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A PRAGMATIC CRITIQUE OF MODERN EVIDENCE SCHOLARSHIP

Michael L. Seigel*

A recent survey of modern evidence scholarship produced a remarkable discovery: the major intellectual movements characterizing legal thought during the latter quarter of the twentieth century—including critical legal studies ("cls") and practical legal studies ("pls")—have left evidence scholarship virtually untouched.1 The authors of modern evidence scholarship have not confined their efforts to traditional doctrinal exegesis, however. Instead, most have traveled down one of two non-traditional paths: the "new evidence scholars" have studied the decision-making processes of the jury from a theoretical and often mathematical perspective, while many other evidence professors have focused their attention on the application of social scientific research to evidence issues.2

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2 Id. at 851-58; see also WILLIAM TWINING, RETHINKING EVIDENCE 69-70 (1990) (noting three areas of development in evidence scholarship: inquiries into "the nature of probabilistic reasoning in forensic contexts," studies pertaining to law and psychology, and pursuit of "the new rhetoric").

Professor Park's assessment of the present state of evidence scholarship leads him to lament the decline of traditional doctrinal analysis. He attributes this decline to the bleak outlook for doctrinal reform. See Park, supra note 1, at 869. Professor Park's pessimism about the efficacy of doctrinal evidence scholarship has affected his own scholarly work; his most recent energies have been directed toward empirical research. See Peter Miene et al., Juror Decision Making and the Evaluation of Hearsay Evidence, 76 MINN. L. REV. 683 (1992); Margaret Bull Kovera et al., Jurors' Perceptions of Eyewitness and Hearsay Evidence, 76 MINN. L. REV. 703 (1992).

The prospect of doctrinal reform in the law of evidence has improved dramatically since Professor Park surveyed the evidence scene. Subsequent to his writing, a number of scholars and judges argued that the cause of this doctrinal stagnation was the failure of the Supreme Court to establish an advisory committee to oversee amendments to the Federal Rules of Evidence, and they called for the establishment of such a committee. See, e.g., Edward R. Becker & Aviva Orenstein, The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 GEO. WASH. L. REV. 857, 859-62, 909-14 (1992). The Supreme Court has heeded this call. See Timothy B. Dyk & Gregory A. Castanias, Daubert Doesn't End Debate on Experts, NAT'L L.J., Aug. 2, 1993, at 17, 18 ("The Advisory Committee on the Rules of Evidence, which had been inactive virtually since the passage of the rules in 1975, was resurrected in the fall of 1992.").
The state of contemporary evidence scholarship can be traced to evidence scholars’ near-universal acceptance of “optimistic rationalism,”\(^3\) that is, the belief that the overarching function of evidence law is to maximize the (already fairly high) probability that factfinders in our adjudicatory system will accurately determine objective historical truth.\(^4\) Functioning as a shared ideology, rationalism has caused the evidence community to suffer from what might be termed “collective myopia.” As a result of their rationalist\(^5\) orientation to the processes of adjudication, evidence scholars have generally failed to see any application of postmodern jurisprudential perspectives, such as cls or pls—or feminism or critical race theory, for that matter—to their intellectual domain. In this respect, evidence thought has been stagnant.\(^6\)

This Article fits into the fairly nascent pls movement,\(^7\) which finds

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\(^3\) This term was coined by Professor Twining. See Twining, supra note 2, at 75.

\(^4\) See id. at 71-82; see also infra part I.

\(^5\) I use the term “rationalist” throughout this article as a shorthand reference to the “rationalist tradition” elucidated by Professor Twining. I am not referring to that term as it is used in philosophy. See 7 ENCYCLOPEDIA OF PHILOSOPHY 69-75 (Paul Edwards et al. eds., 1967) (delineating the various ways the term “rationalism” has been used in philosophy).

\(^6\) There is great significance to the qualification “in this respect” in this sentence. I do not mean to suggest that evidence scholarship has produced nothing of value in recent years; quite the contrary. It goes without saying that, for generations, academicians have made a multitude of important contributions to this field. (I forego citation of this point because noting the work of some scholars would necessarily insult those not included on the list.) My critique is thus not intended as a blanket denigration or condemnation of modern evidence scholarship. Rather, it is intended to provoke evidence scholars into a self-conscious examination of their collective enterprise. If my thesis is correct, such an examination would yield some positive results. I am hopeful that this critique will be taken in that spirit.

Although the point should be obvious, it is also worth stating that I have not read all the evidence scholarship written in recent times. I have read enough, however, to satisfy myself that my general conclusions concerning modern evidence scholarship are accurate. I also rely on the conclusions of others who have surveyed the field, such as Professors Park and Twining. See Park, supra note 1, at 849-50; Twining, supra note 2, at 32-82.

\(^7\) The name “pls” was coined by Professor Jay Feinman in an essay critical of scholars who have begun to explore applications of pragmatism and practical reason to legal questions. Professor Feinman’s view is that pls is merely a “liberal/moderate/conservative response to the radicalism of Critical Legal Studies.” Jay M. Feinman, Practical Legal Studies and Critical Legal Studies, 87 Mich. L. Rev. 724, 731 (1988). About the same time, Professor Edward Rubin identified what he called the “Law as Practical Reason” movement. See Edward L. Rubin, The Practice and Discourse of Legal Scholarship, 86 Mich. L. Rev. 1835, 1878-80 (1988). Given its relatively recent origins, it is not surprising that this movement has yet to be identified by a single name. It is also not surprising that those characterizing their scholarship as fitting within this school of thought have a fairly wide range of views on the import of pragmatism and practical reasoning to the law. See, e.g., Symposium on the Renaissance of Pragmatism in American Legal Thought, 63 S. Cal. L. Rev. 1569 (1990); Richard A. Posner, The Problems of Jurisprudence 37-123 (1990) [hereinafter Posner, Problems] (explaining the contours of his pragmatic orientation to the law); William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321 (1990) (using practical reason as a tool in explicating the process of statutory interpretation); Steven J. Burton, Law as Practical Reason, 62 S. Cal. L. Rev. 747 (1989) (setting forth his philosophy of practical reason); Richard A. Posner, The Jurisprudence of Skepticism, 86 Mich. L. Rev. 827 (1988) [hereinafter Posner, Skepticism] (describing a skeptical outlook about law informed by prag-
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its roots in the philosophy of pragmatism. Specifically, the Article undertakes a pragmatic critique of evidence scholarship, and it reveals that the myopia caused by optimistic rationalism extends far beyond the failure of evidence scholars to see the applicability of fashionable jurisprudential and practical reason; Daniel A. Farber & Philip P. Frickey, Practical Reason and the First Amendment, 34 UCLA L. REV. 1615 (1987) (attacking foundationalism in First Amendment jurisprudence and suggesting instead the use of practical reason); Vincent A. Wellman, Practical Reasoning and Judicial Justification: Toward an Adequate Theory, 57 U. COLO. L. REV. 45 (1985) (arguing that practically based ends-means rationality is an adequate method of legal justification); Joseph W. Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 3-4 n.8 (1984) (describing his position as "irrationalism" but noting that "[a] better term might be pragmatism"). My interpretation of practical reason will be developed throughout this Article. At this point, however, I think it important to note that "practical" bears no relationship to "that which is immediately useful or ideologically mainstream." Burton, supra, at 747 n.1. Thus, I reject Professor Feinman's characterization of the movement; rather, I agree with Professor Burton that practical reason can be used to justify action radically different from existing social custom. See id.; see also Richard Rorty, The Banality of Pragmatism and the Poetry of Justice, 63 S. CAL. L. REV. 1811, 1813 (1990) (noting that individuals as ideologically diverse as Richard Posner and Roberto Unger are philosophical pragmatists). At the same time, I embrace the view that practical reason offers an antidote to the nihilism that characterizes much cls literature. See John Stick, Can Nihilism Be Pragmatic?, 100 HARV. L. REV. 332, 332-33 (1986).

8 The philosophical roots of legal pragmatism can be traced to the works of American pragmatist philosophers such as Peirce, James, and Dewey, as well as European philosophers such as Wittgenstein and Habermas. See, e.g., 5 CHARLES S. PEIRCE, What Pragmatism Is, in COLLECTED PAPERS OF CHARLES SANDERS PEIRCE (Charles Hartshorne & Paul Weiss eds., 3d prtg. 1965); William James, PRAGMATISM AND FOUR ESSAYS FROM THE MEANING OF TRUTH (Ralph Barton Perry ed., 1942); John Dewey, My Philosophy of Law (1941); John Dewey, LOGIC: THE THEORY OF INQUIRY (1938); John Dewey, EXPERIENCE AND NATURE (2d ed. 1929); John Dewey, THE QUEST FOR CERTAINTY (1929); John Dewey, Essays in EXPERIMENTAL LOGIC (2d ed. 1918). For an excellent overview of the early pragmatists and their views pertinent to the law, see Thomas C. Grey, Holmes and Legal Pragmatism, 41 STAN. L. REV. 787, 787-815, 864-67 (1989). Grey classifies Oliver Wendell Holmes as an early legal pragmatist despite his professed contempt for some pragmatist philosophers and their views. See id. at 788-89, 805-36, 864-70. Grey's thesis is that Holmes's professed ambivalence toward pragmatism stemmed from his "predication [of being] an instrumentalist without an adequate system of ends." Id. at 850.

