

# The Nature of Legal Evidence†

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"I will tell an old-world story," responds Critias to Socrates, "which I heard from an aged man . . . ."¹ The tale, he comments, "is certainly true, having been attested by Solon, who was the wisest of the seven sages . . . and he told the story to Critias, my grandfather, who remembered and repeated it to us." The grandfather, "at the time of telling it, was, as he said, nearly ninety years of age, and I was about ten."² And so Critias, the grandson, spins the tale of ancient Atlantis, which "was the leader of the Hellenes. . . . But afterwards there occurred violent earthquakes and floods; and in a single day and night of misfortune all your warlike men in a body sank into the earth, and the island of Atlantis in like manner disappeared in the depths of the sea."³

The basis for the tale's authenticity—legendary hearsay or pure belief—is only one evidentiary approach recognized by Plato. Later on, Timaeus states a second approach, the rule of factual probability: "Enough if we adduce probabilities as likely as any others . . . and we ought to accept the tale which is probable and inquire no further."⁴ A third approach, which in retrospect may be termed evidentiary actuality, proceeds from the results of observational astronomy⁵ and anatomical dissections⁶ and is based on sense perception.

These three approaches may be conveniently used to analyze both the nature of evidence generally⁷ and the reasons for the special na-

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1. PLATO, *TIMAEUS* 5 (3d ed. B. Jowett transl. 1949).

2. *Id.*

3. *Id.* at 9.

4. *Id.* at 13. Timaeus later states: "Remembering what I said at first about probability, I will do my best to give as probable an explanation as any other—or rather, more probable. . . ." *Id.* at 31.

5. *Id.* at 20-21.

6. *Id.* at 27-28, 52-65.

7. It is interesting to see the use of the term "evidence" in a general sense by two revered legal historians in volumes hailed as masterpieces. See, e.g., 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 40 (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND]: "As regards the constitution of Anglo-Saxon courts, our di-

ture of legal evidence. In every nonlegal field, any item is considered as bearing on the problem, regardless of its degree of importance, so long as those who consider the item feel that it is worthy of being appraised and evaluated.<sup>8</sup> Evidence, in this general context, may therefore include written (documentary), oral (testimonial), real (the actual physical or demonstrative), and even subjective (beliefs, views)<sup>9</sup> items that can be used in making a determination. Thus, whatever bears substantively on the merits of the question—historical data, anthropological artifacts, economic statistics, scientific results, even Biblical narratives—may properly be termed evidence.<sup>10</sup>

But when lawyers speak of evidence, they usually refer only to "facts," although this may stand for various things: for example, *an act*; a completed and operative *transaction*; a designation of what *exists*; or "generally, as indicating things, events, actions, conditions, as happening, existing, really taking place."<sup>11</sup> Legal evidence<sup>12</sup> may be divided into two broad areas: first, substantive facts that have been accepted by a court of law for the jury's consideration (that is, the actual legal evidence); and, second, procedural rules, usually termed the law of evidence, that constitute a set of exclusionary legal requirements or hurdles. "This excluding function is the characteristic one in our law of evidence."<sup>13</sup>

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rect evidence is of the scantiest. We have to supplement it with indications derived from the Norman and later times." As employed in this paper, "general evidence" compasses this broad spectrum of uses.

8. See also A. Brecht, *The Latent Place of God in Twentieth-Century Political Theory*, in *THE POLITICAL PHILOSOPHY OF ARNOLD BRECHT* 148 (M. Forkosch ed. 1954); S. Hook, JOHN DEWEY: AN INTELLECTUAL PORTRAIT 54-55 (1939). W. JAMES, *PRAGMATISM* 72-73 (1916) [hereinafter cited as JAMES]:

Now pragmatism, devoted though she be to facts, has no such materialistic bias as ordinary empiricism labors under. Moreover, she has no objection whatever to the realizing of abstractions, so long as you get about among particulars with their aid and they actually carry you somewhere. Interested in no conclusions but those which our minds and our experiences work out together, she has no *a priori* prejudices against theology. *If theological ideas prove to have a value for concrete life, they will be true, for pragmatism, in the sense of being good for so much. For how much more they are true, will depend entirely on their relations to the other truths that also have to be acknowledged.*

9. See, e.g., 6 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* §§ 1714-40 (3d ed. 1940) [hereinafter cited as WIGMORE] for numerous illustrations of subjective statements under his exceptions to the hearsay rule. In political science, business affairs, marketing, and other activities, the psychological factor is a recognized determinant. For example, in elections voters may follow emotions, and in stock markets traders are sometimes inclined to follow hunches.

10. See text accompanying notes 97-98 *infra* for several definitions of evidence.

11. J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 190-91 (1898) [hereinafter cited as THAYER].

12. See further definitions in text accompanying notes 99-104 *infra*.

13. THAYER 264. On other aspects of evidence, see notes 105-16 *infra* and accompanying text.

The first of these two areas will be our concern. And yet, while the nature of this legal evidence may be stated simply, its rationale and features cannot be comprehended without a preliminary understanding of the nature of evidence generally (part I), and the historical (and procedural) features of legal evidence, especially with reference to the evolution of the jury system (part II). The nature of legal evidence, as a separate concept, is discussed thereafter (part III).

## I

### PARADIGMS OF NONLEGAL EVIDENCE

An initial analysis of the three Platonic classifications—the two extremes (hearsay and evidentiary actuality) and the middle probability approach—may clarify the nature and acceptability of evidence both generally and in law, since the law operates within a context of facts.<sup>14</sup> Evidence and fact are ordinarily intertwined, but they need not be. Keeping this in mind, we may restate the Platonic approaches to evidence: subjective beliefs founded only on faith (old wives' tales, rumor, gossip, or the path of the moon) with no imprint of the five senses or man's reason upon them, which may therefore be said to represent a factual or evidentiary "zero percent" (of sense perception); at the other extreme, the "hundred percent," or actual physical, evidentiary item which is brought into court (for example, the book or film deemed to be obscene); between these extremes there is a probability as to a fact or evidence.

The first two classifications may variously be denominated as pure theory versus actuality, fiction versus fact; the last one, probability, can never be pinned down, even though ostensibly dealing with the demonstrable. The probability scale is strictly between zero percent and one hundred percent, and the indicator moves up or down as facts are pumped into or out of its reservoir.<sup>15</sup> This holds true in both the

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14. See Rosenne, *Directions for a Middle East Settlement—Some Underlying Legal Problems*, 33 LAW & CONTEMP. PROB. 44 (1968).

15. A separate problem arises as to whether certainty can be tied in with facts, so that no element of faith or nonfact enters. This question is illustrated by a development in Descartes' thought. Initially, in his 1637 *Discourse*, he would never "receive anything as true which I did not know evidently to be so . . . and to include nothing more in my judgments than what presented itself so clearly and so distinctly to my mind, that I would not have any occasion to doubt it." Quoted in Morris, *Descartes and Probable Knowledge*, 8 J. HIST. PHIL. 303, 303 (1970). This, of course, rejects probability as a basis for knowledge and insists upon certainty. And yet Descartes was perfectly willing to base knowledge upon "causes which are proved by effects," that is, he accepted the fallacy of affirming the consequent. And, even more to the point, he wrote that a group of facts "when they are considered separately, lead only to probability; but, being considered all together, they have the force of a demonstration." *Id.* at 304. Morris notes that some of Descartes' contemporaries would have recognized that such a combination of probabilities would never give certainty. *Id.*

judicial and nonjudicial areas of knowledge and conduct.<sup>16</sup> Of course, to be considered at all, a fishwife's tale, the baying of the dog at the moon, or actual physical evidence placed before the investigator, must be somewhat relevant: it must bear upon and apply to the problem being investigated.<sup>17</sup> But in nonlegal fields there is a deliberate and allowable flexibility such that, within each, the overall concept of evidence is narrowed by the field's own special rules, policies, or purposes. One should, therefore, speak of biological evidence, historical evidence, religious evidence, sociological evidence, and so forth.

The practicing lawyer's trial tactics will ordinarily include testimony given by experts in the special field(s) of knowledge involved in a case. The rules of legal evidence apply generally in this situation so as to permit or reject the proffered testimony; still, within each such discipline the specialist's testimony may be separately and internally questioned. That is, each branch of learning formulates and internally applies its own concepts (rules) for utilizing facts (evidence) in drawing expert inferences or supporting conclusions. When the specialist ventures into new areas, he may find his results challenged because his discipline's internal procedures and formulations are unacceptable. In other words, the nature of each discipline's substantive evidence is affected by its own rules of exclusion, which are not the same for other disciplines, and since different circumstances and ends permit these rules to be loose or tight, no cavalier rejection of them by others should occur. Yet much of the evidence from other fields may be rejected in a court of law, even though it is acceptable for their own disciplines and may be considered substantial enough for them to draw their own inferences and construct their own branches of knowledge. Since it is the jury system that spawned the exclusionary probative rules concerning the general evidence originally admitted, thereby making it legal (limited) evidence, an understanding of some aspects of the jury's evolution is necessary in seeking the policies underlying these rules.

## II

### DEVELOPMENT OF THE JURY SYSTEM—ITS EFFECT ON THE LAW OF EVIDENCE

Since it was not the jury's province to determine the facts solely

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16. See the letter by Hans Bethe, Nobel laureate in physics, to N.Y. Times, Feb. 28, 1971, § E, at 12, col. 3, which states that the Manhattan Project in 1945 involved "a better than 90 per cent probability that the atomic bomb would in fact explode," and that "we should act [in foreign policy] on high technical probability rather than requiring certainty . . . ."

