the amount of the trier's knowledge grows. Nevertheless, the goal of ascertaining the truth of a particular proposition is not always served by the indiscriminate admission of all relevant evidence. Moreover, *truth finding is not always the law's overriding aim.*[82]

Weinstein and Berger argued rules of evidence and procedure, in addition to truth finding, should be "economizing resources, inspiring confidence, supporting independent social policies, permitting ease in prediction and application, adding to the efficiency of the entire legal system, and tranquilizing disputants."[83] The reporter of the Model Code of Evidence had argued that without Rule 303, trial dockets would be so clogged that courts would be considered incompetent.[84] Weinstein and Berger shared this view, arguing that a system seeking "impeccable precision" would involve "extraordinary expense and delay," while "rough and

---

79. FED. R. EVID. 403.

80. *Id.*

81. *See* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Advisory Committee's Note to Rule 403, 46 F.R.D. 161, 226–27 (1969).

82. Weinstein & Berger, *supra* note 61, at 70 (emphasis added).

83. *Id.*

84. *See* Morgan, *supra* note 20, at 223–24.

ready, approximation of the facts" would be "much more effective."[85]

Yet, in contrast to proposed Model Rule of Evidence 303, FRE 403 was not controversial.[86] FRE 403 "received virtually no attention by Congress and was adopted as submitted."[87] As the Senate Committee hearing transcripts explained, the rule did "not present significant theoretical or conceptual difficulties[;] it merely codifies traditional concessions to the human limitations of jurors and recognizes that mortal time is finite."[88]

As the Senate Committee Report alludes, the Federal Rules of Evidence made a choice—efficiency and clarity could trump completeness. But nowhere was there consideration of whether the Constitution gave room for that choice. To the contrary, "[t]he Advisory Committee drafting these rules of evidence deliberately decided not to deal with constitutional requirements."[89] Court decisions pre-dating, presaging, and actually informing FRE 403 did not even acknowledge the possibility of constitutional overtones.[90]

FRE 403 has become a primary tool of excluding evidence. Even early on, commentators noticed a mounting number and variety of cases applying FRE 403.[91] FRE 403 is the "universal 'fallback'" objection[92] "applicable to almost every evidentiary issue,"[93] and "the major rule that explicitly recognizes the large discretionary role of the judge in controlling the introduction of

85. Weinstein & Berger, *supra* note 61, at 71.

86. *See* Dolan, *supra* note 50, at 221–22.

87. *Id.* at 221; *accord*, WRIGHT & GRAHAM, *supra* note 58, § 5211. ("During Congressional consideration, Rule 403 was labeled 'controversial.' . . . [But] Congress never seriously considered any changes in the rule . . . ." (citations omitted)).

88. *The Federal Rules of Evidence: An Overview and Critique, in Rules of Evidence: Hearing on H.R. 54603 Before the S. Comm. on the Judiciary*, 93d Cong. 139 (1974).

89. Weinstein & Berger, *supra* note 61, at 75.

90. *See, e.g.*, Int'l Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 459 (1st Cir. 1963); United States v. Krulewitch, 145 F.2d 76, 80 (2d Cir. 1944).

91. *See* Gold, *supra* note 70, at 498, 500–03.

92. ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS § 5.03 (3d ed. 2011).

93. DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 71 (2009).

evidence."[94] Today, "[l]itigants invoke Rule 403 quite often,"[95] and FRE 403 is "increasingly utilized by the courts."[96]

III. THE OFTEN FORGOTTEN HISTORY OF THE SIXTH AND SEVENTH AMENDMENTS, AND WHAT THEY PROTECT

The notion that the majority of the populace is ill-suited to make, *and therefore should not make*, decisions of import is at least as old as Plato's *The Republic*.[97] It is, however, a notion the United States Constitution rejects. In two branches of tripartite government—the executive and legislative—the vehicle of direct representative democracy rejects it. In the judicial branch, the Constitution rejects it by creating the right to a jury trial—and does so in three places—Article III, the Sixth Amendment, and the Seventh Amendment. In doing so, the Constitution reflects a very different view of juries than the Federal Rules of Evidence. The writers of both the Federal Rules of Evidence and the Constitution perceive juries as potentially confused, inflamed, distracted, and bored. On this basis, the Federal Rules of Evidence keep swaths of evidence away from the jury. The Constitution, by contrast, empowers juries, warts and all, as the de facto only and preferred alternative to bench trials.

The inclusion of jury trial rights in the Constitution, and the reasons for doing so, were far from casual.[98] At the time of the drafting of the Constitution, the right to trial by jury was probably the only right universally secured by the first American state constitutions."[99] Not surprisingly, the draft federal Constitution included a detailed right to a jury: "The trial of all criminal offences (except in cases of impeachments) shall be in the state where they shall be committed; and shall be by Jury."[100] Perhaps

---

94. JACK B. WEINSTEIN & MARGARET A. BERGER, STUDENT EDITION OF WEINSTEIN'S EVIDENCE MANUAL: A GUIDE TO THE FEDERAL RULES OF EVIDENCE BASED ON WEINSTEIN'S FEDERAL EVIDENCE § 6.02 (8th ed. 2007).

95. MERRITT & SIMMONS, *supra* note 93, at 71.

96. WEINSTEIN & BERGER, *supra* note 94, at 6–19 (stating that motions in limine are increasingly being used to exclude evidence based on Rule 403).

97. THE REPUBLIC OF PLATO 221–50 (Allan Bloom trans., 2d ed. 1991).

98. *See generally* Duncan v. Louisiana, 391 U.S. 145, 147–58 (1968).

99. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 341 (1970) (quoting L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960)).

100. Draft of Constitution, Aug. 6, 1787, *in* JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF

surprisingly, the draft Constitution was silent concerning juries in civil cases.[101]

The reaction was swift and at times virulent.[102] During the period when ratification of the Constitution was debated and uncertain, one pamphleteer succinctly described the centrality of trial by jury to the American Revolution: "[W]e have bled for it."[103] The same author continued, concerning civil cases, "and [we] are now almost ready to trifle it away."[104] This was not hyperbole—civil trial by jury was, after all, targeted by the British through the Stamp Act, which begat the blockade of Boston and the resulting war.[105] An Anti-Federalist concerned about the silence of the draft Constitution on the topic of civil juries asserted accusingly that "a few of our countrymen should consider jurors . . . as ignorant, troublesome bodies, which ought not to have any share in the concerns of government."[106] One Anti-Federalist pamphlet accused the drafters of forgetting the lessons of the trial of John Peter Zenger.[107] Another wrote that trial by jury "is the only thing that will save us."[108] Similar sentiments have been well-documented.[109] The Federalists responded that they had no intention of eliminat-

---

AMERICA 337 (Gaillard Hunt & James Brown Scott, eds. 1920).

101. *See* Kenneth S. Klein, *Is* Ashcroft v. Iqbal *the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?*, 88 NEB. L. REV. 467, 471–72 (2010).

102. *Id.* at 472–73.

103. *Essay by One of the Common People, December 3, 1787*, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 566, 566 (Neil H. Cogan ed., 1997).

104. *Id.*

105. *See* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 393–97 (1999); Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HAST. L.J. 579, 594–96 (1993).

106. *The Federal Farmer, No. 4, October 12, 1787*, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 553, 554.

107. *See Cincinnatus, No. 1, November 1, 1787*, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 558, 558–59. John Peter Zenger was a New York publisher who was acquitted of sedition in 1735. The case was a historic juncture both for freedom of the press and for the power of a jury—in that instance, through nullification—to act as a check on government power. *See* Douglas Linder, *The Trial of John Peter Zenger: An Account*, http://law2.umkc.edu/faculty/projects/ftrials/zenger/zenger.html (last visited Apr. 17, 2013).

108. *The People: Unconstitutionalism, December 10, 1787*, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 568, 568.

109. *See, e.g.*, Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

ing civil juries and that the silence of the draft Constitution was being misinterpreted.[110]

The full-throated defense by both Federalists and Anti-Federalists of juries was not based on a Pollyannaish view of the capabilities of jurors. Juries were accused of, and perhaps even believed at least sometimes to be, "ignorant."[111] Jurors were said to be unable to "distinguish between right and wrong."[112] Jurors were described as decision makers "by chance,"[113] "stupid,"[114] "unprincipled,"[115] and potentially imposing injustice by "ignorance or knavery."[116] Nonetheless, juries were argued to be preferable to judges: "Destroy juries and everything is prostrated to judges, who may easily disguise law, by suppressing and varying fact."[117] Eliminating trial by jury "will destroy all check on the judiciary authority, render it almost impossible to convict judges of corruption, and may lay the foundation of that gradual and silent attack on individuals, by which the approaches of tyranny become irresistible."[118] "The temptations to prostitution, which judges might have to surmount, must certainly be much fewer while the cooperation of a jury is necessary, than they might be if they had themselves the exclusive determination of all causes."[119]

The argument for broad jury rights won the day. The draft Constitution was ratified, subject to the commitment that the First Congress amend it in several particulars to confirm and protect various individual rights.[120] The Bill of Rights included two guarantees of jury rights. The "right to trial by jury" clause of

---

110. Wolfram, *supra* note 109, at 673; *but see* Henderson, *supra* note 109, at 296–97.

111. *A Farmer, No. 4, March 21, 1788, reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 579, 581.

112. *Id.*

113. *Id.*

114. *Aristocrotis, April 1788, reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 582, 582.

115. *A [New Hampshire] Farmer, No. 3, June 6, 1788, reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 586, 586.

116. *Id.*

117. *A Farmer, No. 4, March 21, 1788*, *supra* note 111, at 580.

118. *Address of a Minority of the Maryland Convention, May 1, 1788, reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 582, 582.

119. THE FEDERALIST NO. 83, at 500 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

120. *See e.g.*, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 493–506 (listing many drafts of Amendment VII of U.S. Constitution in First Congress).

the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[121] The Seventh Amendment, in its entirety, provides,

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[122]

In other words, the drafters and ratifiers of the Constitution understood that juries could be misled, or corrupted, or confused. Some argued to not preserve a right to jury trial because, in light of the perceived weaknesses of at least some juries, judges were preferable.[123] But the sentiment that prevailed—with open eyes about juries—was that juries, for all of their flaws, were preferable to judges. As Thomas Jefferson wrote to Abbe Arnoux,

> [W]e all know that permanent judges acquire an Esprit de corps, that being known they are liable to be tempted by bribery, that they are misled by favor, by relationship, by spirit of party, by a devotion to the Executive or Legislative, that it is better to leave a cause to the decision of cross and pile,[124] than to that of a judge biased to one side .... Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the legislative.[125]

As Jefferson's words allude, the constitutional enshrinement of trial by jury is not so much a reflection of trust in the objective

---

121. U.S. CONST. amend. VI. The text of Article III referred to juries in the same state, but made no mention of district—this edit may be what primarily motivated clarifying the Article III jury right in the Sixth Amendment. *See* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 177–78 (2001). For another explanation of the difference between, and reason for, the Constitution's two clauses addressing criminal jury trial rights, see Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373, 380–84 (2012).