Two contemporary philosophers, Richard Rorty and Richard J. Bernstein, have had the greatest influence on the legal community's recent embrace of pragmatism. Richard Rorty, CONSEQUENCES OF PRAGMATISM (1982) [hereinafter Rorty, CONSEQUENCES]; Richard Rorty, PHILOSOPHY AND THE MIRROR OF NATURE (1979); Richard J. Bernstein, PHILOSOPHICAL PROFILES (1986) [hereinafter Bernstein, PHILOSOPHICAL PROFILES]; Richard J. Bernstein, BEYOND OBJECTIVISM AND RELATIVISM (1983); see Singer, supra note 7, at 7 n.13; Peter D. Swan, Critical Legal Theory and the Politics of Pragmatism, 12 DALHOUSIE L.J. 349 (1989) (comparing the philosophies of Rorty and Bernstein and their impact upon legal scholarship, specifically through an examination of the work of Professor Singer). These contemporary philosophers might be termed "neopragmatists," for their views diverge from those of the earlier American pragmatists in two important ways. First, neopragmatists "talk about language instead of experience or mind or consciousness, as the old pragmatists did. The second respect is that we have all read Kuhn, Hanson, Toulmin, and Feyerabend, and have thereby become suspicious of the term 'scientific method.'" Rorty, supra note 7, at 1813 (footnote omitted); see also Grey, supra, at 789-91 (noting that neopragmatists reject the logical positivist orientation of their predecessors). This latter deviation from old style pragmatism—that is, the rejection of science as having a special claim to truth—is an important feature of this Article. See infra text accompanying notes 170-86.
dential movements to their activities. In fact, optimistic rationalism is nothing other than a foundationalist theory of evidence law. Like all foundationalist theories, rationalism purports to be an overarching principle from which right answers regarding evidence doctrine can be logically deduced; and like all foundationalist theories, rationalism necessarily fails to meet its promise.9

This Article contends that strict adherence to optimistic rationalism has blinded evidence scholars to the reality that the law of evidence is as indeterminate as all other areas of the law. At its core is not a single goal—the attainment of truth—but a number of important, complex, and, alas, competing considerations. Answers to questions concerning the appropriate configuration of evidence doctrine cannot be deduced from a unitary principle; indeed, they cannot be deduced at all. Rather, arguments about evidence doctrine must be conducted in the realm of "practical reason." Practical reason is the process through which individuals argue about and justify decisions made under conditions of immutable uncertainty; it is, fundamentally, a conversation. The methods of practical reason include induction, analogy, ends-to-means rationality, and the test of time.10

The monolithic acceptance of rationalism as the foundational principle of evidence law has operated as a cognitive straightjacket for generations of evidence scholars. Once scholars recognize that their single-minded pursuit of accurate verdicts is neither a comprehensive nor fully coherent enterprise, they will take notice of a whole range of potentially beneficial doctrinal reforms that they have heretofore ignored or reflexively dismissed. But the purpose of this Article is not to argue for any particular reform. Instead, its objectives are more fundamental: to liberate evidence scholarship from its unnecessary and unfortunate narrow-mindedness and to demonstrate how practical reason could be employed to justify alternatives to current doctrine and practice.11

These objectives cannot be accomplished, however, without addressing a second factor contributing to the impoverishment of contemporary evidence thought. Almost without exception, evidence scholars are logical positivists. Simply stated, logical positivism is the view that truth is limited to that which can be verified through the processes of objective science. Not incidentally, evidence scholars' largely instinctive acceptance of logical positivism is related to their universal acceptance of opti-

9 See infra part II.
10 See infra parts III-IV.
11 The reader may detect the exhortatory nature of this goal. Indeed, I agree with Steven Smith that pragmatism is less a philosophy or theory and more a form of exhortation—a call to "scholars and judges to avoid intellectual vices that they already acknowledge as such but are nonetheless prone to commit." Steven D. Smith, The Pursuit of Pragmatism, 100 YALE L.J. 409, 446 (1990). My call is for the community of evidence scholars to "achieve self-awareness of its own discourse, and reassess its features on a continuous basis." Rubin, supra note 7, at 1859.
mistic rationalism, for the two are conceptual cousins. The project of optimistic rationalism—the ongoing refinement of trial procedures in pursuit of a system that accurately reproduces historical truth—is, at some level, an effort to make the adjudicatory system increasingly more scientific.\(^\text{12}\)

The combination of evidence scholars' foundationalism with their logical positivism accounts fully for the exceedingly narrow focus of modern evidence scholarship.\(^\text{13}\) Specifically, it explains why evidence professors have turned with increasing frequency in recent years to empirical social science for answers to evidence questions. Faithful to the rationalist tradition, they start with the assumption that their overarching goal is to seek ways of ensuring the rectitude of trial outcomes. As logical positivists, they believe that scientific inquiry is essential in determining which particular doctrinal configurations will achieve this goal. As a result, modern evidence scholars have argued that solutions to issues as diverse as the admissibility of hearsay, the propriety of witness preparation, and the efficacy of demeanor evidence can be reasoned from existing social scientific research data or from the results of a program of future empirical endeavors.\(^\text{14}\)

This Article's second main task is to place the importance of social scientific inquiry to the reform of evidence doctrine in better perspective. It takes the position that social scientific inquiry is less useful and more

\(^{12}\) See infra text accompanying notes 157-71.

\(^{13}\) Evidence scholars' foundationalism is also at the root of the “new evidence scholarship,” a term coined by Professor Lempert in 1986. Richard Lempert, The New Evidence Scholarship: Analyzing the Processes of Proof, 66 B.U. L. Rev. 439 (1986). The “new evidence scholars” and their critics have been engaged in lively debates over the extent to which jury decisionmaking can be modeled through the use of logic and mathematics and over the efficacy of a number of competing decisionmaking models. See Michael L. Seigel, Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule, 72 B.U. L. Rev. 893, 900-01 n.31 (1992) (describing the “heated debates in contemporary evidence scholarship over appropriate descriptive and normative models of jury decisionmaking” and delineating the main schools of thought in this area); TWNING, supra note 2, at 119-20 (summarizing the debate between proponents of a mathematical approach to probabilistic reasoning and proponents of a nonmathematical approach to such reasoning); Craig R. Callen, Cognitive Science and the Sufficiency of “Sufficiency of the Evidence” Tests, 65 Tul. L. Rev. 1113, 1113-16 (1991) (discussing the current debate surrounding the adequacy of a purely statistical approach to fact finding); Davis A. Schum, Probability and the Processes of Discovery, Proof, and Choice, 66 B.U. L. Rev. 825, 826 (1986) (listing five schools of “inferential direction”). The interest of evidence scholars in these issues rests on their usually unarticulated belief that improved insight into jury decisionmaking could be used to prescribe rules and procedures designed to achieve more accurate jury verdicts. See, e.g., Ronald J. Allen, A Reconceptualization of Civil Trials, 66 B.U. L. Rev. 401, 426 (1986) (arguing that a reconceptualization of jury trials in light of probability analysis is important because it “may lead to fewer errors being made at trial”). But see Lempert, supra, at 469-71 (commenting on Professor Allen's position, noting that “it is clearly not irrational for a system of trial proof to pursue ends other than or in addition to the minimization of verdict errors”). This, of course, is the goal of all optimistic rationalists. A more specific look at the new evidence scholarship is beyond the scope of this Article.

\(^{14}\) See supra note 2; infra notes 18, 166.
costly than most evidence scholars presently surmise. The fundamental support for this position is based, once again, in the philosophy of pragmatism. Most importantly, this Article will demonstrate that social science data cannot be applied to legal questions without resorting to techniques such as analogy, induction, authority, ends-to-means rationality, and the test of time—that is, the very fundamentals of practical reason. Thus, social science research cannot, on average, provide solutions to evidence problems any more authoritative than solutions suggested by other methods of practical reason; in other words, applied social science is, itself, nothing more (though nothing less) than one facet of practical reason.

Importantly, this reconceptualization of applied social science does not mean that empirical research is a worthless endeavor that ought to stop. Despite its inherent limitations, social scientific inquiry slowly adds to our shared understanding of the human condition and quite appropriately affects the practical discourse of law. Nevertheless, this Article will demonstrate that the current preoccupation of many evidence scholars with social scientific research has not been cost-free. In many instances, this preoccupation has caused scholars to call for quite radical reforms based upon “scientific” research with little or no consideration of important competing—but nonquantified—concerns. Worse yet, the empirical data these scholars rely upon as definitive support for their proposals are often incomplete or subject to varying interpretations. At the same time, staunch empiricism has caused other evidence scholars to adopt the radically conservative position that doctrine should not be reformed at all unless changes are supported by empirical study.