17. See note 117 *infra* on the admissibility of items before their weight is to be considered, with relevancy applying to admissibility.

on the evidence produced in court until well into the 17th century, the legal rules which regulated the admissibility and exclusion of such evidence could not begin to develop until that time. Historically, it was not until the two centuries following that sufficient experience was attained with the new bifurcation of court and jury responsibility to allow the development of regularly applied procedural rules. The law of evidence, in this respect, paralleled its substantive and procedural forebears, especially the development of the jury: "[The] law of evidence grew out of the jury system," writes Thayer; it is "a piece of illogical, but by no means irrational patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system."<sup>18</sup>

### A. *The Early Common Law Experience*

There were no legalistic rules of evidence, as we know them, in the pre-Norman and early Norman years. To understand the reasons for this, and to see also the growth of our current rules of evidence, requires a consideration of procedures used in the early trials, and their evolution into our modern legal system, replete with rules for getting the facts, ascertaining the truth, and arriving at a verdict.

The so-called trials in the Anglo-Saxon period were not really concerned with evidence or reasoned law and justice. They were, rather, methods of proof<sup>19</sup> used primarily for the personal rightings of wrongs.<sup>20</sup> Their inflexible judicial operations made "no attempt to apply any measure of probability to individual cases. Oath was the primary mode of proof . . . going not to the truth of specific fact, but to the justice of the claim or defence as a whole . . . [and,] if duly

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18. THAYER 508-09 (first referring to Sir Henry Maine's views and then quoting him). See also Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141, 142 (1889), stating that the law of evidence "developed in England because they had the jury in England, or rather because in England they did not give up the jury." Thayer footnotes a quotation attributed to Maine, that "the English law of evidence would probably never have come into existence but for one peculiarity of the English judicial administration,—the separation of the judge of law from the judge of fact, of the judge from the jury." *Id.* at 142 n.2. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 304 (1931) [hereinafter cited as HOLDSWORTH]: "The modern witness, and the modern law of evidence only gradually began to appear when, in the course of the sixteenth century, the jury were losing their character of witnesses."

19. 2 POLLOCK & MAITLAND 598: "We must once for all discard from our thoughts that familiar picture of a trial in which judges and jurymen listen to the evidence that is produced on both sides, weigh testimony against testimony and by degrees make up their minds about the truth. . . . We have not to speak of trial; we have to speak of proof." See also THAYER 16 n.1.

20. "It is the feebleness of executive power that explains the large space occupied in archaic law by provisions for the conduct of suits when parties make default. In like manner the solemn prohibition of taking the law into one's own hands without having demanded one's right in the proper court shows that law is only just becoming the rule of life. . . ." 1 POLLOCK & MAITLAND 37.

made, was conclusive . . . ."<sup>21</sup> Their procedures were formulary, not evidentiary: if one failed to produce the proper number<sup>22</sup> of persons to swear,<sup>23</sup> or was disqualified from taking an oath, he "had to go to one of the forms of ordeal."<sup>24</sup> For example, the Saxon methods of proof included compurgation (oath helpers)<sup>25</sup> and the ordeal;<sup>26</sup> later, after the Norman conquest, trial by combat was introduced by William. Thus, common law trials "were methods of proof; and the party who went through the form of proof—witnesses, battle, compurgation, or ordeal—won his case."<sup>27</sup>

It is from the interplay among such native customs, and their rationalizing "by ideas drawn from the civil and canon law,"<sup>28</sup> that lawyers like Bracton, with a background "of a more rational system of procedure,"<sup>29</sup> eventually developed the more sophisticated system that

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21. *Id.* at 38.

22. "Only two essoins [excuses for delay] are allowed in any possessory recognition, and none at all in the writ of novel disseisin." 1 POLLOCK & MAITLAND 64.

23. "[T]he credibility of the plaintiff's and defendant's bands of witnesses was decided in primitive times and much later, not by the nature of their testimony, but simply by looking to see if they all told the same tale and by counting their heads." 1 HOLDSWORTH 302.

24. 1 POLLOCK & MAITLAND 39.

25. *E.g.*, about 990, one party (Wynflaed) to a lawsuit "produced four witnesses" who swore to her right to the possession of the disputed land, whereupon King Ethelred ordered a shire court, consisting of all the great lords, to settle the matter. Wynflaed produced 36 persons willing to swear to her right, whereupon the court dispensed with the oath. During Canute's reign (1016-35) a son sued his mother for some land; in court the husband of the mother's kinswoman did not know the disposition by the mother of the land; the court ordered three thegns (lesser nobles) and the husband to ride to the mother to find out what disposition the latter had made of the land; the mother was angered, called her kinswoman before her, and announced to the messengers that it was to her kinswoman that she granted her possessions, directing the thegns to announce her message to the court and inform them of this grant "and not a thing to my own son, and ask them to be witness of this," which the thegns did; whereupon the court gave the possession to the kinswoman. B. LYON, *A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND* 94-95 (1960).

26. One such method was the trial by hot water; another was the carrying of a hot iron for a particular distance. The former involved plunging one's hand wrist-deep into the boiling water (save in cases of treason, where it was elbow-deep). After three days the bandages were removed and the hand inspected, a good (healed) hand being self-evident for the party. 1 POLLOCK & MAITLAND 52. *See also* W. WALSH, *A HISTORY OF ANGLO-AMERICAN LAW* 78-79 (2d ed. 1932). On the older modes of trial, *see* THAYER 7-46, and as to the ordeal, *id.* at 34-39. As to the rationale behind the ordeal and compurgation, Professor Thayer concludes that it "was simply a mode . . . of clearing one's self of a charge." *Id.* at 39.

27. 9 HOLDSWORTH 130. *See* 1 HOLDSWORTH 299-312; THAYER 16: "The old forms of trial (omitting documents) were chiefly these: (1) Witnesses; (2) The party's oath, with or without fellow-swearers; (3) The ordeal; (4) Battle. . . . They were companions of trial by jury when that mighty plant first struck its root into English soil, and some of them live long beside it." *See also id.* at 17, 24, 34, 39; Forkosch, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 TEXAS L. REV. 303, 304 n.6 (1962).

28. 1 HOLDSWORTH 303.

29. *Id.*

included the modern-type jury.<sup>30</sup> The early juries were, however, innovations stemming from power, whether royal or ducal, and were inherited by the Normans from the Frankish kings.<sup>31</sup> After the Norman Conquest of 1066, these institutions were brought over to England.<sup>32</sup> Their size,<sup>33</sup> composition,<sup>34</sup> and use<sup>35</sup> are indicated by sev-

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30. "And so in the thirteenth century we find several cases in which these bands of witnesses [sectas] were examined by the judges, and in which a decision was arrived at by considering the credibility of the tales which they told." *Id.*

31. 1 POLLOCK & MAITLAND 140-42. See L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 443-44 n.7 (1968). Levy disagrees with Van Caenegem's thesis [R. VAN CAENEHEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILLE 103 (1959)] that the jury was native to England and was not some alien import ("The evidence for this thesis seems slim and supposititious").

32. The Normans, of course, continued to use the jury method, and up to Glanville the English law was colored by the former; when the union between the two countries ended in 1205, England came to the fore. Thus Henry II, as Duke of Normandy before ascending the English throne, established the jury "as a right to have this method of proof in certain classes of cases, and in making it obligatory." THAYER 55. See also 1 POLLOCK & MAITLAND 144.

33. The present number of jurors, generally 12, is uncertain and confused in its English origins. This number looms importantly because of pressures to reduce it (or to abolish juries entirely) so as to expedite cases and clear calendars. See generally *Williams v. Florida*, 399 U.S. 78, 87-92 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968). See also note 130 *infra*. THAYER 85-86 discusses the early history:

In early times the inquisition had no fixed number. . . . It may have been the recognitions under Henry II. that established twelve as the usual number; and even there the number was not uniform. . . . In 1199 there is a jury of nine. In Bracton's Note Book, at dates between 1217 and 1219, we see juries of 9, 36, and 40,—partly owing, indeed, to the consent of litigants. We have already noticed that the grand assize was sixteen, made by adding the four electors to the elected twelve, and that recognitions as to whether one be of age were by eight. The attain jury was usually twenty-four; but in the reign of Henry VI. a judge remarked that the number was discretionary with the court.

The number of jurors may also be reflected chronologically in a variety of historical facts. For example, dating from about 997, the laws of Ethelred contain references to jury-like meetings of 12 men. See W. STUBBS, SELECT CHARTERS 85 (9th ed. 1913), quoted in T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 108 (5th ed. 1956). See also B. LYON, *supra* note 25, at 295, which cautions against accepting this origin of the jury as "there is not enough evidence to substantiate this view." Nevertheless, Bishop Stubbs indicates that the number 12 was widely used. 1 F.W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 100-01 (5th ed. 1891). Oath helpers or compurgators [see notes 25 *supra*, 35 *infra*] at first varied with the rank of the parties, but 12 was finally settled upon as the established number. COKE'S LITTLETON 295 (1775).