122. U.S. CONST. amend. VII.

123. *See, e.g.*, *Remarks of John Marshall on June 20, 1788, During the Virginia State Convention Concerning Ratification of the Constitution, reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 540, 544 ("If we can expect a fair decision any where, may we not expect justice to be done by the judges. . . ?").

124. "Cross and pile" was a game of chance akin to heads or tails. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 541 (3d ed. 2002).

125. *Thomas Jefferson to Abbe Arnoux, July 19, 1789, reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 595, 596.

competency of juries, as it is a reflection of the relative competency of juries as compared to judges.[126] Put yet another way, since "the procedural system in which judges rule on what the jury will hear implies a judicial posture of superior cognitive ability and greater freedom from bias,"[127] one might argue that the Constitution entrusts fact finding to juries *despite* recognizing (or at least presuming) that judges are smarter than juries.[128]

There is one other aspect of the constitutional history directly pertinent to an evaluation of the constitutionality of FRE 403. As is shown even by the above brief review of the words of Americans from the time, juries were understood to have all of the cognitive flaws that today animate FRE 403.[129] Yet, in stark contrast to FRE 403, which in response to these concerns seeks to limit the range and nature of evidence juries will consider, the Constitution anticipates that juries will consider wide-ranging evidence. This becomes apparent from the ratification debate concerning "vicinage"[130] and the resulting language found in the Sixth Amendment.

A jury of the "vicinage" is a jury from the geographic vicinity,[131] and in the eighteenth century was perceived to be a jury more likely to be able to bring their local knowledge, external to the

126. *See* Teter, *supra* note 71, at 163–64; *see also* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (asserting that the jury provides an accused with an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge").

127. Luebsdorf, *supra* note 41, at 1254.

128. There is empirical evidence suggesting that judges are no better or different than jurors in evaluating potentially inflammatory or distracting evidence. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 808–10 (2001); Joseph Sanders, *The Merits of the Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence*, 33 SETON HALL L. REV. 881, 925 (2003); *see also* Donald A. Dripps, *Relevant But Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial and the Right to Put on a Defense*, 69 S. CAL. L. REV. 1389, 1400–02 (1996).

129. *See supra* notes 106–08, 111–19 and accompanying text.

130. *See, e.g.*, *The Federal Farmer, No. 2, Oct. 9, 1787*, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 551, 551–52; *The Federal Farmer, in No. 3, Oct. 10, 1787*, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 552, 552–53; *The Federal Farmer, No. 4, Oct. 12, 1787*, *supra* note 106, at 554; *A Democratic Federalist, Oct. 17, 1787*, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 554, 554–55; *Centinel, No. 2, Oct. 24, 1787*, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 557, 557–58; *A Son of Liberty, Nov. 8, 1787*, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra* note 103, at 562, 562.

131. *See* Blinka, *supra* note 49, at 562.

trial evidence, to an evaluation of the trial evidence.[132] The Sixth Amendment incorporates a guarantee of vicinage by requiring a jury "of the State and district wherein the crime shall have been committed."[133] Vicinage juries were not precisely "self-informing" in that juries did not do external investigation and were not selected based upon having direct knowledge, but vicinage juries explicitly were permitted to reach verdicts based on their own knowledge, *even when parties presented no trial evidence at all.*[134] In other words, constitutional preservation of jury vicinage confirms that the jury was *expected* to bring external evidence to trial decision making and that trial verdicts were not dependent on the evidence presented at trial—quite an inapposite view of juries and trials to that of the contemporary Federal Rules of Evidence.

IV. JURIES HAVE THE CONSTITUTIONAL PREROGATIVE TO BE THE EXCLUSIVE FACT FINDER

The Constitution three times guarantees a right to trial by jury but not once defines what the precise scope of the jury's role is to be. Given the richly variant traditions of jury roles of the day, as described in Federalist No. 83, that omission could not be due to an assumed single, objectively correct answer.[135] Indeed, the lack of consensus on the role of the jury was the proffered reason for the initial silence of the draft Constitution on civil jury trials.[136]

In order to determine whether FRE 403, by keeping relevant evidence away from the jury, is an unconstitutional encroachment on the role of the jury, the precise role of the jury has to be defined. Case law has done so. The irreducible minimum role of the jury is as the finder of fact. And more to the point, the jury is the *exclusive* finder of fact. Legal reform that has encroached on the jury's fact finding role uniformly falls as unconstitutional.

---

132. *Id.* at 562–63; *A Son of Liberty, Nov. 8, 1787*, *supra* note 130, at 562.

133. U.S. CONST. amend. VI.

134. *See* Blinka, *supra* note 49, at 569–70.

135. *See* THE FEDERALIST NO. 83, at 500–03 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

136. *See* Klein, *supra* note 101, at 472–73.

A. *The Right to Trial by Jury is the Right to Fact Finding by a Jury*

The Supreme Court has long recognized the core prerogative of the jury as the fact finder. In 1897, the Supreme Court held that, while the Seventh Amendment "does not attempt to regulate matters of pleading or practice," it does require "that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."[137] In 1943, the Court made a similar holding in *Galloway v. United States*, stating that courts could apply evidence rules so long as the "fundamental elements" of trial by jury remained.[138] And as Professor Moses has correctly observed,

> Although the Court in *Galloway* did not articulate what it thought the fundamental elements of the jury trial were, it cited as authority such cases as *Gasoline Products Co. v. Champlin Refining Co.*, *Ex parte Peterson*, and *Walker v. New Mexico*, all of which defined as fundamental the jury's role as the finder of facts.[139]

The fact finding function of the jury has been the lodestar when evaluating procedural modifications to jury trial practice. As the Court stated in *Dimick v. Schiedt*, "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[140] Professor Moses concludes,

> [W]hen the Court has approved changes to the jury trial right, it has insisted that such changes must not undermine the fundamental role of the jury to find facts. When the Court has *not* approved such changes, its justification has also been that of protecting the role of the jury to find facts.[141]

---

137. Walker v. N.M. & S. Pac. R.R. Co., 165 U.S. 593, 596 (1897).

138. 319 U.S. 372, 392 (1943); *see also* Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671 (1918).

139. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 201 (2000); *see also* Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Scott, *supra* note 138, at 672, 675 (arguing that the essential elements of trial by jury included that the jury decided issues of fact).

140. 293 U.S. 474, 486 (1935).

141. Moses, *supra* note 139, at 202.

Stated from a different viewpoint, but reaching the same conclusion, Professor Burns argues that throughout history there have been two forms of trial struggling against each other, but under both, the jury remains the finder of fact in jury trials.[142] "The commitment to jury trial runs so deep in the United States that every aspect of trial procedure reflects the assumption of jury factfinding."[143] The Court describes the "essential feature" of the criminal jury as "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen."[144]

B. *The Jury is the Exclusive Finder of Fact*

What is less explicitly addressed by courts and commentators is whether the jury is the *exclusive* fact finder. Put another way, it is whether the constitutional guarantees of a jury's fact finding role prohibit a judge from taking away *any* factual issues, or *any* evidence relevant to factual issues, from the jury. The second phrase of the Seventh Amendment—"no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law"[145]—could be read as explicitly affirming the exclusive fact finding role of the jury. Yet, through mechanisms such as FRE 403, orders granting FRCP 50 motions, and appellate review and reversal of jury verdicts, courts undeniably do influence and take away and reverse jury fact finding.[146] Plainly, the second sentence of the Seventh Amendment is not considered to settle the matter, even in civil trials. So is the jury actually the *exclusive* fact finder?

Try this thought experiment: Envision a criminal case where the defense has exercised the right to trial by jury. The judge certainly could not enter an order that the sole issue to be determined by the jury is whether the person seated at the defense table is the same person named in the indictment. In other words, the judge could not reserve the determination of guilt to the bench, even if the judge thinks he or she would be a better deci-

142. *See* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 9, 64–65 (2009).

143. Dripps, *supra* note 128, at 1393.

144. Williams v. Florida, 399 U.S. 78, 100 (1970). *See generally* Siegel, *supra* note 121, at 395–96 (discussing colonial reticence to ever let judges decide facts in a criminal trial).

145. U.S. CONST. amend. VII.

146. *See generally* Dimick v. Schiedt, 293 U.S. 474, 491–93 (1935) (Stone, J., dissenting).

sion maker and even if the judge is right. But would the judge violate Article III and the Sixth Amendment if the judge entered an order limiting the length of time each party had to present evidence or requiring, through the vehicle of judicial notice, that the jury accept a fact as settled rather than hear evidence and decide it for themselves? Are these differences in degree or something more fundamental? Is there a textual difference between the Sixth and Seventh Amendment that would support a different answer in a civil case? And—although this last question wanders hopelessly far from the original scenario—if the answers to these questions indicate that the jury is the exclusive fact finder, then how can states (as many states do) impose damages caps, rather than leave it to the jury to quantify damages?

Reviewing the answer courts give to these facial encroachments on jury responsibilities—the propriety of time limits in criminal and civil trials, or how the jury should be instructed on judicially noticed facts in criminal and civil trials, or the propriety of damages caps legislation in personal injury actions—is instructive in determining exactly what the Constitution guarantees when the Constitution guarantees the right to a jury trial.

In the last thirty years, a handful of published opinions have addressed the propriety of time limits in criminal trials.[147] Typical among these opinions is *United States v. Reaves*, wherein the district court colorfully described the underlying necessity for time limits on criminal evidence presentations:

> It would seem that early in the career of every trial lawyer, he or she has lost a case by leaving something out, and thereupon resolved never again to omit even the most inconsequential item of possible evidence from any future trial. Thereafter, in an excess of caution the attorney tends to overtry his case by presenting vast quantities of cumulative or marginally relevant evidence. In civil cases, economics place some natural limits on such zeal. The fact that the attorney's fee may not be commensurate with the time required to present the case thrice over imposes some restraint. In a criminal case, however, the prosecution, at least in the federal system, seems not to be subject to such fiscal constraints, and the attorney's enthusiasm for tautology is virtually unchecked.[148]

147. *See, e.g.*, United States v. Holmes, 44 F.3d 1150 (2d Cir. 1995); United States v. Hildebrand, 928 F. Supp. 841 (N.D. Iowa 1996); United States v. Reaves, 636 F. Supp. 1575 (E.D. Ky. 1986).