An outline of this Article is as follows. Part I sets forth the contours of the rationalist tradition. Part II examines the category of legal formalism known as foundationalism and argues that rationalism is firmly entrenched as a foundationalist principle of evidence scholarship. This Part points out that rationalism suffers from two of the problems inherent in all foundationalist principles: its faithful application sometimes leads to absurd results and other times leads to no result at all. Part III explores in much greater detail the consequences resulting from the domination of rationalism within evidence scholarship. It begins by exposing how rationalism’s focus on the goal of accuracy implicitly overestimates the objectivity of jury verdicts and continues by setting forth a number of concerns ignored or significantly undervalued by rationalist thought. The third Part then examines the manner in which rationalism has led to a fundamental distortion of the discourse within the evidence commu-


16 See infra text accompanying notes 186-90.

17 See infra text accompanying notes 191-209.
nity. Part IV sets forth a theory of practical reason and proposes it as a replacement for foundationalism in evidence thought. Part V explores the connection between rationalism, logical positivism, and the increasing dominance of social scientific study in evidence scholarship. The second section of this Part evaluates the costs and benefits of empirical research to the reform of evidence doctrine. Part VI is a brief conclusion.18

I. THE RATIONALIST TRADITION

Professor William Twining has written at length about what he has labeled the “rationalist tradition” in evidence scholarship. The central tenet in this tradition is that the

direct end of adjective law is rectitude of decision . . . through accurate determination of true past facts material to precisely defined allegations . . . proved to specified standards of probability or likelihood on the basis of careful and rational weighing of evidence . . . presented (in a form designed to bring out truth and discover untruth) to supposedly competent and impartial decision-makers with adequate safeguards against corruption and mistake . . . .19

As Professor Twining notes, the rationalist tradition has long and solid roots, dating from “Gilbert through Bentham, Thayer and Wigmore to Cross and McCormick.”20

On the whole, evidence scholars have been both aspirational and optimistic in their rationalist orientation. In other words, although most evidence scholars have criticized the doctrinal configuration of their day, they have aspired to rationalism, and they have been optimistic about the feasibility of achieving this goal.21 Indeed, it is not unfair to characterize the last two centuries of Anglo-American evidence scholarship as an essentially monolithic debate over the nature and direction of reform that will speed progress toward the rationalist ideal. Evidence scholars who have challenged the fundamental assumptions of the rationalist model have been quite rare.22

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18 One final introductory note is in order. For purposes of illustration, this Article makes periodic reference to three specific examples of evidence scholarship: J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71 (1990); Stephan Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547 (1984); and Olin G. Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991). I have selected these articles for extended treatment because they are representative of the most interesting and provocative work that evidence scholars have produced in the area of “law and social science” in recent years. Of course, I also refer to numerous other examples of evidence scholarship throughout this Article.

19 TWNING, *supra* note 2, at 73 (numbers omitted).

20 Id. at 71.

21 Id. at 75.

22 Professor Twining identifies only two evidence scholars who have seriously questioned the foundations of rationalism: James Glassford, a Scottish Advocate and Sheriff-Deputy who wrote in 1820, and Professor Kenneth Graham. Glassford “was a pioneering exponent of a ‘holistic’ ap-
Straightforward statements concerning the primacy of the rationalist objective of obtaining accurate verdicts are ubiquitous in modern evidence scholarship. For example, Professor Landsman clearly proclaims his rationalism in *Adversary Procedure*. He states at the outset that his concern about the preparation of disinterested witnesses stems from the fact that testimonial distortions "can be a major cause of adjudicatory error." In addition, Professor Landsman reiterates in his conclusion that his proposal "represents an attempt to reform the adversary system in ways that maintain adversarial vitality while improving adjudicatory accuracy."

In many cases, however, scholars exhibit a fundamentally rationalist attitude but reference it only indirectly. Professors Tanford and Wellborn fall into this latter category. In *Jury Instructions*, Professor Tanford quotes with approval the Supreme Court's admonition that our approach to the evaluation of judicial evidence . . . " Id. at 77. Professor Graham has characterized rationalism as an "obfuscating ideology which has been used to legitimate institutions and doctrines that uphold an ethos of social control, which is technocratic, hierarchical, centralized and statist." *Id.* at 78 (footnote omitted); see *Kenneth W. Graham, Jr., The Persistence of Progressive Proceduralism*, 61 Tex. L. Rev. 929 (1983) (book review); *Kenneth W. Graham, Jr., 'There'll Always Be an England': The Instrumental Ideology of Evidence*, 85 Mich. L. Rev. 1204 (1987) (book review).

In the next chapter of his book, Professor Twining examines whether "modern versions of scepticism and relativism," including philosophical skepticism, historical relativism, and phenomenology, call into question the central tenets of optimistic rationalism. TWINING, supra note 2, at 92-152. The title of this chapter, "Some Scepticism About Some Scepticisms," sums up his general conclusion; Professor Twining is himself an optimistic rationalist.

Interestingly, Professor Twining does not include within his analysis pragmatism or practical legal studies. This omission is evident from a review of his chart comparing the rationalist's assumptions with those of the skeptics he has examined. See id. at 132. For instance, he depicts the ideal rationalist as adhering to a correspondence theory of truth, juxtaposing against this the variant of a coherence theory of truth. *Id.* He does not consider the pragmatic attitude toward truth: that both the coherence and correspondence theories are simply "noncompeting trivialities." RORTY, CONSEQUENCES, supra note 8, at 17. "For pragmatists, 'truth' is just the name of a property which all true statements share." *Id.* at xiii. William James defined the pragmatic view of truth this way: it is "the name of whatever proves itself to be good in the way of belief, and good, too, for definite, assignable reasons." JAMES, supra note 8, at 59.

23 Landsman, supra note 18, at 549.

24 *Id.* at 586; see also *Eleanor Swift, A Foundation Fact Approach to Hearsay*, 75 Cal. L. Rev. 1341, 1348 (1987) ("Rules of evidence and procedure are routinely evaluated by their alleged effect on the accuracy of the trier's factfinding."); *Charles R. Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1194 (1979) ("The generally articulated and popularly understood objective of the trial system is to determine the truth about a particular disputed event."); *Christopher B. Mueller, Post-Modern Hearsay Reform: The Importance of Complexity*, 76 Minn. L. Rev. 367, 380 n.46 (1992) (agreeing with Professor Swift that a theory of operational accuracy should underlie evidence rules); *Dale A. Nance, The Best Evidence Principle*, 73 Iowa L. Rev. 227, 232 (1988) ("The reasonably accurate determination of disputed factual issues is . . . the pivotal task to be performed at trial . . . ").

Indeed, I have stated the rationalist credo myself. See Seigel, supra note 13, at 898 ("Most scholars agree that the primary purpose of the rule against hearsay, like most other rules of evidence, is to assist the fact finder . . . in ascertaining an accurate picture of historical truth.") (footnote omitted).
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jury trial system depends on the "crucial assumption . . . that juries will follow the instructions given them by the trial judge." He contends that the question whether juries comprehend and obey instructions "strikes at the heart of the legitimacy of our current litigation system." Without doubt, Professor Tanford's belief in the importance of this issue is based upon its connection to the goal of obtaining accurate jury verdicts. A full account of his thesis is as follows: if juries are misunderstanding or disobeying instructions (explicitly stated), inaccurate verdicts are the result (implicit assumption), and the legitimacy of trial by jury is jeopardized (explicitly stated).

Similarly, Professor Wellborn sets out in Demeanor to challenge the widely held premise "that ordinary people [i.e., jurors] untrained in detecting deception will make significantly more accurate judgments of credibility if they have the opportunity to view the demeanor of a witness." If demeanor evidence does not "enhance judgments of credibility . . . it is appropriate to reexamine several legal doctrines and practices." Professor Wellborn's interest in demeanor is thus directly tied to the accuracy of credibility judgments, which is, of course, a critical factor in obtaining accurate verdicts. His fundamentally rationalist perspective is confirmed when, after determining that demeanor evidence does not, in fact, enhance credibility judgments, he concludes that trials with live testimony are still desirable because, inter alia, "with regard to accurate factfinding—a broader issue than accuracy of credibility determinations—live testimony may well have overall positive value."

On very rare occasions, an evidence scholar has expressly questioned the centrality of the rationalist premise. The most celebrated recent instance of this phenomenon was the publication of Charles Nesson's article regarding the social acceptability of verdicts. In this

25 Tanford, supra note 18, at 73 (quoting Parker v. Randolph, 442 U.S. 62, 73 (1979) (White, J., dissenting)).
26 Id.
27 Wellborn, supra note 18, at 1075.
28 Id. at 1076.
29 Whether this claim is supported by the social scientific evidence upon which he relies is discussed below. See infra text accompanying notes 187-89, 203-04.
30 Wellborn, supra note 18, at 1092. Wellborn does note that trials serve purposes beyond the accurate determination of facts. But this statement does not call into question his essential rationalist ideology. See infra text accompanying notes 76-85.