Various cases speak of groups of 12 men used to decide the issue. There is, for example, a story describing a lawsuit which by 1164 found Henry II asserting that "[a] 'recognition' by twelve lawful men was to decide [the question] . . . ." 1 POLLOCK & MAITLAND 145, 152. See also text accompanying notes 42, 49 *infra*. By "1166 the accusing jury [see note 44 *infra*] becomes prominent. In every county twelve men of every hundred and four men of every township are to swear that they will make true answer to the question of whether any man is reputed to have been guilty of [a specified crime]. Those who are thus accused must go to the ordeal." *Id.* See also THAYER 64, 85-90, 125 n.2. The Articles of Eyre apparently settled on the 12-man jury [1 HOLDSWORTH 268-69] as did a later statute of 1436 in providing for juries to determine attainments. Stat. 15 Hen. 6, c. 5. See generally THAYER 140. Thus, by the time of Coke's *Institutes*

eral considerations: for example, the invaders did not overthrow the Anglo-Saxon customs, practices, and usages indiscriminately, but used these as foundations; the new kings and lords knew little concerning the laws and codes which had regulated the lives of the people in the past; land and its concomitants, in those feudal days, were the basic desire of the rulers, and the settlement of all conflicting claims was a necessary step to a stable reign; money, in the form of taxes, was needed for many purposes; the prerogatives of the king and his nobles were still not too well settled. The last three examples possibly brought about the early types of procedure used. For example, at the outset of his reign, William, in order to know his subjects, their customs, the taxable capacity of the owners of land, and, perhaps, to get facts to settle disputes, had to establish some records (the Domesday Book). Within 20 years after the Conquest, his royal commission had concluded its travels throughout the kingdom, and had called together and made inquiries under oath of responsible and credible men in each community who were acquainted with the facts ("juries") for royal administrative inquiries.<sup>36</sup> This type of body continued to be used by the monarchs for analogous purposes and, in one form or another, is found in practically every nation today.<sup>37</sup>

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(he died in 1633) the number 12 seems to have been settled on as a common law tradition.

34. See generally 1 HOLDSWORTH 331-36, pointing out that jurors were neighbors, knights, and even lords, depending on the type and nature of case involved, and had to be from the vicinity in which the case arose because only they, supposedly, knew the facts of the case. However, there were qualifications—for example, they had to be freemen and own sufficient property—that make it appear as if only the affluent and the élite could become jurors. The situation changed when, in 1705, a statute was passed permitting juries to come from the body of the county, and in 1826 the necessity to have hundredors [see note 33 *supra*] in criminal juries was abolished. As to the summoning of jurors from persons "likely to know," see 1 HOLDSWORTH 332; THAYER 100.

35. The jurors are summoned by a public officer and take an oath which binds them to tell the truth, whatever the truth may be. In particular, they differ from oath-helpers or compurgators [see note 25 *supra*]. The oath-helper is brought in that he may swear to the truth of his principal's oath. Normally he has been chosen by the litigant whose oath he is to support, and even when, as sometimes happens, the law, attempting to make the old procedure somewhat more rational, compels a man to choose his oath-helpers from among a group of persons designated by his adversary or by his judges, still the chosen oath-helper has merely the choice between swearing to set a formula ("The oath is clean that A.B. hath sworn") or refusing to swear at all. On the other hand, the recognitor must swear a promissory oath; he swears that he will speak the truth whatever the truth may be.

POLLOCK & MAITLAND 140.

36. THAYER 47-51 (giving this as the background of Domesday Book). See also H. GALBRAITH, *THE MAKING OF DOMESDAY BOOK* (1961) (stating that the main object of Domesday was not to assess taxes). See generally T. PLUCKNETT, *supra* note 33, at 109 *et seq.*

37. The names may vary, as, for example, a Royal Commission in Great Britain, or a Congressional (Sub-)Committee in the United States.



Thus, the primitive Norman type of (recognitor)<sup>38</sup> jury was originally a body of neighbors<sup>39</sup> called by a public official to answer, under oath, a particular question put to it—to recognize or declare the truth. But whereas Domesday was a public and administrative matter, the early kings were also somewhat involved in private and judicial suits in which a person claimed some right or property against the sovereign. A law suit between private persons in which, for example, the ownership of land was in question also indirectly involved the king as the ultimate owner of the entire realm and the person who could dispose of all property as he saw fit. Normally, however, where one private person sued another, there was no royal or judicial problem. Yet in suits against or involving the crown and its prerogatives, the early kings feared that the testimony of claimants' witnesses would be prejudiced against the crown. The monarch therefore called upon the community to give its sworn knowledge of the relevant facts. For example, the chronicles<sup>40</sup> disclose a case decided about 1080 in which the question was who held church lands when Edward the Confessor died. The King thereupon caused the "summoning of three shires and various nobles, and orders that out of these, several (*plures*) English be chosen to tell, under oath, the facts . . . ."<sup>41</sup>

38. As to the difference between recognitors and compurgators, see note 35 *supra*.

39. See H. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 173 (1886):

Two forms of authority, the King and the Popular Assembly, are found side by side in a great number of the societies of mankind when they first show themselves on the threshold of civilisation. The Popular Assembly and the Popular Court of Justice are in principle the same institution; they are gatherings of the freemen of the community for different public purposes.

He illustrates by referring to Athens and Rome, where the assemblies monopolized power; as the communities spread geographically, and a nation grows, such "popular institutions tend to fall into decrepitude" because of the time, travel, annoyance, and other difficulties flowing from attendance. One remedy was the Athenian fine levied upon the laggard, and the Germanic "sunis" or "essoins" which merely "signifies the ground of legal excuse" given. *Id.* at 174-75. Modern methods need not be discussed, but the summons (subpoena) to attend, the tendering of excuses, the punishments for disobeying, and the attendant procedures, are known generally.

40. See THAYER 54 n.1:

The chroniclers preserve many valuable documents. As regards their narratives we have to remember their bias and their ignorance of technical law, recalling Coke's warning at the beginning of the third volume of his reports: "And for that it is hard for a man to report any part or branch of any art or science justly and truly which he professeth not, and impossible to make a just and true relation of any thing that he understands not, I pray thee beware of chronicle law," etc.

41. *Id.* at 51. Note that it is the "English" who are to be chosen; also, the direction concluded that (with certain qualifications) "matters shall be adjusted according to the answers." *Id.* See also 1 POLLOCK & MAITLAND 143-44. Professor Plucknett illustrates the reasons behind the use of this community method by referring to the order of Emperor Louis the Pious, son and heir of Charlemagne, in 829, that thereafter the royal rights were not to be ascertained from the mouths of witnesses produced by those parties disputing the monarch's due, for such testimony was bound to be interested, but,

There are certain special characteristics of these juries which bear upon the early nature of legal evidence. For example, land and its ownership and devolution were of primary importance, so that what today would probably be a trial before only a judge, with qualified and knowledgeable witnesses testifying as to their understanding of the facts, was then a trial by jury. Other major differences were involved: today the parties call their own witnesses, whereas at common law the most considerable people in a community (the "jurors") were called by the court; there was no cross-examination as it is now practiced; and, while both the early jurors and the present witnesses state their (sworn) knowledge or testimony, the former were not impeded by the current evidentiary rules to prevent them from drawing on childhood tales, remembrances passed on through the generations, and other means of ascertaining the true state of affairs.

Couched in the terminology and procedures then used, Professor Thayer describes several cases of early juries in action. For example, during the reign of William the Conqueror (1066-87) a controversy arose as to whether certain lands belonged to the King or to "St. Andrew." The King referred the matter to the judgment of all the men in the county (that is, the county court), who awarded it to him, and the presiding Bishop directed the county to choose 12 persons to confirm it by oath, which they did.<sup>42</sup> During the reign of Henry I, in 1122, another land controversy was referred to the declaration of those in a certain neighborhood, and 700 were assembled, the sheriff presiding, with 16 men chosen and swearing, and judgment being given thereon.<sup>43</sup>

Juries also became methods of ascertaining the facts and the truth for other purposes. They were used in criminal accusations,<sup>44</sup> in grand

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instead, the most responsible and credible people of the county would declare on oath what the customary royal rights were. T. PLUCKNETT, *supra* note 33, at 109. "[I]t may very well be that this method was more likely to produce the truth than the voluntary testimony of witnesses supporting their friends against the government." *Id.*

42. THAYER 51-52.

A year afterwards a monk who had once been steward of the region in question, and knew this to be false, raised some question about it [the oath-award]; this resulted in confessions of perjury from the one who led in the oath, and from another; and in the condemnation and punishment of all who swore. This case shows the Anglo-Saxon procedure, which was that of the Germanic popular courts, viz., judgment by the whole assembly. But it also shows the interference of the king's representative [i.e., the presiding Bishop] . . . .

*Id.* at 52 (footnote omitted). See also F.W. STUBBS, *supra* note 33, at 301-02.

43. THAYER 53.

44. 1 POLLOCK & MAITLAND 144: "Of the accusing jury . . . faint traces are to be found. We certainly cannot say that it was never used, but we read very little about it" (footnote omitted). See also *id.* at 137. However, by the time of Henry II the accusing jury had become "part of the ordinary mechanism of justice." *Id.* at 151. THAYER 60-61 states: "In the Constitution of Clarendon, in 1164, . . . [i]n c.vi. a jury of accusation is provided for . . . . In the Assize of Clarendon, in 1166, pro-

assizes<sup>45</sup> later in petty assizes,<sup>46</sup> and in the inquisitions, that is, inquiries as to the facts.<sup>47</sup> It is with the ascent of Henry II (1154-89) that "we reach the period when all this irregular, unorganized use of the inquisition begins to take permanent shape,"<sup>48</sup> and the inquisitorial type of jury becomes somewhat standardized, that is, "the exceptional becomes normal."<sup>49</sup> The several ordinances of Henry II bearing on juries are not preserved, but sufficient of their character is known to conclude that under him a tenant could reject battle and, in the grand assize of the King, obtain a royal writ of right to initiate proceedings directing an inquest to answer a particular question as formulated in that document.<sup>50</sup> These included proprietary actions for land or for advowsons,<sup>51</sup> and in four other cases these writs could issue in petty assizes for a like purpose.