148. 636 F. Supp. at 1576.

For this reason, the district court, invoking its "theoretically unchallengeable" "inherent power . . . to manage its workload," imposed "reasonable time limits" that were "not arbitrary" to avoid "wasteful, duplicative, and inefficient" presentation of not "strictly irrelevant" evidence.[149]

By characterizing the excluded evidence as "wasteful, duplicative, and inefficient," albeit not "strictly irrelevant,"[150] the district court highlighted its view that the record made no showing that time limits caused the advocates to edit from the trial evidence of any importance. The district court opinion did not mention or perform any analysis of the constitutionality of these time limits when measured against Sixth Amendment jury rights. There would have been no reason to do so, given the rationales of the decision, which were that the evidence "excluded" is decided upon by the advocates rather than the court, and that no material evidence was excluded.[151] In other words, the criminal cases addressing time limits do not frame it as a right to jury trial issue because the cases begin from the premise that time limits, when imposed, still leave time for presentation of all relevant and material evidence and that no such evidence is being excluded *by the judge*.

And, of course, this is not well-populated jurisprudence. Time limits in criminal trials inevitably trigger an intuitive judicial reticence to tread on the accused's ability to develop a defense.[152] Thus, published decisions discussing time limits in criminal cases are rare.

By contrast, there is more jurisprudence addressing the propriety of time limits in civil actions—much of which is cited and discussed in the few cases approving time limits in criminal cases. Also, while the Federal Rules of Criminal Procedure make no mention of the possibility of trial time limits, Federal Rule of Civil Procedure 16(c)(2)(O) explicitly contemplates that a court can impose time limits on the presentation of evidence at trial.[153] Yet, the jurisprudence on civil trial limits, like the cases in criminal

149. *Id.* at 1576–77, 1580.
150. *Id.* at 1576.
151. *Id.* at 1580.
152. *See* 44 F.3d at 1157.
153. FED. R. CIV. P. 16(c)(2)(O).

trials, is stone silent about the possible constitutional hurdle of encroaching on jury trial rights.

Added to FRCP 16 in 1993, subsection (c)(2)(O) provides that in any pretrial conference, the court may "establish[] a reasonable limit on the time allowed to present evidence."[154] The Advisory Committee explained,

> It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial.[155]

Of course, while imposing time limits in a civil action will force choices concerning what evidence to introduce,[156] nominally the decision is made by parties and their advocates, not judges. Thus, court-imposed time limits do not necessarily implicate concerns about the propriety of *judges* excluding potentially relevant evidence.

Several courts have addressed the matter since the 1993 amendments.[157] As a general matter, the focus of analysis by the appellate courts has been on the undeniably laudable goals of the relevant procedural and evidence rules—accuracy and efficiency—and the countervailing vaguely described goal of fairness, without any reference to the constitutional prerogative of the jury. More specifically, as in *Reaves*, civil trial time limits are seen as necessary tools to reign in attorneys.[158]

---

154. *Id.*

155. FED. R. CIV. P. 16 advisory committee note to the 1993 Amendments; *see also* Patrick E. Longan, *The Shot Clock Comes To Trial: Time Limits For Federal Civil Trials*, 35 ARIZ. L. REV. 663 (1993) (evaluating the potential necessity of allowing time limits in civil trials).

156. Judge William Schwarzer argues that "lawyers, if permitted, will try every issue, present every witness and offer every exhibit that might possible persuade a jury to return a verdict in their favor." William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, *reprinted in* 132 F.R.D. 575, 577 (1991).

157. *See, e.g.*, Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir. 2001); Crabtree v. Nat'l Steel Corp., 261 F.3d 715, 720–21 (7th Cir. 2001); Sims v. ANR Freight Sys., Inc., 77 F.3d 846, 848–49 (5th Cir. 1996); Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 608–11 (3d Cir. 1995); Schwartz v. Fortune Magazine, 193 F.R.D. 144, 148–49 (S.D. N.Y. 2000).

158. United States v. Reaves, 636 F. Supp. 1575, 1578 (E.D. Ky. 1986).

For example, in *Duquesne Light Co. v. Westinghouse Elec. Corp.*, the Third Circuit explained,

> The rules repeatedly embody the principle that trials should be both fair and efficient. Thus, the Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Similarly, the Federal Rules of Evidence "shall be construed to secure . . . elimination of unjustifiable expense and delay." More particularly, Fed.R.Evid. 403 allows judges to exclude even relevant evidence because of "considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
>
> . . . After all, "'it has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by [its] own judgment and whim.'"
>
> However, because by their very nature such procedures can result in courts dispensing with the general practice to evaluate each piece of offered evidence individually, district courts should not exercise this discretion as a matter of course. As one court has put it, witnesses should not be excluded "on the basis of mere numbers." Rather, a district court should impose time limits only when necessary, after making an informed analysis based on a review of the parties' proposed witness lists and proffered testimony, as well as their estimates of trial time. . . . But still the courts need not allow parties excessive time so as to turn a trial into a circus. After all, a court's resources are finite and a court must dispose of much litigation. In short, the litigants in a particular case do not own the court.[159]

Similarly, in *Sims v. ANR Freight Sys., Inc.*, the Fifth Circuit reasoned,

> The role of a federal judge is not that of a mere moderator. Furthermore, the courts of this country labor under heavy caseloads, and in order to accommodate these caseloads some concessions to expediency are necessary. However, if the goal of expediency is given higher priority than the pursuit of justice, then the bench and the bar both will have failed in their duty to uphold the Constitution and the underlying principles upon which our profession is founded. Speed is necessary, and the limited capabilities of the judicial system certainly should be considered in determining whether to impose limits on the introduction of evidence and the length of trial. However, such considerations must be addressed with a cautious respect for the requirements necessary to achieve a fair trial.[160]

With only one exception, no published decision even acknowledges a potential conflict with the constitutional right to trial by jury.

---

159. *Duquesne*, 66 F.3d at 609–10 (citations omitted).

160. *Sims*, 77 F.3d at 849 (citations omitted).

That decision is *Frazier v. Honeywell International, Inc.*[161] But in that opinion, the district court did not analyze the constitutional issue at all; instead, it held that the claim was not properly preserved.[162]

None of the time limits jurisprudence explicitly answers the question of the role of the jury as exclusive fact finder. But one can tease out of the jurisprudence a set of doctrinal threads that give shape to the answer. There is an underlying assumption that a jury should hear evidence of unquestioned relevance.[163] There is recognition that it can distort a trial if a judge excludes evidence from jury consideration.[164] There is an understanding that the distortion can be ameliorated if the decision on what evidence to present is made by the parties and advocates, rather than by the judge.[165] There is an attempt simultaneously to therefore shift the decision to the parties and the advocates and to promote efficiency and accuracy of trials.[166] There is a description of accuracy and efficiency as valid system goals.[167] There is recognition of a countervailing constitutional interest in a fair trial.[168] And there is a conclusion that time limits are permissible so long as there is not an impairment of a fair trial due to the exclusion by the judge of too much relevant evidence.[169] There is never any analysis of whether the constitutional guarantees of jury trials allow the sacrifice of *full* presentation of relevant evidence.

While the jurisprudence arising from the procedural reform of trial time limits disappointingly does not answer whether it is the jury's prerogative to hear and weigh for itself *all* relevant evidence, the text and legislative history of the evidence rules on judicial notice do answer that question, at least for criminal juries. FRE 201 provides for judicial notice of adjudicative facts[170] and

161. 518 F. Supp. 2d 831 (E.D. Tex. 2007).

162. *Id.* at 840–41.

163. *See Sims*, 77 F.3d at 849.

164. *See id.*

165. *See* United States v. Reaves, 636 F. Supp. 1575, 1580 (E.D. Ky. 1986).

166. *See* Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 608–11 (3d Cir. 1995).

167. *See Sims*, 77 F.3d at 849.

168. *See id.*

169. *See Duquesne*, 66 F.3d at 609 (citing SCM Corp. v. Xerox Corp., 77 F.R.D. 10, 13 (D. Conn. 1977)).

170. The Federal Rules of Evidence distinguish between legislative facts and adjudicative facts. *See* FED. R. EVID. 201 advisory committee's note to subdivision (a). Adjudicative

further provides that such facts are binding on the jury *except* in criminal trials: "In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive."[171]

The legislative history of FRE 201 explains the difference between judicial notice in criminal and civil trial. On February 5, 1973, after several rounds of drafting and revisions, Chief Justice Burger, on behalf of the Supreme Court, sent to Congress the proposed Federal Rules of Evidence.[172] Congress largely accepted all of the proposed rules as written; one of the few "Rules Significantly Amended"[173] was FRE 201(g), which Congress amended to provide that judicially noticed facts would *not* bind a criminal jury because giving a mandatory jury instruction on a factual issue to a criminal jury would be "inappropriate" as "contrary to the spirit of the Sixth Amendment right to a jury trial."[174] Congress made no mention of the Seventh Amendment.

The House Report, read in conjunction with the Advisory Committee's Note to FRE 201, constitutes the most direct published discussion of whether the constitutionally enshrined fact finding role of the jury means the jury is the *exclusive* fact finder. The Advisory Committee's Note explains that, in order for a fact to be judicially noticeable, the fact must be "beyond reasonable controversy."[175] And yet, as the House Report emphasizes, in order to comply with jury trial rights, even those facts go to a jury in a criminal trial.[176] It would seem that the constitutional right

---

factual determinations are the facts of a particular case; in other words, adjudicative facts are the facts that would be decided by juries in a jury trial, such as who, what, where, and when. *See id.* Legislative facts are the assumptions or determinations a judge or legislature would make in determining matters of policy, such as the impact of a particular policy on society. *See* GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY § 201.2 (7th ed. 2011). The Federal Rules of Evidence only address judicial notice of adjudicative facts. FED. R. EVID. 201(a).

171. FED. R. EVID. 201(f).

172. *See* H.R. REP. NO. 93-650, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7077.

173. *Id.* at 6–7, *reprinted in* 1974 U.S.C.C.A.N. 7075, 7080. For a fuller but concise summary of the initial drafting and adopting of the Federal Rules of Evidence, see Teter *supra* note 70, at 157–61.

174. H.R. REP. NO. 93-650, at 6–7, *reprinted in* 1974 U.S.C.C.A.N. 7075, 7080; *accord* United States v. Jones, 580 F.2d 219, 223–24 (6th Cir. 1978); State v. Lawrence, 234 P.2d 600, 603 (Utah 1951).