Another prime example of an article in which an evidence scholar expresses an alternative view of the function of trials is Milner Ball's essay examining the trial as a theatrical event. See Milner S. Ball, The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater, 28 STAN. L. REV. 81 (1975). Professor Ball rejects the notion that a trial is simply the means to an end; rather, he states that "the live presentation of witnesses in the courtroom . . . is also an end in itself."
In Professor Nesson’s view, acceptable verdicts are critical to the central moralizing and educative functions of the law; the trial, though ostensibly about truth-seeking, is in fact “a drama that the public attends and from which it assimilates behavioral messages.” Although measures to promote accurate verdicts will often promote acceptable ones, this is not always the case. Moreover, Professor Nesson illustrates that, contrary to the evidence community’s stated goal of pursuing the rationalist ideal, some facets of evidence doctrine can be understood only

Id. at 82. Although he argues that the theatrical aspects of live trials further the goal of just outcomes, id. at 100-06, he stresses that, if this were the only goal, other processes might achieve the same result with more economy and efficiency. Therefore, Professor Ball’s main objective is to elucidate other purposes for the live trial, such as the redirection of aggression and the preservation of a space that provides an image of legitimate political community. Id. at 107-13.

Unlike Professor Nesson’s article, Professor Ball’s essay has not attracted a hail of critical response. In my opinion, this is because Professor Ball makes his points more subtly, relying heavily (as his title suggests) on metaphor. The full import of Professor Ball’s perspective has simply gone unnoticed. See infra text accompanying notes 99-101.

Professor Nesson’s later piece on the acceptability of verdicts appears to be an extension and refinement of this earlier observation.

It is possible that Professor Nesson was influenced by the work of his colleague, Laurence Tribe, who had previously questioned the centrality of rationalism in an earlier piece on presumptions, though in a less systematic way. See Charles R. Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 HARV. L. REV. 1187, 1194 (1979). There, after noting the popularity of the rationalist ideal, he states: “But another, perhaps even paramount, objective of the trial system is to resolve the dispute. . . . From an instrumentalist viewpoint, authoritative resolution might even today seem to be the real goal, with ascertainment of the truth but a useful means to that end.” Id. (citation omitted). Professor Nesson’s later piece on the acceptability of verdicts appears to be an extension and refinement of this earlier observation.

Though Professor Tribe’s rejection of rationalism predates that of Professor Nesson, it is significantly less remarkable because Professor Tribe resorts to nonrationalist argument only after setting forth a long and detailed critique of statistical evidence from within the rationalist tradition. See id. at 1332-68 (arguing that, for a variety of reasons, the explicit use of statistical evidence at trial would impair the jury’s ability to determine objective historical truth).

I am not alone in my interpretation of the work of Professors Nesson and Tribe. See Lempert, supra note 13, at 470 (noting that Professors Nesson and Tribe “elaborated a model of the trial which attended to values other than rationality”).

33 Nesson, The Evidence or the Event?, supra note 31, at 1360.
as reflecting a preference for achieving acceptable verdicts rather than accurate ones. On a normative level, Professor Nesson argues that, though it is unsatisfactory and uncomfortable to admit, "[o]ne who is absolutely committed to the process of ascertaining and testing the truth, and who would thus shun any concession of the search for truth for the production of acceptable verdicts, may find that he does so at the expense of other important values." The vehemence and near unanimity with which other evidence scholars have attacked Professor Nesson’s thesis are themselves operative measures of the continued vitality of rationalism. For instance, a student author dismissed Professor Nesson’s theory as “cynical.” In Statistical-Probability Evidence and the Appearance of Justice, however, Daniel Shaviro levels one of the most sweeping criticisms at Professor Nesson’s position. Professor Shaviro begins with the proposition that “[a]part from any practical benefits of deciding cases accurately (such as improving deterrence), the accuracy of verdicts has moral implications.” Morality equals justice, which can be achieved only by obtaining verdicts consistent with historical truth. Thus, in Professor

34 Specifically, Professor Nesson uses cases involving “naked statistical proof” to show that highly probable verdicts, if “unacceptable,” are rejected by the courts. See id. at 1378-85. On the other hand, he refers to the problem of conjunction to illustrate that highly improbable verdicts are often “acceptable” and are therefore routinely upheld by the courts. See id. at 1385-90.

35 Id. at 1392.

36 I note that the articles authored by Professors Nesson and Tribe sparked a great deal of debate regarding the use of statistical evidence at trial, which quickly led to and became intertwined with a larger debate over the efficacy of various mathematical models of jury decisionmaking behavior, all of which was later dubbed the “new evidence scholarship” by Professor Lempert. See supra note 13. Some participants in these debates have, in fact, defended the Nesson-Tribe view that naked statistical evidence should not be considered sufficient to support a verdict. See, e.g., Craig R. Callen, Adjudication and the Appearance of Statistical Evidence, 65 Tul. L. Rev. 457 (1991). These defenses have not, however, endorsed Professor Nesson’s fundamental rejection of rationalist ideology. See, e.g., id. at 466 (arguing that Professor Shaviro failed to consider arguments exposing the weaknesses of bare statistical evidence other than those articulated by Professors Tribe and Nesson).


39 Professor Shaviro encompasses within his criticism the similar views expressed by Professor Tribe. See id. Professor Allen has also authored a comprehensive critique of Professor Nesson’s point of view. See Ronald J. Allen, Rationality, Mythology, and the ‘Acceptability of Verdicts’ Thesis, 66 B.U. L. Rev. 541 (1986). Professor Allen’s affirmation of the rationalist tradition is evident from his conclusion:

It is a tenet of our civilization that legal rights and obligations should, in general, rest on as accurate a reconstruction of reality as is feasible in the context of any particular dispute. The Acceptability Thesis requires that we pretend that obvious departures from rational efforts to reconstruct reality are in fact statements about it. Instead, we should continue to strive for rationality and not be sidetracked down Professor Nesson’s blind alley of drama, ritual, and mysticism.

Id. at 562.

40 Shaviro, supra note 38, at 532.
Shaviro’s view, one who would advocate trumping the rationalist ideal with some other principle (such as the promotion of acceptable verdicts) is, in effect, damning the judicial system to immoral action.\textsuperscript{41} Few evidence scholars have defended the Nesson thesis in light of these attacks.\textsuperscript{42} One might thus view the responses to Professor Nesson as having restored an equilibrium in which rationalism reigns supreme.\textsuperscript{43}

\textsuperscript{41} See id. at 534-43. Professor Shaviro goes on to criticize Nesson’s thesis on a number of other grounds. In general, he questions the validity of a critical assumption underlying Professor Nesson’s thesis: that a rule which does not in fact further accurate factfinding can nevertheless promote a perception of fairness. See id. at 543-53.

My guess is that, to most readers, Professor Shaviro’s critique of the Nesson thesis seems quite convincing. If I am correct, this is simply another example of the strength with which the rationalist ideal shapes modern evidence thought. I hope that by the conclusion of this article at least some readers will agree with me that the debate between Professors Shaviro and Nesson is not a case of good versus evil.

\textsuperscript{42} The defenses of the Nesson thesis have generally been qualified and contextual. For instance, in examining the efficacy of the rule against hearsay, I have argued that the promotion of acceptable verdicts is laudable, at least to the extent that it does not conflict with the achievement of accurate ones. See Seigel, supra note 13, at 925.

Similarly, Professor Tanford has argued that the evidentiary rule excluding prejudicial evidence (such as Federal Rule of Evidence 403) helps preserve the adversariness of our adjudicatory system, achieve efficiency in decisionmaking, and obtain politically acceptable verdicts—even when these goals conflict with the goal of verdict accuracy. See J. Alexander Tanford, A Political Choice Approach to Limiting Prejudicial Evidence, 64 IND. L.J. 831, 845-58 (1989). In so doing, Professor Tanford cites Professor Nesson with apparent approval. Id. at 855 n.167. What is telling about Professor Tanford’s position, however, is his argument that, because the prejudice rule “involves conflicting fundamental values that cannot all be respected,” it should be analyzed in accordance with the “political choice” paradigm, meaning that “it is the province of the appellate courts, not the trial judges, to choose which values to favor over others.” Id. at 865. Professor Tanford thus treats the prejudice rule as a special case within evidence doctrine, a point verified by the fact that in his subsequent article concerning jury admonitions he exhibits a fundamentally rationalist orientation. See supra text accompanying notes 25-26. The point of this Article is that all evidence doctrine implicates these competing concerns.

Professor Cohen has stated that the Nesson thesis has “undeniable intuitive appeal” that explains “our reluctance to [permit] verdicts based on ‘naked statistical evidence’ more convincingly” than alternative theories. Neil B. Cohen, The Costs of Acceptability: Blue Buses, Agent Orange, and Aversion to Statistical Evidence, 66 B.U. L. REV. 563, 567 (1986). Nevertheless, Professor Cohen’s article is hardly a defense of the Nesson thesis; rather, Professor Cohen’s project is to show that the promotion of acceptable verdicts over accurate ones—or, in the context of the argument over naked statistical proof, “event-verdicts” over “evidence verdicts”—comes at a significant cost. Id. at 568-70.