"Trial by jury, in the narrowest sense of that term, trial by jury as distinct from trial by an assize, slowly creeps in by another route."<sup>52</sup> That route is consent, for where the pleadings of the litigants put in is-

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vision is made for taking inquests throughout England by local juries of accusation, and for the trial of the chief cases by the ordeal. . . ." See also *id.* at 64-65, 151-53; 3 HOLDSWORTH 611-23 (for a discussion of the old and new criminal procedures). And see note 36 *supra*. This Article concentrates upon the civil, not criminal, aspects of the jury system and the nature of legal evidence therein.

45. At first, assize (*assisa*) meant the sitting of a court or council; then it denoted the decisions made or enactments adopted. Assizes thus devised writs to enforce the royal council's enactments. The terms also referred to enactments by numerous bodies, such as the King and either a great or small council or a justiciar with either of these councils; to instructions given by the King or a justiciar to itinerant justices; and even to judicial writs.

46. See, e.g., 3 HOLDSWORTH 611-12; 1 HOLDSWORTH 327-32. These petty assizes could also initiate proceedings.

47. See THAYER 47-48, quoting H. BRUNNER, *DIE ENTSTEHUNG DER SCHWURGERICHT* 84 (1872), concerning the Germanic type of jury brought over to England:

The capitularies and documents of the Carolingian period have a procedure unknown to the Germanic law, which has the technical name of *inquisitio*. The characteristic of it is that the judge summons a number of the members of the community, selected by him as having presumably a knowledge of the facts in question, and takes of them a promise to declare the truth on the questions to be put by him. . . . This inquisition . . . was applied both in legal controversy and in administration, and we must observe that the departments of administration and justice were then considerably united.

48. THAYER 53. See also 1 POLLOCK & MAITLAND 145.

49. 1 POLLOCK & MAITLAND 144. There is even one instance of a double jury being chosen: the Berkshire men picked 24 who answered the question, whereupon the Wallingford men protested. On the King's direction the latter chose their own like number, who then made their own oaths. Both juries swearing differently, the presiding Earl so reported to the King and also gave his own recollection as a boy, upon which recollection the monarch decided the matter. THAYER 53-54.

50. *Id.* at 58-65.

51. "Advowson" refers to a right in ecclesiastical law to present a person to the bishop, who is to admit him "to a certain benefice within the diocese, which has become vacant." BLACK'S LAW DICTIONARY 69 (3d ed. 1944).

52. 1 POLLOCK & MAITLAND 149.

sue a question of fact, they might agree to be bound by a jury's verdict. As the years passed, the judges began to compel acceptance of an opponent's offer of a jury by threatening loss of the cause otherwise. In other words, the assizes (grand or petty) might initiate proceedings with a factual question required to be determined by the widest possible jury of the litigants' neighbors; a subsequent narrow jury did not initiate any proceeding but was a method of determining the factual issue, which arose after the cause had begun and pleadings raising such an issue had been exchanged, with a judgment ordinarily issuing upon such a jury determination.<sup>53</sup> Where the ordinance(s) did not extend the practice, or where a party refused to consent, the old and formal methods of proof had to be utilized. This factor, however, intermixed with other causes, led to new forms of action in which "the only mode of trial was by the jury . . . [that] grew [so] fast [as] to be regarded as the one regular common-law mode of trial, always to be had when no other was fixed."<sup>54</sup> While these different types all spring from a common root, they must, as juries, be distinguished one from the other since there was a big difference between a sworn verdict, for example, and a judgment.<sup>55</sup> Thus in the 12th century the jurors assembled not *iudicia facere* (to make judgments), but *recognoscere veritatem* (to declare the truth).

In these several aspects of juries, some common threads may be discerned. For example, Domesday was an administrative (legislative) inquiry by a royal commission for facts upon which to tax; a question put to a community concerning the King's prerogatives also involved a similar administrative (executive) inquiry. Where land ownership or

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53. See note 55 *infra* and accompanying text. While the 1215 Magna Carta's famous 39th Chapter required a "lawful judgment of his peers or the law of the land" before a freeman could be deprived of life, liberty, or property, this did not include a jury trial [see E. GRISWOLD, *Introduction to THE GREAT CHARTER* viii (1965): "Scholars have debated whether the origin of trial by a jury of one's peers can be traced to the 39th article . . ."]; to the contrary, by that date the barons did not wish it, and even the French were then striving for a similar right and also rejecting the jury. 1 POLLOCK & MAITLAND 173 n.3. See generally J. HOLT, *MAGNA CARTA* (1965); C. MCILWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* (1939); W. McKECHNIE, *MAGNA CARTA* (2d ed. 1914).

54. THAYER 60. But see 1 POLLOCK & MAITLAND 140: "[T]he jury spreads onward from the king's own court. To the last, trial by jury has no place in the ordinary procedure of our old communal courts."

55. [We] have to distinguish the jury from a body of doomsmen, and also from a body of compurgators or other witnesses adduced by a litigant to prove his case. A verdict . . . [that] may declare that William has a better right to Blackacre than has Hugh, differs essentially from a judgment, a doom adjudging the land to William . . . [so that] between the sworn verdict and the judgment there is a deep gulf.

1 POLLOCK & MAITLAND 139. When the jury and the doomsmen became established institutions, the transformation of the latter into jurors became possible and may have occurred in the manorial courts. *Id.* See also note 35 *supra*.

advowsons were in question, an intermixed judicial and administrative (executive) inquiry intervened; and even in the inquisitions the King's administrators intruded.<sup>56</sup>

*B. The Post-Norman Period: Development of the  
Modern Jury and the Importance of Procedure*

The judicial inquiry into facts put in issue by the parties<sup>57</sup> moved from the area of formalistic modes of proof, where the properly made oath was conclusive, into that which concentrated upon the substance of proof; in other words, the evidence, not its method of introduction, became the primary concern of the courts. However, the new stress on evidentiary substance was still tied in with the old stress on evidentiary procedure, just as substantive law evolved from out of the interstices of procedural law.<sup>58</sup> This emphasis on procedure is the villain in this Article, for while legal writ procedures and pleading methods have gradually freed themselves from the early shackles of formalism, legal evidentiary procedures are still so enmeshed.

The overshadowing of evidentiary substance by strict procedural rules can be linked historically to the use of juries as fact-finders. During the pre-Norman and early Norman eras, the jurors were called forth from the same neighborhood as the parties and possessed all relevant knowledge of the case (whether personally discovered or related by others).<sup>59</sup> This knowledge or understanding ordinarily determined the question put by the convening authority,<sup>60</sup> since there were no witnesses as such called by the parties to testify publicly or privately.<sup>61</sup> Beginning with the reign of Edward I (1272-1307), oral pleadings, later to be superseded by written ones,<sup>62</sup> began to produce an issue of fact for trial that eventually "substituted for the old system of proof a trial based upon the pleadings of the parties. Thus . . .

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56. See note 47 *supra*. The inquisition, used in criminal matters as a jury of accusation, was, of course, not a trial jury [see notes 33, 44 *supra*], although today it is subject to the judiciary.

57. See text following note 52 *supra*.

58. H. MAINE, *supra* note 39, at 389. See also 3 HOLDSWORTH 596. Fortescue (1442-60), when pressed by the absurdity of a distinction in procedure he was laying down, once replied that the procedure "has been [so] laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason." *Id.* at 626.

59. No attempt was made at this early date to exclude evidence that was not "acceptable." See text accompanying notes 66-67 *infra*.

60. In effect, this made the jurors the triers of the facts and the law, even though in theory they were not to make judgments but only to recognize and declare the truth.

61. THAYER 114. It was not until 1562 that a statute provided for the use of process in calling witnesses. 5 Eliz. c.9, § 12. See also notes 72-73, 77, 81 *infra* and accompanying text.

62. See generally 3 HOLDSWORTH 613-40.

we begin to get the modern distinction between issues of fact which the jury must determine, and issues of law which the court must determine."<sup>63</sup> The result was a trial limited to a narrow issue or question of fact, in which the question was so framed as to be the sole issue upon which the matter hinged.<sup>64</sup> A Daedalian procedural strictness in pleading thus developed that even went beyond the early formalistic oaths.<sup>65</sup>

It was in these adversary formulations that an exact science of pleading emerged. However, the judges were not rigid in enforcing the rules of pleading, with the result that evidence was freely introduced through mere allegations in these documents: "Often we find the courts allowing one to set forth his case fully, 'for fear of the laymen,' *i.e.*, in order that the jury might not pass upon questions of law, and might not go wrong through any misapprehension of the facts. Much 'evidence' was thus entered on the records."<sup>66</sup> In effect, this meant that the early jurors were now publicly and openly receiving, from counsel and the pleadings, extrapersonal and additional knowledge. As time went on this increased, aided by the absence of a law of evidence as we understand it.<sup>67</sup> Thus, simultaneously with the pleading strictures and the narrowing of the issues, the ways of adding to the juror's knowledge were, conversely, gradually broadened and increased.