175. FED. R. EVID. 201(b) advisory committee's note.

176. *See* H.R. REP. NO. 93-650, at 6–7, *reprinted in* 1974 U.S.C.C.A.N. 7075, 7080 (not-

to a jury trial, at least in a criminal trial, does equate to the right of the jury to decide *all facts* and to decide what weight to give *all evidence.*[177]

In other words, when jury trial rights are remembered and factored into consideration, jury trial rights are treated as sacrosanct. Having identified the Sixth Amendment jury trial concern, Congress was so uneasy with encroaching on jury prerogatives that it would not even permit instructing the jury to accept as true something as innocuous as undisputable facts. Put yet another way, in criminal trials the jury is the exclusive finder of fact, no matter what.

There is no explanation of why there would not be an identical Seventh Amendment concern for judicial notice in civil trials. It may be that, as often seems the case, the Seventh Amendment simply is not in anyone's consciousness. Certainly the text of the Sixth Amendment—"trial, by an impartial jury"[178]—when compared to the text of the Seventh Amendment—"trial by jury"[179]—does not support any distinction.

Legislatively imposed damage caps in civil litigation are another area of law potentially infringing on the parameters of the constitutional role of the jury. At first blush, capping damages awards without reference to the evidence of actual damages is a possible encroachment on the jury's fact finding role.

Here, the analysis is done under state-guaranteed jury trial rights. The Seventh Amendment right to trial by jury in a civil case is not incorporated through the Fourteenth Amendment as a restriction on the states.[180] But a near-identical guarantee is with-

---

ing that all facts judicially noticed go to the jury, but a discretionary instruction is allowed for criminal trials).

177. *See Jones*, 580 F.2d at 224 ("Congress intended to preserve the jury's traditional prerogative to ignore even uncontroverted facts . . . . [T]he Supreme Court's rule violated the spirit, if not the letter, of the constitutional right to a jury trial."). The proponents of judicial notice cited by the Official Comment to FRE 201 argue for it as a matter of efficiency, and rarely if ever consider it as a matter of propriety. *See* Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *in* PERSPECTIVE OF LAW: ESSAY FOR AUSTIN WAKEMAN SCOTT 83 (Roscoe Pound et al. eds., 1964); Arthur John Keefe et al., *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 669–70 (1950); Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 271 (1944).

178. U.S. CONST. amend. VI.

179. U.S. CONST. amend. VII.

180. *See* McDonald v. City of Chicago, 561 U.S. ___, ___ n.13, 130 S. Ct. 3020, 3035 n.13 (2010).

in forty-eight state constitutions, and in the two states where it is not in the constitution, it is in their statutes or codes.[181] And so, there is a body of state court jurisprudence addressing whether damages caps infringe on the fact finding role of juries.

Many states have damages caps of one sort or another. As of the time these words are being penned, at least thirteen states capped punitive damages in all or some circumstances.[182] At least twenty-one states have capped non-economic damages in all or some circumstances.[183] At least seven states have some other form of a damages cap.[184] Some of these states have court decisions an-

---

181. ALA. CONST. art. I, § 11; ALASKA CONST. art. I, § 16; ARIZ. CONST. art. II, § 23; ARK. CONST. art. II, § 7, *amended by* ARK. CONST. amend. 16; CAL. CONST. art. I, § 16; C.R.C.P. 38(a); CONN. CONST. art. I, § 19, *amended by* CONN. CONST. art. IV; DEL. CONST. art. I, § 4; FLA. CONST. art. I, § 22; GA. CONST. art. I, § 1, para. XI; HAW. CONS. art. I, § 13; IDAHO CONST. art. I, § 7; ILL. CONST. art. I, § 13; IND. CONST. art. I, § 20; IOWA CONST. art. I, § 9; KAN. CONST. Bill of Rights, § 5; KY. CONST. § 7; LA. CODE CIV. PROC. ANN. art. 1731 (2011); ME. CONST. art. I, § 20; MD. CONST. Declaration of Rights, art. V; MASS. CONST. pt. I, art. XV; MICH. CONST. art. I, § 14; MINN. CONST. art. I, § 4; MISS. CONST. art. III, § 31; MO. CONST. art. I, § 22 (a); MONT. CONST. art. II, § 26.; NEB. CONST. art. I, § 6; NEV. CONST. art. I, § 3; N.H. CONST. pt. I, art. XX; N.J. CONST. art. I, para. 9; N.M. CONST. art. II, § 12; N.Y. CONST. art. I, § 2; N.C. CONST. art. I, § 25. N.C. CONST. art. IV, § 13 (1); N.D. CONST. art. I, § 13; OHIO CONST. art. I, § 5; OKLA. CONST. art. II, § 19; OR. CONST. art. I, § 17; PA. CONST. art. I, § 6.; R.I. CONST. art. I, § 15; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 6; TENN. CONST. art. I, § 6; TEX. CONST. art. I, § 15; UTAH CONST. art. I, § 10; VT. CONST. ch. I, art. XII; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 21; W. VA. CONST. art. III, § 13; WIS. CONST. art. I, § 5; WYO. CONST. art. I, § 9.

182. ALASKA STAT. § 09.17.020 (Repl. Vol. 2012); ARK. CODE ANN. § 16-55-208 (Repl. Vol. 2005 & Supp. 2011); FLA. STAT. § 766.118 (Repl. Vol. 2012); GA. CODE ANN. § 51-12-5.1 (Supp. 2012); IDAHO CODE ANN. § 6-1604 (Repl. Vol. 2010 & Cum. Supp. 2012); 735 ILL. COMP. STAT. 5/2-1115.05 (Repl. Vol. 2003 & Cum. Supp. 2013); MONT. CODE ANN. § 27-1-220 (Repl. Vol. 2011 & Cum. Supp. 2012); N.H. REV. STAT. ANN. § 507:16 (Repl. Ed. 2009); N.J. STAT. ANN. § 2A:15-5.14 (Repl. Vol. 2000 & Cum. Supp. 2012); N.C. GEN. STAT. § 1D-25 (Repl. Vol. 2011 & Supp. 2012); OKLA. STAT. tit. 23, § 9.1 (Repl. Vol. 2011); TEX. CIV. PRAC. & REM. § 41.008 (Cum. Supp. 2012); VA. CODE ANN. § 8.01-38.1 (Repl. Vol. 2007 & Cum. Supp. 2012).

183. ALASKA STAT. § 09.17.020 (Repl. Vol. 2012); CAL. CIV. CODE § 3333.2 (Repl. Vol. 1997 & Cum. Supp. 2013); GA. CODE ANN. § 51-13-1 (Supp. 2012); HAW. REV. STAT. § 663-8.7 (Repl. Vol. 2012 & Cum. Supp. 2012); IDAHO CODE ANN. § 6-1603 (Repl. Vol. 2010 & Cum. Supp. 2012); KAN. STAT. ANN. § 60-19a02 (Repl. Vol. 2005 & Cum. Supp. 2012); ME. REV. STAT. tit. 24-A, § 4313.9 (Compact Ed. 2012); MASS. GEN. LAWS ANN. ch. 231, § 60H (West 2013); MICH. COMP. LAWS § 600.1483 (Repl. Vol. 2006 & Cum. Supp. 2012); MISS. CODE ANN. § 11-1-60 (Cum. Supp. 2012); MO. REV. STAT. § 538.210 (Repl. Vol. 2008); MONT. CODE ANN. § 25-9-411 (Repl. Vol. 2011 & Cum. Supp. 2012); Act of Aug. 7, 2002, ch. 3, sec. 5, 2002 Nev. Laws 18th Spec. Sess. 3, 6–7 (repealed 2004); N.D. CENT. CODE § 32-42-02 (Repl. Vol. 2010); OHIO REV. CODE ANN. § 2323.43 (Repl. Vol. 2010 & Supp. 2012); Affordable Access to Healthcare Act, ch. 390, sec. 6, 2003 Okla. Laws 1678, 1681–82 (expired 2010); OR. REV. STAT. § 31.710 (West 2013), *invalidated by* Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999); S.C. CODE ANN. § 15-32-220(A) (Cum. Supp. 2012); TEX. CIV. PRAC. & REM. § 74.301 (Repl. Vol. 2011 & Cum. Supp. 2012); UTAH CODE ANN. § 78-14-7.1 (Repl. Vol. 2012); WASH. REV. CODE § 4.56.250 (Repl. Vol. 2006).

184. LA. REV. STAT. ANN. § 40:1299.42 (West 2013) (damages cap for medical malprac-

alyzing whether damages caps infringed on the right to trial by jury. It is those court decisions that are of interest.

The consensus of the state jurisprudence is that a state can expand or contract a substantive right, but once that right is defined, it is for a jury to determine factually what happened in a particular case. For this reason, several state supreme courts have held damages caps to infringe on the constitutional right to trial by jury.[185] The Alabama Supreme Court explained, "A jury determination of the amount of damages is the essence of the right to trial by jury."[186] The Florida Supreme Court reasoned, "[B]ecause the jury verdict is being arbitrarily capped . . . the plaintiff [is not] receiving the constitutional benefit of a jury trial as we have heretofore understood that right."[187] Yet, for the same reason, several other state supreme courts have held damages caps do not infringe on the constitutional right to trial by jury.[188] Typical of these holdings is the rationale of the Alaska Supreme Court, agreeing with the Third Circuit Court of Appeals, that "a damages cap [does] not intrude on the jury's fact-finding function, because the cap [is] a 'policy decision' applied after the jury's determination, and [does] not constitute a re-examination of the fac-

---

tice actions); NEB. REV. STAT. § 44.2825 (Repl. Vol. 2010) (damages cap for medical malpractice actions); N.M. STAT. ANN. § 41-5-6 (Repl. Vol. 2003 & Cum. Supp. 2012) (cap on medical malpractice damages, excluding punitive damages); S.D. CODIFIED LAWS § 21-3-11 (Repl. Vol. 2004 & Cum. Supp. 2012) (damages cap for medical malpractice actions); VA. CODE ANN. § 8.01-581.15 (Cum. Supp. 2012) (damages cap for medical malpractice actions). *But see* ARIZ. CONST. art. 2, § 31 (prohibiting damage caps in wrongful death or personal injury actions); KY. CONST. § 54 (prohibiting damage caps in wrongful death or personal injury actions); PENN. CONST. art. 3, § 18 (prohibiting damages cap in wrongful death actions, or for injuries to persons or property); WYO. CONST. art. 10, § 4 (prohibiting damage caps in wrongful death or personal injury actions).

185. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So.2d 156, 159–65 (Ala. 1991); Smith v. Dep't. of Ins., 507 So.2d 1080, 1095 (Fla. 1987); Knowles v. United States, 544 N.W.2d 183, 186–88 (S.D. 1996); Sofie v. Fibreboard Corp., 771 P.2d 711, 723 (Wash. 1989).

186. *Moore*, 592 So.2d at 161 (quoting Indus. Chem. & Fiberglass Corp. v. Chandler, 547 So.2d 812, 819 n.1 (Ala. 1989)).

187. *Smith*, 507 So.2d at 1088–89.

188. *See, e.g.*, Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1050–51 (Alaska 2002); Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1119–20 (Idaho 2000) (upholding damages cap because, even though fact-finding is in the exclusive province of the jury, the court must apply the law, which is formulated by the legislature, to the facts found by the jury); Peters v. Saft, 597 A.2d 50, 53–54 (Me. 1991) (noting that a "drastic" damages cap might violate the right to a jury trial because it would effectively eliminate the remedy altogether); English v. New England Med. Ctr., Inc., 541 N.E.2d 329, 331–32 (Mass. 1989); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 906–07 (Mo. 1992); Wright v. Colleton Cnty. Sch. Dist., 391 S.E.2d 564, 569–70 (S.C. 1990); Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877, 887–88 (W. Va. 1991).

tual question of damages."[189] No state supreme court has held that, even when damages caps do encroach on fact finding by a jury, they are constitutional. Rather, the courts holding damages caps unconstitutional do so because they see capping damages as infringing on a factual determination (the quantifying of damages),[190] while courts holding damages caps constitutional see caps as matters of substantive law.[191]

So having reviewed this body of jurisprudence on time limits and judicial notice and damages caps, we return to the set of questions posited at the beginning of this section in the hypothetical "thought experiment" criminal trial: Would the judge violate Article III and the Sixth Amendment if the judge entered an order limiting the length of time each party had to present evidence? Yes, if the consequence was judicially forced exclusion of relevant evidence. Would the judge violate Article III and the Sixth Amendment if the judge required, through the vehicle of judicial notice, that the jury accept a fact as settled rather than hear evidence and decide it for themselves? Yes, because of the right of the jury to be the exclusive fact finder. Is there a textual difference between the Sixth and Seventh Amendment that would support a different answer for judicial notice in a civil case? No, even though the legislative history and text of the pertinent Federal Rule of Evidence erroneously seems to assume so without explanation. And in light of these answers, how do damages caps not encroach on jury trial rights? Damages caps *do* violate jury rights in jurisdictions where the caps delimit the factual quantification of damages, as opposed to the substantive law classification of the type of recoverable damage.

In summary, then, the jurisprudence is not explicit, but the jurisprudence is conceptually consistent and coherent—the import of the jury's constitutionally protected role as fact finder is that the jury is the *exclusive* fact finder. Put another way, procedural or evidentiary rules that encroach on jury fact finding are facially, constitutionally suspect.

189. *Evans*, 56 P.3d at 1051 (citing Davis v. Omitowoju, 883 F.2d 1155, 1165 (3d Cir. 1989)).

190. *See, e.g.*, *Moore*, 592 So.2d at 164.

191. *See, e.g.*, *Evans*, 56 P.3d at 1051.

V. FRE 403 IS AN UNCONSTITUTIONAL INFRINGEMENT OF THE JURY'S ROLE AS EXCLUSIVE FACT FINDER

In *Parklane Hosiery Co. v. Shore*, then Associate Justice Rehnquist argued that the constitutionally enshrined roles of the jury cannot be eliminated, absent constitutional amendment, simply because they do not work very well:

> It may be that if this Nation were to adopt a new Constitution today, the Seventh Amendment guaranteeing the right of jury trial in civil cases in federal courts would not be included among its provisions. But any present sentiment to that effect cannot obscure or dilute our obligation to enforce the Seventh Amendment, which *was* included in the Bill of Rights in 1791 and which has not since been repealed in the only manner provided by the Constitution for repeal of its provisions.
>
> . . . .
>
> The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury surely was a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment.[192]

While Justice Rehnquist was writing in dissent, the salient point remains correct: If a constitutional provision is impaired by a procedural or evidentiary rule, then applying the jurisprudential hierarchy of the Supremacy Clause,[193] the procedural or evidentiary rule falls unless it too is supported by a constitutional provision.

It should not give pause that Justice Rehnquist wrote in dissent. Justice Rehnquist wrote in dissent in *Parklane* because he disagreed with the majority's analysis that collateral estoppel did not implicate jury rights;[194] the majority never asserted that if jury rights were triggered, those rights could be overcome by efficiency or accuracy needs.[195]

The Supreme Court has never recognized either efficiency or accuracy as singular values of overriding constitutional importance. Both in the context of jury trial rights and other rights,

192. 439 U.S. 322, 338, 346 (1979) (Rehnquist, J., dissenting).
193. U.S. CONST. art. VI, cl. 2.
194. *Parklane*, 439 U.S. at 347 (Rehnquist, J., dissenting).
195. *See id.* at 346–48.

the Court has rejected efficiency of trials and accuracy of verdicts as a basis to limit the effect of constitutional clauses. Yet, efficiency and accuracy are all that support the operation of FRE 403 excluding relevant evidence from the jury. Therefore, FRE 403 is unconstitutional.

A. *Neither Efficiency of Trials nor Accuracy of Verdicts Can Justify Restriction of Constitutional Rights*

The goals of efficiency of trials and accuracy of verdicts cannot support keeping relevant evidence from the jury.

1. Efficiency of Trials Cannot Justify Restriction of Constitutional Rights

In *Blakely v. Washington*,[196] the Supreme Court explicitly held that efficiency of trials could not support a restriction of Sixth Amendment jury trial rights:

> Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury. Justice Breyer may be convinced of the equity of the regime he favors, but his views are not the ones we are bound to uphold.
>
> *Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice.* One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. *There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.*"[197]

In his dissent in *Parklane*, then Justice Rehnquist argued an identical position in the context of the Seventh Amendment: "Just as the principle of separation of powers was not incorporated by the Framers into the Constitution in order to promote efficiency or dispatch in the business of government, the right to a jury trial was not guaranteed in order to facilitate prompt and accurate de-

196. 542 U.S. 296 (2004).

197. *Id.* at 313 (emphasis added) (citations omitted).

cision of lawsuits."[198] And of course, for our purposes, there is no doctrinal basis to distinguish between the Sixth Amendment analysis in *Blakely* and a Seventh Amendment analysis—efficiency either is a value of constitutional dignity or it is not.

Blakely is not an isolated opinion—in the context of a variety of constitutional clauses, the Court repeatedly has held that efficiency cannot trump constitutional rights. The Court has rejected efficiency as a basis to ignore the constitutional requirement of presidential oversight of the execution of the laws, holding, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution," for "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[199] The Court has held that efficiency could not justify bypassing the constitutional requirement of a two-thirds vote of both houses of Congress, rather than just one, to overcome a presidential veto.[200] The Court has rejected efficiency as a justification to violate the Constitution's command that Congress play no direct role in the execution of the laws.[201] In his dissent in *United States v. Booker*,[202] Justice Stevens (joined by Justices Souter and Scalia) wrote that criminal sentencing guidelines infringed on Sixth Amendment jury rights: "We have always trusted juries to sort through complex facts in various areas of law. This may not be the most efficient system imaginable, but the Constitution does not permit efficiency to be our primary concern."[203]

198. *Parklane*, 439 U.S. at 348 (Rehnquist, J., dissenting).

199. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. ___, ___, 130 S. Ct. 3138, 3156 (2010) (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986)) (internal quotation marks omitted).

200. *See* INS v. Chadha, 462 U.S. 919, 945–46 (1983).

201. *See Bowsher*, 478 U.S. at 736 (quoting *Chadha*, 462 U.S. at 944).

202. 543 U.S. 220 (2005).

203. *Id.* at 289 (Stevens, J., dissenting) (citations omitted). The majority opinion did not argue efficiency as a justification for an extra-constitutional remedy, nor did it argue that efficiency was a constitutional value; rather, the majority argued that the Guidelines did not implicate the Sixth Amendment jury trial requirement. *Id.* at 256–58 (majority opinion).

2. Accuracy of Verdicts Cannot Justify Restriction of Constitutional Rights

Accuracy fares no better than efficiency. There are two reasons that the FRE 403 value of accuracy is not a constitutional value. First, FRE 403 promotes the system's, or government's, interest in some sort of objective accuracy in verdicts. But the Bill of Rights defines limitations on the government and rights of the individual, not vice versa. Second, the Court has held, through a series of cases, that even a litigant does not have a constitutional right to an accurate verdict.

While the Due Process Clause in some ways includes a notion of verdict accuracy, the accuracy concept of FRE 403 is a very different value, and in ways that matter constitutionally. FRE 403 empowers a judge to keep relevant evidence from a jury if the judge thinks the evidence may lead the jury to a verdict different from what the judge perceives to be an objectively correct one.[204] This is different from the due process right to a fair trial. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[205] In other words, the constitutional "fairness" right is the right of an accused to a full and fair opportunity to present a case to a jury.

The "accuracy" value FRE 403 codifies is different from fairness, and from due process. FRE 403 is not about the opportunity to *include* evidence, but rather, is about the power to *exclude* evidence. Further, FRE 403 approaches evidence from the perspective of the *court's* perceptions of an accurate outcome, not the *litigant's* perspective. Thus, FRE 403 allows the judge to impose on the jury the judge's own view of what is the accurate trial outcome and exclude evidence to promote that view, as opposed to due process, which allows a litigant the opportunity to present to the jury the litigant's views of what happened.

This is an important distinction constitutionally. If accuracy is a constitutional value, it would be a value of the litigants, as opposed to a value of the government. Thus, for example, a criminal defendant's right to present all exculpatory evidence is more ex-

204. *See* FED. R. EVID. 403 advisory committee's note.

205. Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

pansive than a prosecutor's right to present all incriminating evidence.[206] So if accuracy is a constitutional value, then accuracy is a basis for a litigant to insist upon the introduction and consideration of all relevant evidence, not for the court's right to exclude such evidence.

Further, the Supreme Court repeatedly has held that even a litigant has no constitutional right to an accurate verdict. The lack of constitutional protection of accuracy is demonstrated by Court opinions allowing the exclusion of litigant-proffered, admittedly relevant—indeed sometimes key—evidence both post-verdict and pre-verdict. A stark example of the post-verdict context is the death penalty appeal decided in *Herrera v. Collins*.[207] In *Herrera*, the Court ruled,

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.
>
> . . . .
>
> Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.
>
> . . . .
>
> The Constitution itself, of course, makes no mention of new trials.[208]

In other words, the criminal defendant's "right" to an objectively accurate verdict in a *death penalty conviction* was insufficient to overcome the system goal of finality. Plainly, even in this context, accuracy in verdicts does not rise to the level of a singular constitutional value.