\textsuperscript{43} It is somewhat ironic that most contemporary evidence scholars also fit into the category of “complacent rationalists” (see Twining, supra note 2, at 75). That is, they believe that, on the whole, current doctrine reasonably satisfies the rationalist ideal. Proof of the complacency of modern evidence scholars can be established by articulating obvious reform proposals that clearly foster rationalism—and seem, at least on their face, feasible—but have been almost completely overlooked in Anglo-American evidence literature. Such reforms might include:

—imposing a post-trial comprehension test to ensure that the jury has understood the critical aspects of the case. If too many jurors fail the test, the verdict would be invalidated;

—providing trial transcripts to jurors on a daily basis so that they could study them at home and use them during deliberations;

—permitting jurors to ask questions of the court, counsel, and the witnesses to minimize the possibility that they might decide the case on an erroneous view of the facts or law;
The above exposition should not be taken to suggest that pursuit of accuracy is the only principle underpinning the law of evidence. No one doubts that the truth-finding process must at some point be limited by the practical need to resolve legal disputes with reasonable dispatch. Moreover, some rules of evidence explicitly rest, at least in part, on rationales wholly at odds with truth-finding. The traditional rule barring the introduction of evidence pertaining to subsequent remedial measures is one example. The fact that a party has remedied a design defect or dangerous condition after it has caused an injury is probative evidence: it increases the probability that the party acted unreasonably (and therefore negligently) by failing to address the harm prior to the accident. Admission of such evidence would thus seem to assist the factfinder in determining historical truth. Nevertheless, the traditional rule operates to exclude such evidence based primarily on the rationale that a contrary rule would cause persons to leave dangerous conditions unremedied, which would result in additional harm. Thus, accuracy of verdicts is sacrificed to accomplish a more important external objective. Other rules falling in this category include those which exclude privileged information—permitting the jury to call certain witnesses, particularly expert witnesses if the jury is confused over a technical point; setting up courtrooms to provide for three juries of six or eight or ten persons each, having the juries deliberate separately, and requiring a unanimous verdict both within each jury and among all three juries (or perhaps declaring victorious the party that wins two out of three verdicts).

Complacency leads to the belief that proposals of this kind are too drastic to merit serious attention. In my opinion, the current state of apathy rests on evidence scholars' general, though unstated, acceptance of a Darwinian theory of evidence law, as follows: (1) since trial by battle came into disfavor, generations of common-law judges and evidence scholars have been united in their pursuit of accurate verdicts; (2) each generation has developed and modified evidence doctrine in furtherance of this goal; (3) these modifications have slowly but steadily moved humanity ever closer to the attainment of the rationalist ideal; (4) the task left for current and future generations of evidence scholars is to improve upon this foundation; (5) improvement will come with changes at the margin. Cf. Stephen Toulmin, *Human Understanding* 135-44 (1972) (setting forth a Darwinian approach to the historical development of scientific knowledge).

In any event, it is ironic that evidence discourse has been impoverished not only by its foundationalism and logical positivism—the main theses of this article—but also on its own terms by apathy toward the status quo. Similarly, it is not at all uncommon to find evidence scholars referencing goals of our adjudicatory system other than the pursuit of accurate verdicts. Indeed, the authors of two of the three articles employed herein for illustrative purposes have, on other occasions, proffered nonrationalist justifications for components of evidence doctrine. See Tanford, *supra* note 42, at 845-58 (arguing that the rule excluding prejudicial evidence is designed to promote "legal accuracy," adversariness, efficiency, and the acceptability of verdicts); Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts, 29 Buff. L. Rev. 487, 526 (1980) (defending the adversary system because, *inter alia*, it promotes the social acceptance of verdicts). My point is not that evidence scholars are unaware of these other goals, it is that they often fail to realize their significance. See infra part III.C.


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tion and offers to compromise or plea bargain.

Interestingly, it is often argued that even these rules have a truth-furthering component as well. For instance, the subsequent remedial repair rule can be justified on the ground that such evidence is more likely to mislead the factfinder than help it arrive at an accurate verdict. The factfinder might be too quick in assuming that "because the world gets wiser as it gets older, therefore it was foolish before." Similarly, at least some of the privileges, especially the attorney-client privilege, are commonly defended on the ground that, in the long run, they are more likely to produce rather than hinder accurate verdicts in an adversary system.

In any event, the existence of a few areas of evidence doctrine where rationalism has arguably given way to a competing goal does not call into question the fundamental primacy of the rationalist ideal. The exceptions are narrowly defined and operate only at the edges of evidence law. The vast majority of evidence doctrine—regarding relevance, unfair prejudice, character evidence, hearsay and its exceptions, expert testimony, judicial notice, authentication, and best evidence—has the rationalist objective of fostering accurate verdicts at its core.

49 See, e.g., Fed. R. Evid. 408.
50 See, e.g., Fed. R. Evid. 410.
52 See, e.g., Monroe Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1470 (1966) (In an adversary system, determination of the truth requires "the fullest uninhibited communication between the client and his attorney, so that the attorney can most effectively counsel his client and advocate the latter's cause.").
53 Any reader who continues to doubt this assertion needs only to examine the leading textbooks on evidence for additional proof. (I use the word textbook rather than casebook because this more accurately describes most of the books being used to teach evidence in contemporary law school classrooms.) For example, Professors Lempert and Saltzberg state in their textbook that "the 'truth-finding' model [of the law of evidence] dominates. Generally speaking, rules of evidence are to be judged by whether or not they increase the chance that the jury will reach a correct verdict." Richard O. Lempert & Stephan A. Saltzberg, A Modern Approach to Evidence 148 (1982) (footnote omitted). Professors Lempert & Saltzberg do raise other possibilities: the trial as a battle; the trial as an "elaborate ritual designed to reconcile losing litigants to their fate"; and the trial as a method of dispute settlement (where emphasis is on closure rather than accuracy). Id. The first of these they see as "ancestral trappings" that modern evidence will never completely shed. The second they dismiss as cynical because it depends on the mere "appearance of fairness." Id. The third they acknowledge as motivating some legal doctrine, though it is telling that the aspects of doctrine they specify—limited rights of collateral and direct appeal, rules of res judicata, and statutes of limitations—are not traditionally associated with the law of evidence.

Similarly, Professors Mueller and Kirkpatrick state in their textbook that the "mistrust of juries is the single overriding reason for the law of evidence." Christopher B. Mueller & Laird C. Kirkpatrick, Evidence Under the Rules 1 (1988). They separately specify "accurate factfinding" as a goal of the law of evidence, but they note that the mistrust of juries is a specific instance of the more general concern about accuracy. Id. at 2 & n.1. They cite in addition the goals of furthering substantive policies related to the litigation (such as burdens of proof) and furthering policies.
In sum, at least since the time of Sir Jeffrey Gilbert, the law of evidence has been dominated by one central guiding principle: that the goal of evidence doctrine is to maximize the probability that the processes of litigation will result in an objectively accurate verdict. Other goals have been granted some recognition, but they have never challenged the primacy of the rationalist ideal, and their importance in the overall development of evidence law has been slight. On very rare occasions, an evidence scholar has made the claim that some other principle, such as the pursuit of acceptable verdicts, is deserving of a status equivalent to that granted the pursuit of accurate ones. Rather than ignite a dialogue, such challenges have resulted in reflexive reaffirmance of optimistic rationalism by members of the evidence community. As the next section demonstrates, optimistic rationalism thus qualifies as a foundationalist theory of evidence law.

II. RATIONALISM AS A FOUNDATIONALIST PRINCIPLE

A. Formalism and Foundationalism

Evidence scholarship, though dramatically influenced by legal realism in some ways, is in one very important respect a repository of legal formalism. Dating back to Langdell, formalism is the belief that the law is a closed analytical science, like mathematics. Formalists assert that rules of law, and their exceptions, can be logically deduced from initial premises. In the formalist's world, if the initial premises are "true" and the deductive process "valid," the outcome is legally "correct." In addition, there can be only one correct answer to any given legal problem.

Few contemporary legal scholars defend formalism per se. But this does not mean that formalism is dead. In its contemporary form, formalism most often appears disguised as foundationalism. Foundationalism is the attempt to articulate a "single dominant value" or unrelated to the goals of litigation. Id. at 1-2. Only the latter goal directly conflicts with the pursuit of accurate verdicts.

55 See infra text accompanying note 159.
56 See Burton, supra note 7, at 778-79; Rubin, supra note 7, at 1855 ("There once was a time when legal scholars did lay claim to objectivity. They believed they were engaged in the process of discovering true legal principles that stood above and beyond the ordinary sphere of law, or that they were tracing the implications of principles that had been discovered. This doctrine is now known as 'formalism.'") (citation omitted); Richard A. Posner, What Has Pragmatism to Offer Law?, 63 S. CAL. L. REV. 1653, 1663 (1990) ("Legal formalism is the idea that legal questions can be answered by inquiry into the relation between concepts and hence without need for more than a superficial examination of their relation to the world of fact. It is, therefore, anti-pragmatic as well as anti-empirical.").
57 There are, of course, exceptions. See, e.g., Frederick Schauer, Formalism, 97 YALE L.J. 509 (1988); Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 YALE L.J. 949 (1988).
58 See Farber & Frickey, supra note 7, at 1618.
"grand theory" underling an area of law. A foundationalist theory claims to represent the building blocks upon which a large doctrinal tower can rest. Although the architect of such a theory might not be a full-fledged formalist because she rejects the notion that "the law" is a closed analytic system, she nevertheless maintains that from her foundationalist principle a portion of legal doctrine can, in fact, be logically deduced. The goal of foundationalism is to provide a uniform and objective method for judges (and presumably scholars) to answer difficult legal questions.