No one can tell with exactness how and when the next great method of adding to the jurors' knowledge occurred—that is, the use of witnesses in open court publicly testifying and being cross-examined.<sup>68</sup> However, there are a few clues. For example, as early as 1371, challenges to jurors as "being in the service of a party and as having given their verdict beforehand" resulted in swearing these men and having them testify to other (unchallenged) jurors who now decided the question.<sup>69</sup> This process continued

until at last witnesses called in by the parties were regularly admitted to testify publicly to these other witnesses, summoned by the sheriff,

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63. *Id.* at 628.

64. As to the reasons for particularity in the stating of these factual issues, see *id.* at 633-39.

65. See text accompanying notes 19-27 *supra*.

66. THAYER 115.

67. 3 HOLDSWORTH 635.

68. THAYER 123.

69. *Id.* at 123-24. Generally two of the unchallenged jurors questioned the challenged ones publicly on oath. These challenges might involve the jurors' qualifications in not having enough freehold, or as having been in the service of a party and having given their verdict beforehand, in which cases the challenged jurors swore and gave evidence accordingly, and the triers (the unchallenged jurors) determined whether they had told the truth. The jurors might also be challenged for having gotten money of a party, in which case no evidence was taken but the issue was determined by the triers on an oath.

whom we call the jury. This mounting witnesses upon witnesses was a remarkable result and teemed with great consequences. The contrast between the functions of these two classes became always greater and more marked. The peculiar function of the jury—as being triers—grew to be their chief, and finally, as centuries passed, their only one; while that of the other witnesses was more and more defined, refined upon, and hedged about with rules. It is surprising to see how slowly these results came about.<sup>70</sup>

This innovation of witnesses testifying in open court did not automatically mean that a *tabula rasa* substituted for the memory and knowledge of a juror. The earlier half of the 16th century was probably a period of transition,<sup>71</sup> and even into the 17th century the jurors, hearing the testimony of witnesses in open court as to the facts in the matter, but being drawn from the neighborhood, “may [themselves] have evidence from their own personal knowledge,” or “know the witnesses to be stigmatized and infamous,”<sup>72</sup> and therefore determine their verdict from their own knowledge as well as the evidence (or, if no evidence were given, then upon their own knowledge).<sup>73</sup> Nevertheless, the rule evolved that “where a juryman has knowledge of any matter of evidence in a cause which he is trying, he ought not to impart the same privily to the rest of the jury, but should state to the court that he had such knowledge, and thereupon be examined, and subject to cross-examination, as a witness.”<sup>74</sup>

The growth and spread of this concept of open or public testimony is illustrated by a “remarkable petition” in 1354 to have “all evidence which is to be said . . . be openly said at the bar . . . upon their [the witnesses] own peril and oath.”<sup>75</sup> In 1433 it was “a well-known thing to testify publicly to the jury,” even though the “slow emergence of the practice and the slight indications of it” do not disclose any such general practice<sup>76</sup> and, on the contrary, public testimony such as this was considered of small importance.<sup>77</sup> By the 15th century, there-

70. THAYER 137.

71. See, e.g., 3 HOLDSWORTH 648-53. An indicting jury of 23 men could accuse a person on the basis of its own knowledge until the end of the 15th century, when it became “a body examining criminal evidence presented to it.” B. LYON, *supra* note 25, at 637.

72. Bushell's Case, 124 Eng. Rep. 1006, 1012 (C.P. 1670).

73. “[The jury] may have evidence from their own personal knowledge . . . but to this the judge is a stranger, and he knows no more of the fact than he hath learned in court, and perhaps by false depositions, and consequently knows nothing.” *Id.* See also notes 77, 81-82 *infra*.

74. Mr. Justice Buller, in *Smith v. Hollings*, Stafford, Spring Assizes, 1791, quoted in Bushell's Case, 124 Eng. Rep. 1006, 1012-13 (C.P. 1670).

75. THAYER 125.

76. *Id.* at 126.

77. *Id.* at 130. In a case tried in 1499, one justice, in upholding the verdict, wrote: “Evidence is only given to inform their consciences as to the right. Suppose no

fore, the civil jury was assuming its modern form of trying only questions of fact on evidence presented to it in open court, but "the transformation was not yet complete because juries were still selected from the region in which the case had originated."<sup>78</sup>

By the middle of the 17th century, the witnesses and the jury were being regarded as distinct from each other,<sup>79</sup> and, in writing his *Institutes*, Lord Coke could asseverate that "[a]lbeit by the common-law trials of matters of fact are by the verdict of twelve men, etc., and deposition of witnesses is but evidence to them, yet, for that most commonly juries are led by deposition of witnesses . . . ."<sup>80</sup> Similarly, in 1670, Chief Justice Vaughan, while conceding that jurors had an independent knowledge of the facts, wrote

[t]hat the Verdict of Jury, and Evidence of a Witness are very different things, in the truth and falsehood of them: A witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a jury-man swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after . . . .<sup>81</sup>

This 1670 opinion supports the future sharp division between witnesses who alone supply the facts, and jurors who, having no independent knowledge, can only "infer and conclude from the testimony of such witnesses" who to them appear credible and believable.<sup>82</sup> This bifurcation is also seen in one of the comparatively early methods of controlling<sup>83</sup> the power of the jurors, namely, the granting of a new trial because of some defect in or lack of evidence. The first bases for

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evidence given on either side, and the parties do not wish to give any, yet the jury shall give their verdict for one side or another. And so the evidence is not material to help or harm the matter." Quoted *id.* at 133. See also note 81 *infra*.

78. B. LYON, *supra* note 25, at 638. See also note 34 *supra*.

79. 1 HOLDSWORTH 336.

80. Quoted in THAYER 135.

81. Bushell's Case, 124 Eng. Rep. 1006, 1009 (C.P. 1670), stemming from the Trial of William Penn and William Mead, 22 Charles II, 6 How. St. Tr. 951 (1670).

It is true, if the jury were to have no other evidence for the fact, but what is deposed in court, the judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case, though even then the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.

But the evidence which the jury have of the fact is much other than that: for,

1. Being returned of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in court, but to this evidence the judge is a stranger.

124 Eng. Rep. at 1012.

82. See THAYER 137-38 ("Gradually it was recognized that while the jury might not be bound by the testimony, yet they had a right to believe it, and that they were the only ones to judge of its credibility").

83. On other methods, see note 69 *supra*.



this corrective type of judicial action included, for example, "miscarriages of juries," "ordinary misconducts," "the challenge to jurors, in criminal cases, who had served on the grand jury,"<sup>84</sup> and, during the reign of Edward III (1327-77), "because a great lord concerned in the cause sat upon the Bench at the trial."<sup>85</sup> The first recorded use of this judicial power stemming from such evidentiary base seemingly begins with the year 1655, but, as Lord Mansfield remarked generally a hundred years later, "It is not true 'that no new trials were granted before' " then;<sup>86</sup> by "the early part of the seventeenth century the practice of revising and setting aside the verdicts of juries, as being contrary to the evidence, was . . . clearly recognized and established."<sup>87</sup> Lord Parker's general rule in exercising this supervisory power was to do " 'justice to the party,' or in other words 'attaining the justice of the case,' " and the "reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances."<sup>88</sup> Evidence, in this context, becomes a term somewhat different from its earlier methodological formality (automatic acceptability),<sup>89</sup> and now begins to take on its modern exclusionary and procedural character.

It is not too great a step from this background of general and particular judicial control over juries to the modern versions of witnesses per se and, specifically, to the evidence so involved. The early jurors exercised, as we have seen, a judicial power, and their functions included the practical determination of the matter by utilizing their own knowledge, with or without testimony. However, by 1816 Lord Ellenborough assumes that it is reversible error for a judge, in his instructions to the jurors, to "lay any stress on the personal knowledge which the jury might be supposed to possess in order to aid any defect of evidence."<sup>90</sup> In other words, "The true qualification for a juror has thus become exactly the reverse of that which it was when juries were first

84. THAYER 171-72. The first quoted term is from *Wood v. Gunston*, 82 Eng. Rep. 867 (K.B. 1655).

85. Lord Chief Justice Holt, so commenting in *Lady Herbert v. Shaw*, 88 Eng. Rep. 937, 938 (K.B. 1731).

86. *Bright v. Eynon*, 97 Eng. Rep. 365, 366 (K.B. 1757).

87. THAYER 172. See also notes 42, 69 *supra*.

88. Quoted by Lord Mansfield in *Bright v. Eynon*, 97 Eng. Rep. 365, 367 (K.B. 1757).

89. See text accompanying notes 59, 66-67 *supra*.

90. *The King v. Sutton*, 105 Eng. Rep. 931, 935 (K.B. 1816). See also *Parks v. Ross*, 52 U.S. (11 How.) 362, 373 (1850):

It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred.

instituted. In order to give an impartial verdict, he should enter the box altogether uniformed on the issue which he will have to decide."<sup>91</sup>

This complete about-face in the role of jurors, restricting them to decisions based only on the courtroom facts,<sup>92</sup> now created numerous problems for the judges. These problems may be subsumed under two overall heads: first, the complexities surrounding the question whether the witness was trustworthy and competent and could therefore testify; and, second, assuming his ability to testify, whether his testimony was admissible, that is, whether it could be entered on the record for the jurors' consideration. Since jurors now were assumed to enter the box with a cognitive *tabula rasa* so that facts could be writ upon their minds<sup>93</sup> (through, for example, the medium of witnesses giving oral testimony<sup>94</sup>), it remained for the presiding judge initially to determine the above two questions. Yet the courts were compelled to enter this labyrinth without any cord of Ariadne to guide them. Should they follow logic, common sense, or experience? Should public policy control? Should ad hoc rules be fashioned, or should positive enunciations in codes or statutes be promulgated; and if the former, should they be permitted to jell or remain fluid? These few questions illustrate the Serbonian bog enveloping the nature of the evidence and evidentiary rules existing and being fashioned during these centuries.