Decisions on discovery sanctions—both in civil and criminal cases—demonstrate the same point pre-verdict, where the system concern is not finality but, rather, is regulating misbehavior. Whether in a criminal case or a civil case, courts may exclude relevant evidence—thereby impairing the likelihood of an accurate verdict—as a punishment for pre-trial discovery abuse.

---

206. *See* Dripps, *supra* note 128, at 1390.

207. 506 U.S. 390, 393 (1993).

208. *Id.* at 400–01, 408. Similarly, in *Lockhart v. McCree*, the Court held that assuming "'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries," death-qualified juries still satisfied the Constitution. 476 U.S. 162, 173 (1986).

In *Taylor v. Illinois*, the Court held that excluding a defense witness's testimony as a sanction for failure to disclose the witness in response to a pretrial discovery request did *not* constitute "constitutional error."[209] In other words, even the right of a criminal accused to fully present evidence that the accused was not guilty is an insufficient reason to limit a court's power to exclude defense evidence in order to deter poor attorney behavior. Similarly, in *Roadway Express, Inc. v. Piper*, the Court held,

> Federal Rule of Civil Procedure 37 (b) authorizes sanctions for failure to comply with discovery orders. The District Court may bar the disobedient party from introducing certain evidence, or it may direct that certain facts shall be "taken to be established for the purposes of the action. . . ." The Rule also permits the trial court to strike claims from the pleadings, and even to "dismiss the action . . . or render a judgment by default against the disobedient party."[210]

This conclusion—that whatever is the FRE 403 value of an accurate verdict, it does not rise to the level of being a constitutional value that can vie with and perhaps override other constitutional values—may seem surprising, but actually derives directly from the context in which the Constitution was written. As Professor George Thomas III explains,

> The modern Court's instinct has been to seek ways to make it easier for police and prosecutors to solve . . . crimes . . . . But the Framers were not concerned with the government's interest in solving crime. While we today fear criminals, the Framers feared the central government. . . .
>
> The criminal procedure provisions that best advance the goal of accurate verdicts are the Sixth Amendment rights to notice of the nature and cause of the accusation, to be confronted with adverse witnesses, and to have compulsory process for obtaining favorable witnesses. Yet the Framers said very little about these accuracy-enhancing rights. . . .
>
> . . . No one claims now—indeed, no one claimed in the Magna Carta, the Petition of Right in 1627, or the Massachusetts Body of Liberties in 1641—that juries are uniquely qualified to deliver the truth about factual guilt.[211]

209. 484 U.S. 400, 401–02 (1988).

210. 447 U.S. 752, 763 (1980) (alterations in original).

211. Thomas, *supra* note 121, at 173, 175–76.

3. Conclusion

The bottom line is straightforward: Efficiency qua efficiency is not a constitutional value sufficient to compromise other constitutional values. Accuracy qua accuracy is not a constitutional value sufficient to compromise other constitutional values. And as the Court held in *Blakely*, even fairness, which plainly *does* have a constitutional role, does not support curtailment of jury trial rights.

B. *FRE 403 Empowers Courts to Restrict Jury Fact Finding in Order to Promote Efficiency and Accuracy*

The conclusion that FRE 403 is unconstitutional—now to be explicitly set forth—should no longer be either surprising or dubious. If a constitutional provision and an extra-constitutional system goal conflict, then the Supremacy Clause of the Constitution mandates a clear outcome—the extra-constitutional goal must give way.[212] If neither of the objectives of FRE 403—efficiency and accuracy—are constitutional values, and if the jury is constitutionally the exclusive fact finder, then FRE 403 constitutionally cannot, in the interest of promoting accuracy or efficiency, exclude from the jury relevant evidence on issues of consequence.

This article is not the first to argue that there are constitutional problems with excluding evidence, but it is the first to assert and assess those problems under the Constitution's jury trial clauses. Professor Donald Dripps, quoted above, develops this thesis in the context of the right to due process, arguing "A generation of Supreme Court cases . . . holds that rules of evidence that operate to exclude relevant, exculpatory evidence violate the Due Process Clause or the Sixth Amendment's Compulsory Process and Confrontation Clauses."[213] But by grounding his argument in doctrines other than the right to trial by jury, even if "the exclusion of relevant but prejudicial exculpatory evidence [in a

212. *See* U.S. CONST. art. VI, cl. 2.

213. Dripps, *supra* note 128, at 1391, 1402–04 & nn.54–63; *see also* John H. Blume, Sheri L. Johnson & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1099–1103 (2007).

criminal trial] is simply unconstitutional,"[214] Professor Dripps does not address the constitutionality or unconstitutionality of the exclusion of relevant evidence in *all* trials, criminal *and* civil, and for *all* parties, including prosecutors and plaintiffs.[215]

Further, the Supreme Court has rejected the position that the Due Process Clause, the Compulsory Process Clause, or the Confrontation Clause open the floodgates of evidence admissibility, instead holding that "[t]he right to present relevant testimony is not without limitation."[216] But neither this holding, nor the holdings of the precedent the Supreme Court quoted, considered the implications of the Sixth or Seventh Amendment right to trial by jury.[217] Neither *Blakely* nor *Parklane* nor any other Supreme Court case has squarely pitted evidentiary exclusionary rules against either the Sixth or Seventh Amendment right to trial by jury. And this is not for want of opportunity.

In *Holmes v. South Carolina*, the issue was whether "a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict."[218] South Carolina had print, blood, DNA, and fiber evidence that Bobby Lee Holmes had beaten, raped, and robbed Mary Stewart.[219] Holmes presented expert testimony that the forensic evidence all either had been planted or contaminated, but under South Carolina evidence rules, Holmes was not allowed to call "several witnesses" who placed Jimmy McCaw White near the crime scene, coupled with four witnesses who testified either that White had confessed or that White had acknowledged Holmes's innocence.[220] In other words, the trial court, as allowed by South Carolina evidence rules, weighed the evidence on its own, came to a conclusion on its own about factually who committed the crime,

214. Dripps, *supra* note 128, at 1391.

215. Professor Dripps recognizes, of course, that even in just criminal trials, and focusing just on the accused, "[t]here is as yet . . . no judicial recognition of a constitutionally mandated system of free proof for the criminal defendant." *Id.*

216. Michigan v. Lucas, 500 U.S. 145, 149 (1991) (quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987)).

217. *Id.* at 149–53; *Rock*, 483 U.S. at 53–56.

218. 547 U.S. 319, 321 (2006).

219. *Id.* at 321–22.

220. *Id.* at 322–24.

and then shaped the evidence the jury heard to conform the verdict to the trial court's factual conclusion.

The Supreme Court vacated this verdict, holding the South Carolina exclusion rule was arbitrary, lacking a rational basis, and thus violated a constitutional right inferred from the Due Process Clause, the Confrontation Clause, and the Compulsory Process Clause—a criminal defendant's right to present a meaningful defense.[221] In the course of doing so, the Court affirmed the constitutionality of FRE 403 in general, holding that the Constitution permits judges "to exclude evidence that is repetitive . . . only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues."[222]

But not in the opinion in *Holmes,* nor in any of the cases cited and relied upon in *Holmes*, nor in any of the cases cited and relied upon in the cases cited and relied upon in *Holmes*, did the Court ever address the explicit constitutional right to trial by jury; rather, the *sole* constitutional issue the Court evaluated in each instance was the inferred constitutional right of a defendant to develop a defense.[223] So while "[t]he Supreme Court has repeatedly reaffirmed the constitutionality of evidence rules, like Rule 403,"[224] the Court always has done so by looking only at constitutional provisions *other than* jury trial rights.

That distinction is more than incidental. In *Blakely*, the underlying policies animating FRE 403—efficiency and accuracy—were addressed and rejected by the Court *in the context of jury trial rights,*[225] and for good reason. The Constitution intentionally creates a system that gives priority to "jury trial over rationality."[226]

---

221. *Id.* at 324–25, 328–31. The Court recognized that in different circumstances such an evidentiary exclusion could occur. *Id.* at 324. That confirms again that accuracy is not a constitutional value.

222. *Id.* at 326–27 (quoting Crane v. Kentucky, 476 U.S. 683, 689–90 (1986))(internal quotation marks omitted).

223. *See id.* at 324–31; United States v. Scheffer, 523 U.S. 303, 308 (1998); Montana v. Egelhoff, 518 U.S. 37, 42 (1996) ("[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible."); Rock v. Arkansas, 483 U.S. 44, 56, 58, 61 (1987); *Crane*, 476 U.S. at 683, 689–90; Delaware v. Van Arsdall, 475 U.S. 673, 678–79 (1986); California v. Trombetta, 467 U.S. 479, 485 (1984); Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983); Chambers v. Mississippi, 410 U.S. 284, 302–03 (1973); Spencer v. Texas, 385 U.S. 554, 564 (1967).

224. WEISSENBERGER & DUANE, *supra* note 170, § 403.1; *see also Egelhoff*, 518 U.S. at 42 (such rules are "familiar and unquestionably constitutional").

225. Blakely v. Washington, 542 U.S. 296, 313 (2004).

226. Dripps, *supra* note 128, at 1418.

So the Court actually has, in all but name, already held that FRE 403 is unconstitutional.

One author has argued that FRE 403 can be justified as a tool for protection of witnesses from abusive and unscrupulous counsel.[227] But as *Herrera* makes clear, the Constitution does not guarantee a right to an accurate trial, or even a fair trial; rather, the Constitution only guarantees an *opportunity* to a fair trial.[228] And the only mention of witnesses in the Constitution is from the perspective of the parties, not the witness—a party can compel attendance of witnesses and can confront the opposing party's witnesses.[229] Neither of these rights takes into consideration the witness's preferences.

In *Galloway v. United States*, the Court noted that

> [t]he rules governing the admissibility of evidence, for example, have a real impact on the jury's function as a trier of facts and the judge's power to impinge on that function. Yet it would hardly be maintained that the broader rules of admissibility now prevalent offend the Seventh Amendment because at the time of its adoption evidence now admitted would have been excluded.[230]

And, of course, history teaches that this must be so. First, at most the Seventh Amendment assumed the right to exclude from the jury hearsay evidence—which has its own idiosyncratic issue of confrontation rights—as opposed to generically excluding any time consuming or otherwise nettlesome evidence.[231] More fundamentally, as discussed above, the Sixth and Seventh Amendments anticipated that in jury trials, the jury would hear all relevant evidence, leaving it to the jury, not the judge, to make of it what it would.[232]

There is an important distinction here. The jury constitutionally has the right to hear all *relevant* evidence, not *all* evidence. The definition of relevance does not encompass *any* marginally

---

227. *See* Dolan, *supra* note 50, at 229.