Though most legal scholars would like to think that "we are all realists now," the persistence of foundationalism in many areas of the law belies this claim. For instance, Professors Farber and Frickey recount a history of First Amendment scholarship replete with competing foundationalist theories. Similarly, Professors Eskridge and Frickey reveal three incompatible grand theories of statutory construction that have been advocated by various academic and judicial thinkers during the twentieth century. A careful examination of judicial opinions and legal scholarship in other areas of the law would no doubt betray additional foundational tendencies.

The fundamental problem with foundationalist theories is that they necessarily fail to accomplish their stated objective: they do not provide the singular concept or value upon which an area of legal doctrine can be logically constructed. Any legal issue worth theorizing about is simply

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59 See Eskridge & Frickey, supra note 7, at 321.
60 The notion of foundationalism in the law is borrowed from philosophy. "'Foundationalism' is a long name for the age-old philosopher's dream that knowledge might be grounded in a set of fundamental and indubitable beliefs." Grey, supra note 8, at 799.
61 Professors Farber and Frickey introduced the metaphor of bricks supporting a tower. See Farber & Frickey, supra note 7, at 1639-41.
62 See id. at 1615 (Foundationalists "attempt to identify a single unifying purpose . . . from which they then deduce answers to concrete . . . problems.").
64 See Burton, supra note 7, at 779; see also Rorty, supra note 7, at 1811 (To the extent that no one speaks about a "science of law" anymore, "everybody seems to now be a legal realist.").
65 See Farber & Frickey, supra note 7, at 1617-18.
66 See Eskridge & Frickey, supra note 7, at 324-25.
67 I am taking a stronger position on this issue than some other practical scholars. Even if one were to canvass all existing foundational theories and demonstrate that they were flawed, one would still not have "scientifically proven" that a valid foundational principle cannot exist. See Farber & Frickey, supra note 7, at 1626-27. My argument that foundationalist theories necessarily fail rests itself on methods of practical reason: induction, analogy, and authority. I am convinced that foundationalism is doomed to failure because I have yet to find a foundationalist theory that works, even though many have been advanced by brilliant legal thinkers. Cf. id. Furthermore, I am relying on the authority of Richard Rorty that centuries of inquiry by philosophers have failed to produce a satisfactory foundational theory of philosophy. See RORTY, CONSEQUENCES, supra note 8, at xiv ("Pragmatists think that the history of attempts to isolate the True or the Good, or to define the word 'true' or 'good,' supports their suspicion that there is no interesting work to be done in this
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too complex and too contextual for one theoretical principle to produce satisfactory answers to all its questions. A foundationalist theory simultaneously proves too little and too much. In other words, if some specific factual settings were decided in accordance with the logic of the foundation, the result would be patently absurd. On the other hand, at least as to some issues, a foundational theory will be indeterminate; the principle plus deductive logic will fail to produce any answer at all.

Foundationalism leads to a number of additional debilitating effects on thinking and reasoning about the law. This issue will be addressed later, however. First it is necessary to give context to this discussion by examining the rationalist tradition within the law of evidence in light of the foregoing explication of foundationalism.

B. Rationalism as Foundationalism

The rationalist ideal—that the central object of the law of evidence is to maximize the accuracy of trial verdicts—is a paradigmatic example of a foundationalist principle. As the earlier discussion of rationalism made clear, pursuit of accuracy is undoubtedly the "single dominant value" or "grand theory" underlying the vast majority of evidence doctrine. Moreover, scholars have traditionally approached questions concerning the optimal configuration of evidence doctrine by starting with the rationalist premise and then attempting to deduce from it a correct answer. Evidence scholarship has thus been overwhelmingly foundationalist.

As with all foundationalist theories, faithful syllogistic application area. It might, of course, have turned out otherwise. . . . But in fact [it] hasn't. The history of attempts to do so, and of criticisms of such attempts, is roughly co-extensive with the history of that literary genre we call 'philosophy'—a genre founded by Plato.

In any event, my argument does not depend upon the truth of the statement that foundationalism is universally doomed to failure. It is sufficient for my purposes that foundationalism in the context of the law of evidence is logically flawed and that the result of foundationalism in this context has been negative. See infra text accompanying notes 72-125.

Cf. Farber & Frickey, supra note 7, at 1619-21 (particular foundational theory of First Amendment, resting on notion of self-realization, would seem to protect heroin use and some forms of espionage while excluding from protection corporate speech and commercial advertising).

Cf. id. at 1625 (foundational theory of First Amendment resting on notion of tolerance fails to answer question whether public access to criminal trials is protected speech); Eskridge & Frickey, supra note 7, at 325-29 (grand theory of statutory construction based on intent of the legislature is very often indeterminate).

As we shall see below, evidence scholars sometimes abandon analytic inquiry, i.e., deduction, for synthetic inquiry, i.e., empiricism. See infra text accompanying notes 162-66. For present purposes the distinction is irrelevant because in both instances scholars begin with the rationalist ideal (the "grand theory") and then turn to "scientific" ("objective") methods to determine the "correct" doctrinal answer. This is the essence of foundationalism.

Indeed, what appears to be unique about the law of evidence is the extent to which the foundationalist principle of rationalism has gone virtually unchallenged for the better part of two centuries. See supra text accompanying notes 19-54. In other areas of the law, scholars have typically engaged in extended debates over which of numerous foundational principles is the most effica-
of rationalism leads in some instances to indefensible or absurd outcomes. Consider, for example, Professor Wellborn’s article regarding demeanor evidence. As set out above, Professor Wellborn starts from a position of rationality and the premise that if demeanor evidence does not further the quest for accurate verdicts, doctrine based on this assumption is fundamentally suspect. After reviewing the pertinent social scientific literature, Professor Wellborn concludes that demeanor evidence amounts to “distracting, misleading, and unreliable non-verbal data.” Accordingly, he argues that “strictly with regard to accuracy of credibility judgments, . . . legal procedures could be improved by abandoning live trial testimony in favor of presentation of deposition transcripts.”

Professor Wellborn’s analysis thus points him toward a rather drastic recommendation: that our system of live trials be replaced wholesale with one in which judges would supply jurors with a packet of written materials, give them ample opportunity to read it, and then ask them to deliberate and render a verdict. Although he successfully manages to dodge this absurd outcome, how he does so is very telling. Professor Wellborn first journeys outside of the law of evidence—to the Confrontation Clause—to conclude that, at least in criminal cases, constitutional constraints dictate a live trial. Next, he argues that the logical implications of his analysis are politically unacceptable: “Purely as a political matter, American lawyers and nonlawyers would not tolerate any major curtailment of an institution so deeply embedded in our legal tradition.”

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72 See supra text accompanying notes 65-66. The unitary nature of the evidence community’s foundationalism has resulted, in my opinion, in an especially distorted and impoverished discourse.
73 See supra text accompanying notes 28-30.
74 Wellborn, supra note 18, at 1091.
75 Id.
76 If jurors cannot use demeanor evidence to help determine when witness testimony is false or inaccurate, surely they would be no more successful in using it to evaluate lawyers’ arguments. Thus it follows from the combination of rationality and Professor Wellborn’s conclusions that the prospects of reaching an accurate verdict would be furthered not only by providing jurors with written transcripts of testimony, but also by providing them with written versions of the lawyers’ opening and closing statements. Whether the judge’s instructions ought to be oral or written does not appear to be impacted by Professor Wellborn’s analysis. Cf: Tanford, supra note 18, at 93, 103-06 (instructions ought to be both written and repeated orally several times).
77 By saying this, I do not mean to pass judgment on the question whether we should change our system from a primarily live event to a primarily written exercise. The absurdity of the situation stems from the fact that Professor Wellborn feels compelled to assess whether live trials ought to be abandoned based solely upon his examination of the truth-furthering function of demeanor evidence.
78 Wellborn, supra note 18, at 1091.
79 Id. at 1091-92. It is very interesting to note that Professor Wellborn does not include the academic community in this observation. Given their foundationalist perspective, many evidence scholars probably would call for sweeping doctrinal change if they were convinced that demeanor evidence seriously impairs the factfinding process. Indeed, one can imagine Professor Shaviro argu-
Undoubtedly sensing the inadequacy of these arguments, Professor Wellborn continues with the observation that live testimony—as opposed to demeanor evidence—may further the search for truth by deterring dishonest witnesses. Finally, with neither a cite to Professor Nesson nor an extended discussion, Professor Wellborn turns to the counter-principle of acceptability of verdicts. His discomfort with having to resort to this principle is obvious from the tentative nature of his statements: "It is probably more important that the results of litigation be accepted than that they be accurate. . . . Live testimony may be essential to perceptions of fairness. . . ." He supports this point, not with evidence cases, but with a return to constitutional doctrine. Professor Wellborn's sigh of relief is almost audible when he reaches the conclusion that "[r]ecognition of the weakness of demeanor evidence does not herald a revolution in trial procedure." Nevertheless, Professor Wellborn's rationalist perspective gets the better of him once again when he makes a potentially revolutionary recommendation concerning the rule against hearsay. He calls for the abolition of the prerequisite of unavailability for the introduction of former testimony and pretrial depositions in civil cases.