The source for the answer to these questions has been stated by Holmes, namely, that "[t]he life of the law has not been logic: it has been experience."<sup>95</sup> There is, therefore, one part of legal evidence that has its roots in the old institutions and procedures, and another part that is modern, added to or changing the former because of experience and the needs of the time, even though "the older ideas which

91. 2 PIKE, A HISTORY OF CRIME IN ENGLAND 369 (1876).

92. They were not completely entombed within the walls of a court, because they could, for example, visit and inspect premises. This, today, is not allowed without the permission of the court and it constitutes reversible error when even three jurors (in a murder trial) make an unauthorized visit to the premises involved. See, e.g., *People v. Crimmins*, 26 N.Y.2d 319, 258 N.E.2d 708, 310 N.Y.S.2d 300 (1970).

93. Questions concerning the jurors' ability to sit and decide a matter, to be challenged, or even to testify as a witness, are not within the scope of this Article.

94. Other methods include the introduction of written or other documentary evidence, expert opinions, the presumed knowledge of generally understood and indisputable facts (judicial notice), or any combination of these.

95. O. HOLMES, *THE COMMON LAW* 1 (1881). Holmes continues: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." *Id.* See also THAYER 267-68 ("The law of evidence is the creature of experience rather than logic, and we cannot escape the necessity of tracing that experience").

they [the modern] have preserved have not been without their influence in shaping the modern rules."<sup>96</sup>

### III

#### THE NATURE OF LEGAL EVIDENCE

Webster defines evidence as "That which makes evident or manifest; as: (a) An outward sign; indication . . . (b) That which furnishes, or tends to furnish, proof, any mode of proof . . ."<sup>97</sup> Jones' *Commentaries* gives the following:

In its ordinary acceptation evidence is understood to be anything that makes evident or clear to the mind or such things collectively; any ground or reason for knowledge or certitude in knowledge; proof whether from immediate knowledge or from thought, authority or testimony; a fact or body of facts on which a proof, belief or judgment is based; that which shows or indicates.<sup>98</sup>

Legal evidence, as a special category of evidence, requires a separate definition. Although Dean Wigmore does not care to define legal evidence, he states its "content" to include primarily "[a]ny knowable fact or group of facts . . ."<sup>99</sup> to be used in judicial matters to persuade the hearer. Thayer at first wrote that evidence is "any matter of fact which is furnished in ascertaining some other matter of fact."<sup>100</sup> Nine years later he altered this slightly to say that when evidence is offered in a court one ordinarily proposes "to prove a matter of fact which is to be used as a basis of inference to another matter of fact."<sup>101</sup> And, finally, Jones feels that the breadth of the layman's acceptance of evidence "must be sensibly diminished before it can be of practical application to those rules which the science of law teaches,"<sup>102</sup> and it

96. 9 HOLDSWORTH 128.

97. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 886 (2d ed. 1959).

98. 1 B. JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES 6 (L. Horwitz ed. 1913) [hereinafter cited as JONES].

99. In full: "Any knowable fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked." 1 WIGMORE 3, also collating (at 4-5) the classical definitions from Blackstone (1768) to Thayer (1889).

100. Thayer, *Presumptions on the Law of Evidence*, 3 HARV. L. REV. 141, 143 (1889).

101. He offers, perhaps, to present to the senses of the tribunal a visible object which may furnish a ground of inference; or he offers testimony, oral or written, to prove a fact; for even direct testimony, to be believed or disbelieved, according as we trust the witness, is really but a basis of inference. In giving evidence we are furnishing to a tribunal a new basis for reasoning.

THAYER 263-64.

102. JONES 6.

therefore "has to be restricted until from the legal and technical standpoint it becomes" a series of "exclusive rules [which] excite surprise among laymen, for the reason that by their operation facts which seem to have a probative effect are often rejected, and the question is thus raised among them whether the ends of justice are not thwarted by defects in judicial procedure."<sup>103</sup> However, these rules "are accepted by the lawyers with satisfaction as denoting the limits within which the inquiry is to be conducted . . . ."<sup>104</sup>

### A. *Special Characteristics of Legal Evidence*

There are at least two aspects peculiar to the law that further differentiate the use and character of the particular evidence found within its ken. The first exceptional characteristic is finality, that is, finality as between men. Newton and his successors probably are today affecting this globe, and soon will be affecting others, in greater scope and degree than does law, but even their disciples still hesitate to ascribe finality<sup>105</sup> to their principles, theorems, or even "laws";<sup>106</sup> not so, however, a court of law.

Western civilization requires that where men (and their governments) disagree, there be some body that has the ability to determine finally their differences.<sup>107</sup> Whatever the historic and contemporaneous ends or stages of law are—for example, to keep the peace, to create a degree of certainty and uniformity in the ordering of society, or to socialize by newly infused morals<sup>108</sup>—the bickerings of human beings

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103. *Id.* at 7.

104. *Id.* at 8.

105. "Finality" is a rather strong term, for numerous reversals have occurred in the Supreme Court. These have not only resulted from changed views of the law [*see, e.g., Palko v. Connecticut*, 302 U.S. 319 (1937), overruled in *Benton v. Maryland*, 395 U.S. 784 (1969)], but have also stemmed from historical researches that uncovered either new facts or a better understanding of the earlier legislators. *See, e.g., Erie R.R. v. Tompkins*, 304 U.S. 64, 74 (1938).

106. When the non-Euclidean geometries of Lobachevsky (also developed independently by Bolyai) and Riemann were presented to the world in the 19th century, the basic "laws" promulgated by Euclid appeared, at first, to have been superseded. Einstein's later theory of relativity also shook the classical axioms and principles of geometry and physics so that today there is general acceptance of several types of geometries and a use for the Newtonian theory in describing ordinary terrestrial phenomena. *See, e.g., Barker, Geometry*, in 3 *ENCYCLOPEDIA OF PHILOSOPHY* 285-90 (P. Edwards ed. 1967); M. COHEN & E. NAGEL, *AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD* 143, 144 n.2, 417 (1934).

On chance as an ingredient in the universe, the subatomic microphysicists and other disciplines seem to conclude that no order (as we conceive it) is to be found in nature. *See generally* D. BOHM, *CAUSALITY AND CHANCE IN MODERN PHYSICS* (1957).

107. One reason is that otherwise these differences may eventually pass a boiling point, and then violence and rebellion may occur.

108. For Ponn's five stages of legal history, see E. PATTERSON, *JURISPRUDENCE* 513-15 (1953).

must come to an end at some point. This means, as a corollary, that legal evidence is always concerned with living people and their arguments,<sup>109</sup> and that such limited evidence must therefore be differentiated from the general evidence utilized in the other disciplines.<sup>110</sup> Judicial finality and legal evidence therefore go hand in hand, and in this way legal evidence differs from the general evidence of other disciplines, where finality is ordinarily not required.

The second exceptional characteristic of legal evidence is that it involves facts that have occurred,<sup>111</sup> that is, the minor premise that the late Jerome Frank was wont to castigate as the flaw in any system of justice predicated upon formal logic. The major premise may be the particular law to be applied. For example, all persons have a right to use reasonable force to defend themselves, even unto the point of killing him who seeks their death,<sup>112</sup> yet someone must determine as facts (the minor premise) in a particular case the degree of harm that the threat constituted, and whether the corresponding degree of force used to repel was not more than reasonable under the circumstances.<sup>113</sup> Whether this fact determination should be by a jury, by a judge, or even, today, by an administrative tribunal, is not relevant; the point is that the law needs definitive facts that have occurred upon which to build a particular final determination between two parties.

A third characteristic is sometimes alleged to exist,<sup>114</sup> the "artifi-

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109. The very few instances where, for example, pure in rem proceedings are involved may, as with the fictional *de minimis*, be ignored.

110. See, e.g., THAYER 273-74:

[Legal reasoning] does not, like mathematical reasoning, have to do merely with ideal truth, with mere mental conceptions; it is not aiming at demonstration and ideally exact results; it deals with probabilities and not with certainties; it works in an atmosphere, and not in a vacuum; it has to allow for friction, for accident, and mischance. Nor is it, like natural science, occupied merely with objective truth. It is concerned with human conduct, and all its elements of fraud, inadvertence, willfulness, and uncertainty . . . . It has in it, therefore, a personal element, and it requires not merely a consideration of what is just, in general, but of what is just as between these adversaries.

111. In their day-to-day business, lawyers and courts deal with events and incidents that have occurred; it is their present determination as substantiated facts that constitutes, ordinarily, the judicial function. See, e.g., *Gilchrest v. Bierring*, 234 Iowa 899, 915, 14 N.W.2d 724, 732 (1944): "[T]he [present] determination, that his [past] conduct renders him unworthy to continue in the practice, constitutes the exercise of a judicial function . . . ."