228. Herrera v. Collins, 506 U.S. 390, 404–05 (1993).

229. U.S. CONST. amend. VI.

230. 319 U.S. 372, 391 n.22 (1943).

231. *See* Dripps, *supra* note 128, at 1397–98 & nn.33–34.

232. *See* U.S. CONST. amend. VI; U.S. CONST. amend. VII; Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 378 n.145 (1995) (quoting Byrd v. Blue Ridge Rural Elec., 356 U.S. 525, 537 (1958)); Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1118 (2003).

helpful fact to *any* issue of marginal materiality; rather, the fact has to bear on an issue *of consequence.*[233] It is, however, unquestioned relevant and material evidence on issues of consequence that FRE 403 nonetheless allows to be excluded[234] and which constitutionally cannot be excluded.[235]

C. *Accounting for* Galloway *and the Historical Test in Civil Trials*

In doing any constitutional analysis of a possible impairment of the right to trial by jury, one other issue must be dealt with, at least in the context of civil trials. Among the textual differences between the constitutional guarantees of criminal juries and the constitutional guarantee of civil juries is that Article III and the Sixth Amendment guarantee a right to trial by jury in "all" criminal trials, while the Seventh Amendment guarantees a right to trial by jury in civil trials of "suits at common law."[236] The Supreme Court has interpreted the "suits at common law" language of the Seventh Amendment under the so-called "historical test," holding that not all civil cases have a jury trial right; rather, the way to determine whether a contemporary case carries a jury right is to postulate hypothetically that a contemporary federal civil case, filed in federal district court under current-day laws, instead had been filed in England in 1790s, and to ask whether it then would have been filed in the common law courts or in the

---

233. *See* FED. R. EVID. 401(b).

234. This is the answer to Professor Dripps hypothetical about evidence that a manslaughter victim was a serial rapist. Dripps, *supra* note 128, at 1417–18.

235. Professor Dripps concludes that "the law of evidence does not trust juries to rationally evaluate some forms of exculpatory evidence." Dripps, *supra* note 128, at 1413. While that is an accuracy concern, plainly a similar sentiment can be said about efficiency—the law of evidence does not trust advocates to make good choices about case presentation either. Judges also are highly critical of lawyers in this regard. *See, e.g.*, *Clemens Judge Demands Trial Speed Up to Stem Jury Frustration*, HOUSTON CHRON. (May 8, 2012), http: //blog.chron.com/clemens/2012/05/clemens-judge-demands-trial-speed-up-to-stem-jurys-frustration/. Those concerns may be well-taken, but the Constitution makes a different choice.

236. U.S. CONST. amend. VII. For a discussion of the possible interpretations of "suits at common law," see generally Klein, *supra* note 37. It also bears noting that the Supreme Court holds that "all" in Article III and the Sixth Amendment is only a reference to "serious" crimes. *See* Baldwin v. New York, 399 U.S. 66, 68 (1970); Duncan v. Louisiana, 391 U.S. 145, 158 (1968). For a detailed explication of this textual interpretation, see Felix Franfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926). While this limitation on interpreting "all" may implicitly animate a notion of efficiency, that does not change the thesis of this article, as that would not juxtapose limiting the extant jury trial right to serve efficiency, but rather redefines the scope of the jury trial right.

equity courts.[237] The Court sometimes has applied the same test to determine whether various civil trial reforms are permissible under the Seventh Amendment.[238] Thus, an analysis of the constitutionality of FRE 403 in civil jury trials could require an analysis of whether eighteenth century England had an evidentiary counterpart allowing exclusion of relevant evidence from jury consideration.

The constitutional analysis "could" require an historical analysis, rather than "does" require it, because of one of the holdings in *Galloway v. United States*.[239] Galloway was a World War I veteran who decades later sought benefits for what today might be called PTSD.[240] At trial, after Galloway rested, the trial court granted a motion for directed verdict.[241] On review, the Supreme Court evaluated under the Seventh Amendment the constitutionality of directed verdicts.[242] The Court began this analysis with an apparent holding that "[t]he [Seventh] Amendment did not bind the federal courts to . . . the specific rules of evidence then prevailing [in eighteenth Century England]."[243] While this line from the opinion neither was a holding nor was supported by the cases the Court cited,[244] if it is taken at face value then no historical analysis is required of FRE 403. But because this line from *Galloway* is actually dicta and is unsupported, at least a cursory historical analysis is appropriate as part of a complete constitutional evaluation of FRE 403.[245]

---

237. *See* Klein, *supra* note 37, at 1020–30.

238. *See, e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 376–84 (1996) (applying the historical test to determine whether construction of patent claims must be decided by a jury).

239. 319 U.S. 372 (1943).

240. *Id.* at 372–74.

241. *Id.* at 373.

242. *Id.*

243. *Id.* at 390; *see also* Dimick v. Schiedt, 293 U.S. 474, 491 (1935) (Stone, J., dissenting) ("[T]he Seventh Amendment guarantees that suitors in actions at law shall have the benefits of trial of issues of fact by a jury, but it does not prescribe any particular procedure by which these benefits shall be obtained, or forbid any which does not curtail the function of the jury to decide questions of fact as it did before the adoption of the Amendment. It does not restrict the court's control of the jury's verdict, as it had previously been exercised, and it does not confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791.").

244. *See* Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 276–83 (2009).

245. The Court seemed to return to something akin to the historical test in *Montana v. Egelhoff*, stating that

At first blush, analysis of FRE 403 under the historical test might seem particularly tricky. After all, while specifically 403-like exclusionary rules were not even conceptualized until the nineteenth century, the 1790s were, as best can be determined, *precisely* the moment when generally the most ubiquitous of evidentiary exclusionary rules—hearsay—began to coalesce.[246] So hearsay arguably is at least a rough historical analog for FRE 403, albeit an imperfect one.

But there is scant, if any, reason to believe that any *other* basis for exclusion of evidence existed in the 1790s in England. A series of English cases contemporaneous with the ideas captured in the Sixth and Seventh Amendments shows the respective roles of judge and jury—in each the judge disagreed with the verdict, believing the evidence could not support it; and in each, the solution was a new trial, rather than entry of judgment notwithstanding the verdict.[247] These cases not only reflected "the ever-shifting line that divided the responsibilities of judge and jury" but also reflected that, even in cases involving no jury question of fact, the solution was "to give the case to the jury with strong instructions" rather than enter a non-suit or directed verdict.[248]

As these cases suggest, "judges had a lively relationship with juries. Judges would question jurors, argue with them, and even send them back to reconsider their verdict."[249] But in the end, the

---

> preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally within the power of the State to regulate procedures under which its laws are carried out, . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

518 U.S. 37, 43 (1996) (alteration in original) (citations omitted) (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977) (internal quotation marks omitted); *see also* Cooper v. Oklahoma, 517 U.S. 348, 355 (1996); Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules . . . ."). There can be little debate, however, that the Framers considered jury rights to be fundamental.

246. *See* Gallanis, *supra* note 43, at 500–03, 530–31, 533–37.

247. *See* 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 158–60 (1992).

248. *Id.* at 160.

249. Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 522–23 (1996); *see also* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1, 119 (1983). It does bear noting, at least in passing, that the

only time a judge could keep facts from the jury was when the parties agreed to all of the facts and the conclusions deriving from them; all disputed facts, no matter how improbable, went to the jury to decide.[250]

So, while the historical test is a different analytical approach, the endpoint is the same: FRE 403 is unconstitutional.

VI. WHY THIS MATTERS

The potential implications of FRE 403 being unconstitutional are both micro and macro in scale. The proponents of FRE 403 essentially argue that in the particular context of trial management, FRE 403 is the thin doctrinal line between efficiently reached just verdicts and chaos. Thus, if FRE 403 is unconstitutional, this could put the functionality of the entire system at risk. And that's the *micro* implication.

The macro implication is that efficiency, accuracy, and similar apparently extra-constitutional rationales pervade jurisprudence as a justification for substantive, procedural, and evidentiary doctrines that themselves implicate constitutional rights. If these rationales are not constitutional values, then large swaths of our jurisprudence may be unconstitutional.

A. *The Micro Problem*

FRE 403 is described as the "'cornerstone'" of the Federal Rules of Evidence.[251] Court opinions reflect that FRE 403 is seen as the best tool to respond to unethical or neurotic attorneys.[252] The perception is that trials will be of unwieldy length and obtuseness without the judge stepping in to regulate matters, and FRE 403 is the vehicle to do so.

An initial response to this concern is that it "ain't necessarily so." There is no particular reason to think that any attorney, other than perhaps one trying their first case, will believe putting in unlimited and confusing evidence is a strategy likely to be re-

---

historical test concerns itself with civil trials, and this quotation is a description of criminal trial practice.

250. *See* Thomas, *supra* note 23, at 143.

251. Gold, *supra* note 70, at 497 (citations omitted).

252. *Id.* at 508.

warded.[253] In fact, lawyers routinely self-edit the presentation of evidence. And juries often disregard evidence.[254] But perhaps even more to the point, the Federal Rules of Evidence were only adopted in 1975. The first two hundred years of trials in America were not notably more unruly, long, or unjust than the next thirty-five years under the Federal Rules of Evidence.

Also, the premise of much of FRE 403—that certain evidence is beyond the ability of the jury to handle—is dubious. At the time of the promulgation of FRE 403, academics simply assumed that jurors could not be accurate and dispassionate decision makers.[255] But later scholars question the skepticism toward the capabilities of juries.[256] And empirical evidence seems to support the later scholars.

For example, the quintessential 403 exclusion is evidence of prior crimes in order to protect the defendant from improper conviction of a similar offense.[257] This is called improper "propensity evidence." Courts consistently have voiced concern with so-called propensity evidence.[258] In a decision pre-dating the Federal Rules of Evidence, the Supreme Court affirmed that prior crimes evidence could not be used to prove propensity: "The inquiry is not

253. For example, there is already a roughly analogous strategic choice for criminal lawyers right now—if no one plea-bargained, then the entire system would grind to a halt and no one would get convicted. Attorneys do not make this choice, and while it in part certainly is explained by the "prisoner's dilemma" nature of the decisional matrix, it could be explained, at least in part, by the likely consequences that would be borne by the attorney's own clients.