The inadequacies are patent. As to the first argument, the Confrontation Clause is irrelevant to the vast domain of civil litigation. Moreover, the clause has been interpreted by the Supreme Court as furthering the same goal as the rule against hearsay, i.e., the rationalist goal of facilitating accurate verdicts. See Seigel, supra note 13, at 943 n.152. If one shares this view of confrontation protection, there is no logical reason why one would not at least consider the possibility of reforming confrontation doctrine to accommodate Professor Wellborn's conclusions rather than passively accepting the Confrontation Clause as an impediment to "progress."

As to the second argument, the self-interested objections of the trial bar and the protests of an ignorant public are hardly principled reasons to eschew law reform aimed at increasing the accuracy of verdicts.

This argument points to the indeterminacy of the rationalist ideal. See infra text accompanying note 86.

As contrary to my assertion, Professor Wellborn states that his hearsay proposal is "hardly radical." Wellborn, supra note 18, at 1098. He notes that other evidence scholars—including Dean McCormick—have advocated comparable reform and that similar rules were included in both the 1942 Model Code of Evidence and the 1953 Uniform Rules of Evidence. Id. He also points out that Texas has permitted the free use of depositions in civil cases for a long time; this practice has not led to the excessive use of depositions in lieu of live witnesses in Texas courts. Id. at 1099.

Professor Wellborn's claim of modesty for his suggested reform is less than persuasive. The proposals he relies upon for precedent provide little support for his cause; the evidence community
Foundational rationalism not only leads evidence scholars down a primrose path toward extreme conclusions, but is also far more indeterminate than they commonly recognize. Professor Wellborn's analysis provides an example of this phenomenon as well. As he notes, by misleading the jury, demeanor evidence may hinder the search for the truth, but the requirement of live testimony, by deterring untruthful witnesses, might help it.86 Thus, the ultimate question whether live testimony merits preservation as a fundamental part of the trial process cannot be resolved by resort to the foundationalist principle of rationality. Professor Wellborn misses the significance of this point when he argues for the abolition of the unavailability requirement for former and pretrial testimony. He fails to consider the possibility that, because of the difference in settings, the prophylactic protection against lying may be greater for in-court testimony than for testimony elicited at a deposition. If so, it is impossible to determine whether the offering of depositions in lieu of live testimony at trial would aid or impede verdict accuracy.

Professor Landsman's reasoning in Adversary Procedure provides another example of undetected indeterminacy. Professor Landsman sets out to examine whether pretrial preparation of disinterested witnesses ought to be subject to greater regulation.87 The article follows this line of reasoning: the goal of litigation is rectitude of trial outcomes; the testimony of disinterested witnesses is a critical factor in the outcome of many cases; pretrial contacts with disinterested witnesses significantly increase the probability that their testimony will be distorted by suggestion (innocent or otherwise); therefore, pretrial contacts with disinterested witnesses must be sharply regulated, and suggestion, if not eliminated, must be minimized to the extent humanly possible.88 Professor Landsman's logic is fundamentally flawed because he ignores the fact that suggestion has the power not only to impair but also to improve the accuracy of trial testimony. Suggestion jeopardizes the purity of memory but enhances its completeness.89 Therefore, whether a strict prohibition on pretrial suggestion would frustrate or facilitate the rationalist quest rejected both of them explicitly because it considered them to be too revolutionary. See Seigel, supra note 13, at 893-94 n.4, 930 & n.116. The Texas experience is somewhat more convincing, although it is certainly possible that if the admissibility of pretrial testimony became the norm across jurisdictions, lawyers would become increasingly more comfortable using it, and the ultimate result would indeed be a qualitative change in the adjudication of civil cases. See id. at 919.

86 See Wellborn, supra note 18, at 1092.
87 See Landsman, supra note 18, at 548.
88 Id. at 549-70.
89 See John S. Applegate, Witness Preparation, 68 TEX. L. REV. 277, 337-41 (1989). This fact, which Professor Applegate supports by reference to empirical study, also comports with common sense. If your memory about an event is fuzzy and someone suggests erroneous details to you, you might very well adopt those details in the good faith belief that they are true. On the other hand, we have all experienced situations in which our memory is jogged—and our recollection improved—by another's suggestion.
for verdict accuracy is essentially unknowable; in relation to this question, the foundational principle is simply indeterminate.

III. ADDITIONAL SHORTCOMINGS OF FOUNDATIONAL RATIONALISM

Foundational rationalism has done more than occasionally cause evidence scholars to flirt with absurdity or overlook indeterminacy; it has resulted in the general impoverishment of evidence discourse. Hamstrung by the narrow view of rationalism, scholars have given insufficient attention to other values implicated by evidence doctrine, and they have even ignored some problem areas altogether. The fundamental premise underpinning this thesis is that accuracy of verdicts, although undoubtedly important, is not the only important value relevant to the law of evidence. This premise requires some defense, which will proceed in two steps. The first step is a continuation of the partial deconstruction of the concept of accuracy of adjudicatory verdicts. The second step consists of the articulation of alternative values that deserve more systematic attention in evidence scholarship.

A. The Overstatement of Objectivity

Most evidence scholars would defend their foundational rationalism by pointing out that the law of evidence is unique. In most instances, law is essentially a normative enterprise, defining what persons ought to do. Foundationalism, by artificially elevating one value over all others, understandably leads to bad results. But, evidence scholars would argue, the function of the law of evidence is to guide the factfinder, typically a lay jury, to an accurate understanding of historical truth. Verdicts can be labeled as right or wrong in a truly objective sense—measured by whether they correspond with historical reality. In a murder case, for example, the victim is dead, and either the defendant did or did not kill him. If someone else killed the victim, a guilty verdict would be objectively inaccurate. One might have epistemological skepticism, of course; that is, one might doubt our ability to know the truth. But that is no excuse for not trying our best to ascertain it in order to minimize the
number of wrong outcomes. Therefore, ensuring the accuracy of verdicts is quite properly the paramount value underpinning evidence doctrine.

Although there is a great deal of truth in this account of the trial process, it tells only part of the story. There is no question that in some subset of cases the jury’s job is essentially an objective one and the degree to which the jury has accurately determined historical truth is a full and coherent measure of the jury’s performance. But in many cases the jury’s task is a complex mix of positive and normative endeavors. This is true in every tort case where the ultimate question is whether a party was “reasonably prudent,” designed a “defective product,” or was the “proximate cause” of an injury; in every contract case where the issue is whether a party acted in “good faith,” exercised “reasonable reliance,” or provided “substantial performance.” It is also true in every criminal case in which the defendant claims that he lacked the necessary mens rea—e.g., that his action was not “purposeful” or “reckless”—or where he claims that his action was “necessary” to prevent a “greater harm,” or ought to be “excused” because of “provocation” or “incapacity.”

In cases of the latter kind, the jury’s task is best described as choosing between competing characterizations—that is, subjective interpretations—of essentially uncontested facts, and the jury’s verdict is best understood as a normative judgment about the conduct of one or more of the parties. Measuring this kind of verdict in terms of the accuracy of its reflection of historical truth is babble, because accuracy belongs to a positivist discourse. In these cases, the verdict can be measured only by concepts such as “fair” or “just”; that is, by concepts from a normative discourse.

Estimating the percentage of cases that fall into the category just described is impossible. Nevertheless, it can be stated with confidence

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91 This observation, of course, is not original with me. See, e.g., Catherine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1728, 1742-45 (1990) (noting that one’s experience and temperament influence one’s view of the world, resulting in the fact that “a sharp distinction between factual observations and normative judgments cannot be maintained”); Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487, 492-94 (1986); TWINING, supra note 2, at 107 (“The notion of ‘fact’ in adjudication is more problematic than the orthodox view suggests. . . . Thus it is misleading to suggest that legal enquiries into questions of fact are value-free.”); see also Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 124-29 (1993) (arguing that the representation of minorities on a jury “neither impairs nor enhances [its] ability to ascertain truth; it redefines truth”).

Professor Twining states that the evaluative function of the jury is “widely acknowledged” even within the rationalist tradition. TWINING, supra note 2, at 107. This observation, however, is in tension with his characterization of the alternative view as “orthodox” and with his statement in another context that most debates about evidence doctrine ignore this point. See William Twining, *The Boston Symposium: A Comment*, 66 B.U. L. REV. 391, 391 (1986). In any event, though evidence scholars have on occasion acknowledged the subjectivity of verdicts, the point has not had an appreciable effect on evidence discourse.

92 This statement evinces a deliberately conservative approach to this issue. By way of comparison, Professor Zuckerman demonstrates with much success that the fact-law distinction is funda-
that when evidence scholars debate issues of doctrine they are much more likely to have the purely positivist model of the trial in mind.\textsuperscript{93} Ergo, they are obsessed with the positivist measure of success: an objectively accurate verdict.

\textbf{B. The Other Values at Stake in Evidence Doctrine}

There are, however, other values that deserve to be raised to a higher level of consciousness within the evidence community. Without attempting to be comprehensive or to assign weight or priority to various values, some preliminary thoughts on the matter can be sketched out. First, Professor Nesson is correct that the acceptability of verdicts is an extremely important goal of the law of evidence. Verdicts in both civil and criminal cases are the precursor to the government's use of its coercive power. If the populace does not accept the legitimacy of these verdicts, society is in serious trouble.\textsuperscript{94} This does not mean that verdict

\footnotesize{93} Professor Twining, who has been at this endeavor much longer than I, has made the identical observation. See Twining, supra note 91, at 391 ("Most debates about evidence, inference, and proof proceed on the simplifying, but generally false, assumption that jurors mainly decide questions of pure or simple 'fact,' which can be sharply distinguished from questions of value and of law.").