112. Even here Frank argued against the "basic myth" of lawyers and judges that the law did not change (at least in the day-to-day practical application of law). J. FRANK, *LAW AND THE MODERN MIND* 263 (1930).

113. See Frank, *Cardozo and the Upper-Court Myth*, 13 *LAW & CONTEMP. PROB.* 369, 384 (1948) (classifying the native school of realists into fact and rule sceptics); Frank, *What Courts Do In Fact*, 26 *ILL. L. REV.* 645 (1932). The latter article is discussed in E. PATTERSON, *supra* note 108, at 544-46.

114. Other characteristics may also intrude; for example, the adversary or accusatory system found in the common law countries enters into the nature of the evidence

cial [*sic*] . . . reason" of the law,<sup>115</sup> the intricate set of rules by which cases are decided. The question raised is not only whether the judges (and lawyers) have a monopoly on such reason even within their area of special competence, but also whether the same "artificiall [*sic*] . . . reason" is used in creating the laws of evidence that concern us here. We may respond to the latter question by clearly distinguishing among at least three types of reasoning: first, the general common sense, experience, and reason applied in creating or shaping general laws (including the laws of evidence); second, the special "artificiall [*sic*] . . . reason" or legal expertise used in determining how and when to apply such evidentiary rules in particular cases; and, third, that general common sense, experience, and reason applied by the jury to the evidence admitted in order to decide upon a verdict.<sup>116</sup> In discussing the nature of legal evidence we consider only the formulation of the laws of evidence by experience and common sense, and not their trial application.

*B. Interrelationship of Characteristics and Evidence:  
Exclusion as Policy*

How, then, do the above technical rules of law so bear upon or even condition the nature of the evidence admitted for the jury's (or judge's) consideration that a degree of identity may be said to exist between these substantive and procedural aspects of the law of evidence? For example, we have seen that legal evidence is unlike historical, scientific, or other evidence; legal evidence must not only be relevant to the issues in the case, as formulated by the parties, but admissible as well.<sup>117</sup> Relevancy "is not an inherent characteristic of any item of evi-

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used in these countries. See, e.g., H. STEPHENS, *ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE* 96 (1933) ("The value of the adversary methods is not merely to the parties. The heat of the contest melts out the dross for the tribunal").

115. See 1 HOLDSWORTH 207 n.7.

116. For one illustration of the method to be used in assembling, analyzing, and utilizing the facts admitted into the record (that is, the evidence) in order to obtain the primary facts from which the findings of secondary facts are to be inferred or drawn, and upon which the conclusion of law (the application of the legal rules or major premise to the minor premise[s]) is to be applied, see M. FORKOSCH, *ADMINISTRATIVE LAW* 383-431 (1956).

117. A broad distinction has been made between the substantive and procedural aspects of legal evidence [see text accompanying notes 12-13 *supra*], but technical confusion may occur unless another distinction is made between relevance and admissibility, or between facts not in issue and facts not admissible. Put briefly, the first refers to the proposition to be proved—for example, whether a contract was entered into. Whatever evidence is to be offered must relate to this issue or proposition; if the proposed evidence or proposition concerns the sale of real property it "is rejected, not because of any defect in the evidence, but because the proposition to which it is directed is not before the Court." 1 WIGMORE § 2. But, even though the evidence is directed to the issues, it may nevertheless be rejected because rules of evidence determine it to be inadmissible (for

dence but exists only as a relation between an item of evidence and a matter properly provable in the case."<sup>118</sup> Both admissibility and relevance must be established by the party introducing the evidence, and only then is the adjudicating tribunal furnished with digestible matters of fact.

How is this relation between substance and procedure accomplished? Thayer answers in a three-fold manner: first, the rules prescribe *how* the evidence is to be presented (for example, personally, in open court, by one who "personally knows," and is subject to cross-examination); second, they fix the *witness' qualifications* and privileges, as well as the mode of examination; third, and most important, the rules determine what classes of things shall be excluded.<sup>119</sup> Legal evidence starts with that evidence ordinarily utilized by the other disciplines and proceeds to whittle it down, both quantitatively and qualitatively.

If the axioms of relevancy and admissibility are combined, a general rule or principle emerges: All that is not irrelevant<sup>120</sup> is ordinarily admissible in the first instance; however, for a variety of policy reasons, some otherwise admissible evidence is to be excluded, and the law of evidence is concerned chiefly with these exclusionary rules. But even where an exclusionary rule may apply, an exception to it may be created so that the otherwise inadmissible evidence now becomes admissible. It is to the source of our complicated exclusionary and contraexclusionary rules that we must now direct our attention. The rules cannot be understood without reference to and some comprehension of the jury system, but more is required. The reasons reflect not only the jury system but also the growth of Western civilization, and, more particularly, the concept of the rule of law.

The prevailing trend to monarchical absolutism found in Western Europe during the English period we have examined (the period beginning with William the Conqueror) continued for several centuries,<sup>121</sup> until the Renaissance brought a reformation of the old constrictions in

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example, that it is hearsay). If the fact is rejected, obviously it cannot enter into the reflective process and carries absolutely no persuasiveness whatever. Before consideration there must be admission; before any weight is to be given there must be admissibility.

118. PROPOSED FEDERAL RULES OF EVIDENCE 4-01 (Preliminary Draft), 46 F.R.D. 221 (1969).

119. THAYER 264 ("This *excluding function* is the characteristic one in our law of evidence") (emphasis added).

120. Usually, the affirmative is used in the formulation of a general principle, that is, all that is relevant is ordinarily admissible. However, the negative is preferred in the psychological-legal burden-of-proof sense of requiring the objector to show that the proof offered is irrelevant.

121. See generally G. COULTON, *LIFE IN THE MIDDLE AGES* (1930); E. GILSON, *REASON AND REVELATION IN THE MIDDLE AGES* (1938); E. GILSON, *THE SPIRIT OF*

favor of freedom and individualism. Fundamental in the development of Western civilization was the gradual change in the old (legalistic) ways of deciding on the facts and verdicts. The basic reason for these changes within the field of law is contained in the milieu within which it evolved, one in which Western civilization came to give priority to the general concept of the rule of law.<sup>122</sup> The rule of law is opposed to the rule of the few or the many,<sup>123</sup> of the powerful or the violent—provided, however, that the rule is nondiscriminatory, equal, and just, and that the law is formulated, administered, and changed in response to the felt needs of mankind. In this vein legal evidence was born in a negative fashion. It sought to eradicate all traces of whim and caprice, using reason as a foundation. And it further sought to reject the irresponsibility of juries under the old system by introducing impartial and self-enforcing procedures (the law of evidence) that would result in the achievement of a civilized method for settling disputes fairly, reasonably, and justly so that men would accept determinations and continue to live peaceably with each other.<sup>124</sup>

### CONCLUSION

When the social or other scientist speaks of legal evidence, a limited congeries of facts and inferences comes to mind. He knows that not everything is permitted to be part of this substantive picture, which immediately narrows the conclusions rationally permitted to be drawn.<sup>125</sup>

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MEDIEVAL PHILOSOPHY (1936); E. RAND, *FOUNDERS OF THE MIDDLE AGES* (2d ed. 1941); R. SOUTHERN, *THE MAKING OF THE MIDDLE AGES* (1953); H. TAYLOR, *THE MEDIEVAL MIND* (rev. ed. 1930).

122. The idea of constitutionalism is almost necessarily a spin-off from the concepts of individual liberty and the rule of law. In England, for example, and even though it was peers-versus-king, Magna Carta [see note 53 *supra*] may be said to represent constitutionalism's earliest formulation, that is, a written document greater than all other applied sources of law.

123. This idea of limiting the political power exercised by one man (or group of men) "derives in the first instance from the doctrine and application of the rule of law in mediaeval English government, and has its rise in the feudal guarantee of rights and the determination . . . to insist upon it. That guarantee was given a contractual form, for contract was the essence of feudalism." E. JACOBS, *The Growth of Autonomy*, in 1 *ENCYCLOPEDIA OF SOCIAL SCIENCE* 77 (1937).

124. The old "trial by witnesses" was a testing of the question, in like manner, by their [fellow-swearers'] mere oath. So a record was said to "try" itself. And so, when out of the midst of these methods first came the trial by jury, it was the jury's oath, or rather their verdict, that "tried" the case. But now, when we use the phrases "trial" and "trial by jury," we mean a rational ascertainment of facts, and a rational ascertaining and application of rules. What was formerly "tried" by the method of force or the mechanical following of form, is now "tried" by the method of reason.

THAYER 198-99.

125. See the language of Justice Jackson, as quoted by Anthony Lewis, *N.Y. Times*, Mar. 1, 1971, at 29, col. 1, contrasting the like actions of the British Home Secretary Reginald Maudling: "I am sure the officials here acted upon information which, if it



For example, the parties themselves initially control the formulation of their agreed-upon issues, and it is only evidence that is relevant to these issues which is now logically and legally probative. Then, acting on these relevant facts, the laws of evidence come into play to narrow further the totality of the facts ordinarily at the disposal of the other disciplines.<sup>126</sup> The parties and the rules of evidence thus affect the quantity and quality of this necessary foundation of fact.