254. Indeed, nothing would prevent the jury itself from having a more robust and proactive tool to regulate evidence *See, e.g.*, Stephan Landsman & James F. Holderman, *The Evolution of the Jury Trial in America*, 37 LITIG. 32, 36–37 (2010) (discussing the movement of allowing or even encouraging juror questions). There is no systemic reason why a jury could not itself proactively indicate that it found unnecessarily cumulative further evidence on an issue, or that it wished an explanation of the relevance of seemingly confusing evidence. Likewise, there is no reason to think judges are particularly gifted amateur psychologists, able to accurately predict how juries will react, or overreact, to types of evidence.

255. *See, e.g.*, Dolan, *supra* note 50, at 227 ("Given the makeup of our juries, it is legitimate to conclude that jurors *can* be prejudiced by evidence.").

256. *See* Crump, *supra* note 2, at 625–28.

257. *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 174 (1997).

258. The exclusion of similar acts or crimes is an evidence principle that post-dates the Constitution and the Sixth and Seventh Amendments both in England and in the United States and evolved without reference to the constitutional protection of trial by jury. *See generally* Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 989 (1938).

rejected because [the evidence] is irrelevant; on the contrary, it is said to weigh too much with the jury . . . ."[259]

In an iconic post-rules evidence opinion—*Old Chief v. United States*—Johnny Lynn Old Chief was charged with assault with a deadly weapon, using a firearm in a crime of violence, and being a felon in possession of a firearm.[260] An element of the felon in possession charge was, of course, that he in fact had a prior felony conviction.[261] He did—for assault causing serious bodily injury.[262] The defense offered to stipulate that he had a prior felony conviction, thus keeping from the jury the knowledge of precisely what the prior conviction was for.[263] The government declined the offered stipulation, and the trial judge allowed the government to inform the jury that the prior conviction was for assault.[264] On review, the Court held that the nature of the prior felony was relevant, as defined by FRE 401, to the felon in possession charge, even if stipulated to, but that the particulars should be excluded under FRE 403.[265] In other words, the Court held that while the nature of the particular prior felony *was* relevant, the Court also held that the trial judge abused his discretion by allowing the government to decline the proffered defense stipulation; rather, under FRE 403 the trial judge was *required* to exclude the admittedly-relevant evidence because of a concern that the jury could not be trusted to weight it correctly in evaluating guilt.[266]

Yet, when studied empirically, it turns out that the premise of both of these holdings—that juries will not properly understand or weigh this evidence—is wrong. Professors Ronald Allen and Larry Laudan did empirical work because "[i]n the majority of legal systems in the developed world, triers-of-fact are routinely made aware of the prior convictions of the accused."[267] Yet, all of the hypotheses underlying the contrary position in FRE 403 "are empirically testable . . . have already been tested and most stand

259. Michelson v. United States, 335 U.S. 469, 475–76 (1948).
260. 519 U.S. at 174.
261. *Id.* at 174–75.
262. *Id.* at 175.
263. *Id.* at 175–76.
264. *Id.* at 177.
265. *Id.* at 186–92.
266. *Id.* at 191–92.
267. Larry Laudan & Ronald Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 494 (2011).

refuted or, at least, rendered highly implausible."[268] Their work revisited the extant empirical work and found "existing policies on the admissibility of prior crimes evidence are deeply flawed, because either they are built upon a set of erroneous a priori assumptions about juror inferences or they ignore critical aspects of police and prosecutorial behavior."[269] The paper analyzed both data from thirty years of mock jury studies and forty years of actual jury trial studies.[270] As Professors Allen and Laudan concluded, "[W]e now have solid empirical evidence—instead of intuitions—that the current system is both intellectually dishonest and that it does little or nothing to aid those defendants whom it was specifically invented to protect."[271]

Similarly, to some extent, excluding evidence in pursuit of "accuracy" implicitly assumes that jurors, stripped of distracting evidence, can and will decide cases logically; empirical evidence belies this implicit assumption.[272] Only time will tell whether empirical evidence will expose that the other assumptions underlying FRE 403 are similarly flawed. But those assumptions may be more articles of faith than of evidence.

The bottom line for purposes of this article, however, is even if FRE 403 is, from a system perspective, the "right" choice, it is not a choice constitutionally permissible in civil or criminal jury trials. The Framers were aware of the risk of interminable trials—such trials described the chancery courts of the day, which, ironically, were not jury trials. In the 1940s, one argument raised for the later rejected Model Rule 303 was that, in its absence, trials would be like those in late eighteenth century England, where trials were long and rambling because of no restrictions on admitting relevant evidence:

> If any and all evidence may be admissible which—in terms of some commonly accepted generalization about human conduct or natural events—would operate to any extent to alter the apparent probability of some material proposition, the field of judicial inquiry in most cases would be almost unlimited. Trials could come to an end only by the exhaustion of lawyers' ingenuity or clients' money, and the trial judge or jury might be overwhelmed and bewildered by the multiplic-

268. *Id.* at 496.
269. *Id.* at 500.
270. *Id.* at 500, 503.
271. *Id.* at 527.
272. *See generally* Blume, Johnson & Paavola, *supra* note 213, at 1090–91 & n.142.

> ity of collateral issues. *Such a rule would result in the apparent justice and the practical injustice characteristic of English Chancery practice a century and a half ago.*[273]

Plainly, efficiency was not a hallmark of jurisprudence at the time of the drafting of the Constitution.

The Framers were aware of the possibility of confusing or misleading juries. The letters and writings in the ratification debates discuss this issue repeatedly.[274] With open eyes, the Framers of the Constitution made no mention of these concerns. Rather, they chose the right to trial by jury. That choice cannot be ignored.[275]

B. *The Macro Problem*

If FRE 403 falls, what also may fall for the same or similar reasons? Or put another way, what other rules within the litigation rulebook promote system goals such as efficiency at the expense of jury fact finding? This is a more comprehensive and thoughtful survey than space permits here. But consider just a few examples. FRE 404 to 406, 412 to 415,[276] and 608 to 609, each addresses the admissibility of seemingly relevant aspects of a witness's past, and excludes that evidence using a 403-like balance, sometimes with explicit cross-reference to FRE 403.[277] FRE 407 to 411,

---

273. George F. James, *Relevancy, Probability and the Law*, 29 CAL. L. REV. 689, 701 (1941) (emphasis added).

274. *See supra* Section III.

275. Arguably, if FRE 403 is unconstitutional, then tinkering with it to make it better will not work. *See, e.g.*, Crump, *supra* note 2, at 651–53.

276. Federal Rules of Evidence 412 through 415 codify the "rape shield" doctrine and related special evidence rules for sexual offenses. *See* FED. R. EVID. 412; FED. R. EVID. 413; FED. R. EVID. 414; FED. R. EVID. 415. The rape shield law, in particular, might be thought of as FRE 403 on steroids. While the constitutionality of rape shield laws has consistently been confirmed, rarely has the challenge been on the grounds of jury trial rights, and the few courts that have considered the statutes as a possible infringement of the right to trial by jury have upheld the statutes on the basis that irrelevant or immaterial evidence is being excluded. *See* Michelle J. Anderson, *From Chastity Requirement to Sexual License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 152–61 (2002). *See generally* Joel E. Smith, Annotation, *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R. 4th 283 (1980). In other words, no court has addressed whether relevant and material evidence of a rape victim's sexual past may be excluded from the jury. Further, FRE 412(b)(1)(C) provides that in criminal cases, evidence otherwise excluded under the Rape Shield Law should be admitted if "exclusion would violate the defendant's constitutional rights." FED. R. EVID. 412(b)(1)(C). This would seem, in the criminal context, to either intentionally or unintentionally solve the possible constitutional problem.

277. The threshold question of relevance remains a legal determination for a judge, and so is unaffected by the argument in this article, which addresses only whether a judge can

610, and much of privilege law, take relevant evidence and exclude it for public policy reasons external to the trial.[278] The entirety of article VII of the Rules of Evidence, regulating opinion testimony, is delimiting potentially relevant evidence based on 403-like weighing by the judge.[279] The evidence exclusion sanctions permitted under FRCP 11, 26, and 37, as well as the inherent power of the court to impose evidence exclusion sanctions for contempt and for spoliation, are premised on system goals outweighing jury fact-finding.[280] Arguably, FRCP 8, 50, and 56 involve a judge weighing or re-weighing evidence in lieu of leaving matters exclusively to jury verdict.[281] Federal Rule of Criminal Procedure 16 supports, in the criminal context, potential exclusion of evidence as a discovery sanction.[282] Criminal evidence exclusion sanctions, such as "fruit of the poisonous tree," may merit revisiting under a jury trial right analysis. Motion in limine practice in civil cases may violate the Constitution. And in a variety of Supreme Court cases, including the ones discussed earlier in this article, the Court asserts "practicality" and efficiency as system necessities justifying delimiting otherwise robust constitutional rights.

This will be the subject of what I anticipate to be my next article—what exactly would the system look like if we took jury trial rights seriously? What evidence exclusion doctrines have, or do not have, grounding in a constitutional principle? If all exclusion rules that lack constitutional grounding were removed from the system, would that be palatable, or would it require some sort of adjustment? And if so, what adjustment would the Constitution allow?

But for the moment, this much can be said. FRE 403, by design, is the cornerstone of the Federal Rules of Evidence. And FRE 403 is unconstitutional.

---

exclude evidence already determined to be relevant. FED. R. EVID. 104.

278. *See* Wesley MacNeil Oliver, *Toward a Better Categorical Balance of the Costs and Benefits of the Exclusionary Rule*, 9 BUFF. CRIM. L. REV. 201, 251–57 (2005) (describing various policy reasons for excluding relevant evidence).

279. *See* FED. R. EVID. art. VII. Because hearsay is grounded in the constitutional right to confront one's accuser, at least in criminal trials it would be subject to an entirely different analysis.

280. FED. R. CIV. P. 11; FED. R. CIV. P. 26; FED. R. CIV. P. 37.

281. FED. R. CIV. P. 8; FED. R. CIV. P. 50; FED. R. CIV. P. 56.

282. FED. R. CRIM. P. 16(d)(2).

VII. CONCLUSION

This article develops two ideas. First, that it is at least plausible, and perhaps compelling, that FRE 403 violates the constitutional guarantees of a right to trial by jury. Second, that the possible constitutional infirmity of FRE 403 has never been discussed in case law, scholarly publication, or code development. Frankly, both ideas are startling.

FRE 403 truly is the cornerstone of modern trial practice. But the system should not ignore the Constitution when it does not suit system needs. Until amended, we simply have an inefficient Constitution.

***