Experience, logic, and policy considerations also enter in determining the relevance and admissibility (and therefore the nature and quality) of evidence. A great deal of nonlegal reasoning goes into the fashioning of these concepts. To illustrate, consider the doctrine of judicial notice, "where the Court is justified by general considerations in declaring the truth of the proposition [in issue] *without requiring evidence* from the party."<sup>127</sup> The concept embraces all facts that are notorious, that is, of common knowledge, because judges "are not necessarily to be ignorant in Court of what every one else, and they themselves out of Court, are familiar with . . . ."<sup>128</sup> Since courts differ throughout the world and also throughout the 50 jurisdictions in the United States, experience, policy, and knowledge differ in each one as well. Thus, what is admitted as judicial notice in England might not be admitted here, although, for example, it can be said almost universally that "[n]o juror can be supposed to be so ignorant as not to know what gin is."<sup>129</sup>

As to exclusions, we have seen that even though given facts may be relevant and otherwise admissible, preliminary admissibility is confronted by exclusionary illegitimacy. For while in anthropology, for example, the seeker desires to protect the integrity of his research, it is only within the law that a person's life, liberty, property, and all else he

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stood the test of trial, would justify [their] order. But not even they know whether it would stand this test."

126. See, e.g., Goodman, *The Senate v. Alan and Margaret McSurely*, N.Y. Times, Jan. 10, 1971, § 6 (Magazine), at 28: "The jurors who convicted Alan and Margaret McSurely last June were given only a sketchy notion of their story beyond the fact that they had refused to honor a subpoena from the Senate's Permanent Subcommittee on Investigations. Such were the rules of evidence that governed their trial."

127. 9 WIGMORE 531 (emphasis in original). This aspect of evidence does not come within the narrower law of evidence and may therefore be utilized in every phase of the proceeding. THAYER 279.

128. *Lunley v. Gye*, 118 Eng. Rep. 749, 768 (Q.B. 1853) (Coleridge, J.). 9 WIGMORE § 2571, at 548, divides into three groups the scope of facts included within the concept, his third being: "Sundry matters . . . subject for the most part to the consideration that though they are neither actually notorious [first group] nor bound to be judicially known [second group], yet they would be capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary." See also MODEL CODE OF EVIDENCE Rule 802(c) (1942).

129. *Commonwealth v. Peckham*, 2 Gray (68 Mass.) 514, 515 (1854).

holds dear may be forfeited. It is because these substantive and crucial rights need procedural safeguards that legal rules are evolved, bent, and even stretched at times to meet the community's needs.

These needs, however, change with civilization, and the nature of evidence, until now dependent on the constricting law of evidentiary procedure, should be liberalized and recast in the light of present needs so as to eradicate the outmoded rules of past centuries.<sup>130</sup> As Thayer wrote three-quarters of a century ago:

The chief defects [of the laws of evidence] . . . are that motley and undiscriminated character of its contents . . .; the ambiguity of its terminology; the multiplicity and rigor of its rules and exceptions to rules; the difficulty of grasping these and perceiving their true place and relation in the system, and of determining, in the decision of new questions, whether to give scope and extension to the rational principles that lie at the bottom of all modern theories of evidence, or to those checks and qualifications of these principles which have grown out of the machinery through which our system is applied, namely, the jury. These defects discourage and make difficult any thorough and scientific knowledge of this part of the law and its peculiarities.<sup>131</sup>

Insofar as the nature of legal evidence is concerned, it should reflect the nature of the world in which we live. Where the largely untrained and unworldly illiterates of prior ages seldom sit as jurors, and especially where only a judge hears and decides, much should be left to the modern sophisticate (juror or judge) who decides on the facts. Practically, this is a necessity in these days of overloaded calendars and delayed justice, especially in the criminal branch of the law. It is the substance of justice, not its nice or refined details, that should ordinarily control, absent constitutional protections.<sup>132</sup> The only ques-

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130. See note 33 *supra*, regarding the size of the jury, which, at common law, was seemingly fixed at 12. The "felt needs" of present-day justice require not only liberalization in the rules of evidence, but also in the size of the jury; are these needs sufficient to support judicial or congressional reductions, if not outright elimination? See *Williams v. Florida*, 399 U.S. 78 (1970) (there is no sixth (through fourteenth) amendment violation where a six-man jury was empanelled to try a robbery case in which a conviction resulted in life imprisonment).

131. THAYER 527-28.

132. At first glance it appears somewhat anomalous to suggest a relaxation in the rules, so as to admit more evidence, which, superficially, seems to further delay a trial, and then, in the next breath, urge the necessity of such relaxation because of overloaded calendars and justice delayed. However, procedural niceties prevent much of relevance from being introduced, so that it is "record truth"—that is, only the (true) facts introduced and so found in the trial record—and not "actual truth" which becomes the basis for a verdict. Even so, errors in admission or exclusion bring reversals and more trials, and even if no errors occur, the probabilities of a reversal outweigh all other factors, so that appeals proliferate under current interpretations and applications of constitutional clauses. To illustrate, in England the speed (without sacrifice of justice) in the trial-appeal procedures is undoubtedly a function of their comparatively looser rules of evidence.

tion remaining is whether there still is a need for *any* of these ancient rules, since it would appear that most are currently surplusage.<sup>133</sup>

What, therefore, should be done? Historically, logically, and practically, only one basic question should be answered at the outset, namely, is the proffered evidence logically probative of some issue or matter which has to be probed? Relevancy should thus initially determine admissibility.<sup>134</sup> A second and final question should be answered, however; is there a clear reason or policy ground for exclusion? The exclusionary rules should be exceedingly few, permitted within a narrow construction of their need, and should really be exceptions stemming from a great need to avoid a greater hardship.<sup>135</sup>

Within the ambit of these two principles, all evidence should be admitted, and the weight, not its justification, should be the only question passed upon by the trier(s) of the facts. If the credibility of the witness is sufficient to induce believability of a fact, which now results in its acceptability as the basis for a verdict, why should overly formalized legalistic rules exclude the evidence without taking all this into consideration?

In effect, the discussion in the preceding paragraph is what does occur, albeit within limits, in certain proceedings (for example, administrative cases) and what can occur in nonjury cases, especially those on the equity or admiralty sides of the courts. As Chief Justice Cockburn commented a century ago, "People were formerly frightened out of

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133. For example, in the area of administrative law, which is a phenomenon of this century and, practically, stems from the great use made of the regulatory (and nonregulatory) agencies since 1932, the hearsay rule has been rejected as an exclusionary principle. See, e.g., *In re Rath Packing Co.*, 14 N.L.R.B. 805, 817-18 (1939), where the following was admitted: "Joe Gorman testified that he had been told by a girl named Casey, who in turn claimed to have been repeating a statement made to her by a girl named Padden, that the latter was told by the personnel manager's sister, Gladys Gillette, that her brother had instructions from the superintendent, Morris, to dispense with union members, or those likely to become union members." See also M. FORKOSCH, *ADMINISTRATIVE LAW* 355-56 (1956); R. GRAVESON, *AN OUTLINE FOR THE INTENDING STUDENT* 39 (1967).

134. Or, as the remarkably up-dated PROPOSED FEDERAL RULES OF EVIDENCE 4-02 (Preliminary Draft), 46 F.R.D. 223 (1969), puts it: "All relevant evidence is admissible, except as otherwise provided by these rules, by Act of Congress, or by the Constitution of the United States. Evidence which is not relevant is not admissible."

135. Removing these exclusionary rules will undoubtedly work hardships initially, but without their removal greater hardships will remain or occur. See, e.g., Learned Hand's formulation of the balancing approach, as discussed in *Dennis v. United States*, 341 U.S. 494 (1951), and contrasted with other approaches in M. FORKOSCH, *CONSTITUTIONAL LAW* §§ 329, 398 (2d ed. 1969). See also PROPOSED FEDERAL RULES OF EVIDENCE 4-03 (Preliminary Draft), 46 F.R.D. 225 (1969), mandatorily excluding relevant evidence where "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury," or discretionarily excluding it "if its probative value is outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence, and discuss its weight."<sup>136</sup> What may have been a good start over a hundred years ago has faltered and may even have petered out; and in the process the nature of legal evidence remains sparse, weak, and insufficient, when contrasted with the nature of that evidence available to and found used in the other disciplines. Today, however, "[t]he present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."<sup>137</sup>

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136. *Queen v. Churchwardens*, 121 Eng. Rep. 897, 899 (K.B. 1861). In this country, a decade earlier, even stronger language was uttered in *Johnson v. State*, 14 Ga. 55, 61-62 (1853):

And formerly in England, whole juries were composed of rude and illiterate men—a system of excluding testimony grew up, more technical and artificial than any to be found in the world.

But as jurors have become more capable of exercising their functions intelligently, the Judges both in England and in this country are struggling constantly to open the door wide as possible: *aye, to take it off the hinges*, to let in all facts calculated to affect the minds of the jury in arriving at a correct conclusion. . . .

Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury, however remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict.

See the same judge's similar language in *Haynes v. State*, 17 Ga. 465, 484-85 (1855).

In administrative proceedings, quasi-judicial tribunals have gone to rather extreme limits [see note 133 *supra*], but apparently with judicial approval, in admitting a variety of court-excluded evidence, especially in immigration (deportation) cases. See H. STEPHENS, *supra* note 114, at 55; *Moy Said Ching v. Tillinghast*, 21 F.2d 810, 811 (1st Cir. 1927) ("The officials before whom the [deportation] hearings were had were not restricted in the reception of evidence to only such as would meet the requirements of legal proof, but could receive and determine questions before them upon any evidence that seemed to them worthy of credit").

137. O. HOLMES, SPEECHES 68 (1918).