\footnotesize{94} This point can be illustrated by reference to a trial that was the subject of considerable national attention: the original state prosecution of the police officers accused of using excessive force against an individual named Rodney King. The incident was captured on videotape; there was little dispute as to what happened. Rather, the dispute was over how to characterize the event. The prosecution painted the officers' actions as racist and vindictive. The officers claimed that they were justified in believing that the force they used was necessary to subdue a dangerous man. The jury agreed with the defense, and the verdict caused riots in the streets of Los Angeles. See A Juror Describes the Ordeal of Deliberations, N.Y. Times, May 6, 1992, at A32. Many lawyers and politicians condemned the verdict. See Darlene Ricker, Holding Out: Juries vs. Public Pressure, A.B.A. J., Aug. 1992, at 48.

Talking about this verdict in terms of whether it was "accurate" is ridiculous because the jury made an essentially normative decision. (Given their unthinking acceptance of the rationalist tradition, most lawyers and law professors who commented on the case missed this point. See, e.g., id. at 48-52.) But, in light of the nation's reaction, it seems pretty clear that the verdict was socially unacceptable. The nature of this reaction ought to give pause to those who would argue that the acceptability of verdicts is not an important value of evidence law.

The unacceptability of the Rodney King verdict appears to have stemmed from the fact that it was rendered by an all-white jury who lived in an upper-middle class town far removed from the streets of Los Angeles. See Frank Tuerkheimer, The Rodney King Verdict: Why and Where to from Here?, 1992 Wisc. L. Rev. 849, 850 (claiming that it is "almost impossible" to say that racism played no role in the Rodney King verdict); Mark Hansen, Different Jury Different Verdict?, A.B.A. J., Aug. 1992, at 54-57; Richard Lacayo, Anatomy of an Acquittal, Time, May 11, 1992, at 30 (claiming that the outcome of the Rodney King case was decided when the trial was moved out of Los Angeles). As a result of the verdict, some states are considering legislation designed to lessen the possibility that changes in venue would result in nonrepresentative juries. See Hansen, supra; see also NAACP Legal Defense and Education Fund, The Color of Justice, A.B.A. J., Aug. 1992, at 62-63 (arguing for such changes). My point is this: it should not have taken a national disaster to cause a reexamination of evidence doctrine in light of the value of producing socially acceptable verdicts.
accuracy ought to be sacrificed to achieve acceptability. As the preceding discussion should make clear, this dichotomy is simplistic and artificial.95

Another value discounted in evidence scholarship is the need for a system that efficiently resolves disputes.96 The fact that our judicial system is slowly being displaced by alternative forms of dispute resolution (ADR), for example, negotiation, mediation, and arbitration, ought to be a matter of great concern to evidence scholars—but, from all appearances, it is not.97 In addition to the growth of ADR, more and more cases are resolved pretrial by settlements and pleas. While the evidence community blithely argues over the niceties of the hearsay rule, fewer and fewer cases are actually being tried.98 Evidence scholars’ preoccupation with accuracy to the exclusion of efficiency might one day result in their complete obsolescence.

The evidence community has also paid insufficient attention to the value of the trial as ritual and theater. Scholars must always keep in mind that the trial, as Professor Ball says, “is . . . an end in itself.”99 He

Moreover, unless foundational rationalism is confronted head-on and the dialogue is undertaken in the full spirit of practical reason, the outcome of any reconsideration of evidence doctrine will be unsatisfactory. See infra text accompanying notes 154-56.

The police officers in the Rodney King case were retried on federal civil rights charges about a year later. Two of them were convicted. See Jerome H. Skolnick & James J. Fyfe, A Case for Federal Prosecution, L.A. TIMES, Apr. 19, 1993, at B7.

95 A number of the individuals who read early drafts of this Article seemed to miss this very important point. They accused me of advocating a system where inaccurate outcomes are openly tolerated so that other goals can be pursued. This is simply not my position. It is critical that our adjudicatory system maintain accuracy as a central goal. To the extent that accuracy (defined, in my opinion, by a consensus about what happened) is obtainable, justice (actually, our perception of justice) does indeed depend on it. Moreover, striving for accurate verdicts will often further other goals of the system, such as verdict acceptability. None of this conflicts with the central theses of this Article, namely: (1) accuracy cannot adequately describe many jury verdicts (because of their subjective nature); (2) accuracy is impossible to measure, meaning that many procedures designed to pursue it are of unknown and unknowable value; (3) tradeoffs between accuracy and other goals of our adjudicatory system are inevitable (assuming, for instance, that we want trials to end); and (4) evidence scholarship would be improved by directly addressing these tradeoffs.

96 I believe that Professor Twining would agree with me. He identifies “nature-of-the-enterprise scepticism” as the belief that adjudication is about “the termination of disputes by peaceful means or . . . [through] routine bureaucratic processing.” TWINING, supra note 2, at 131. He notes that moderate forms of such skepticism serve “as a useful corrective against simplistic or complacent views.” Id. at 132.

97 See, e.g., Don J. DeBenedictis, An Experiment in Reform, A.B.A. J., Aug. 1992, at 16-17 (describing heavy reliance on ADR in federal court experiments mandated by the Civil Justice Reform Act to reduce the expense of and delays in civil litigation and referencing no evidence scholars as being involved in the reforms).

98 Even in cases where there is a trial, more and more factfinding is taking place outside of the arena where the rules of evidence apply. In federal criminal cases, for example, the advent of the sentencing guidelines has moved a great deal of factfinding to the sentencing hearing, where the rules of evidence are not in effect. See Becker & Orenstein, supra note 2, at 885-91.

99 Ball, supra note 31, at 82.
continues:

At best, the presentation of a case is a coincidence of reality and illusion, illusion not in the sense of perjury, but in the sense of theatrical metaphor—the reenactment of relevant and material elements for reflection and judgment. Although elusive, this paradoxical interplay of reality and illusion does seem to correspond with the deeper truth of the way we experience life, which is to say that it is a strength, and not a weakness or fault, in both the playhouse and the courtroom.\(^{100}\)

Professor Ball argues that the function of the trial as live theater has many truth-furthering aspects, such as encouraging impartiality and inducing creativity. Importantly, however, trial as theater also serves some nonrationalist functions, such as the redirection of both public and private aggression. Permitting parties to engage in semantic warfare according to established rules and in view of the public serves vital cathartic and cleansing functions. Also, the theatrical and ritualistic nature of the trial allows citizens to suspend disbelief and accept the outcome of trials, in a manner similar to the way in which theater-goers suspend disbelief and engage a play on an intimate and emotional level.\(^{101}\)

Finally, evidence scholarship should not underestimate the values served by having cases decided by lay jurors. Most importantly, perhaps, the jury serves as a check on governmental power; it is a cushion between individuals and the state.\(^{102}\) In addition, the jury provides protection from official bias.\(^{103}\) Parties in both civil and criminal matters often choose to present their cases before a jury, not because they believe that it will reach a more accurate verdict than a judge or a panel of experts, but because they believe that the jury is more likely to be fair and impartial.\(^{104}\) The jury is also more likely to bring to the deliberative process a

\(^{100}\) Id. at 91-92 (footnotes omitted).

\(^{101}\) Id. at 107-15; see also, YALE KAMISAR ET AL., CRIMINAL JUSTICE IN OUR TIME 137, 143 (1965) ("Trials are like the miracle or morality plays of ancient times. They dramatically present the conflicting moral values of a community in a way that could not be done by logical formalization.").

\(^{102}\) See Akhil R. Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1183-85 (1991) (discussing jurors as "populist protectors"); Ronald J. Allen, Unexplored Aspects of the Right to Trial by Jury, 66 WASH. U. L.Q. 33, 35 (1988) (noting that the right to trial by jury "is one of our most democratic institutions . . . . Its existence breaks the isolation of the law by mandating that outcomes in trials be determined by individuals extraneous to the system.").

\(^{103}\) See Toni M. Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. REV. 501, 511 (1986) ("The jury provides a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'") (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

\(^{104}\) Id. (noting that the Supreme Court has acknowledged the need for "diffused impartiality") (quoting Theil v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). Professor Zuckerman would go even further than this, I think. His position is that juries decide cases "on the merits and not just according to the law." Zuckerman, supra note 91, at 499. By this he means that the institution of the jury ensures that litigants are judged as individuals and according to their own peculiar qualities and circumstances. "In our aversion to a blind and unfeeling judicial process we have set up a system of trial in which the peculiarities of the individual litigant may be taken into
broader and more representative cross-section of views and values than a judge or panel of elite specialists. At the same time, the chance to be a juror is a very important civic experience. For at least some citizens, it is one of the few positive direct interactions with their government. account, even when they are not listed in advance among the circumstances affecting his legal position." Id.

The value of the jury is undercut when the jury is not perceived as representative of the community or of the parties' differing interests. This also results in a greater chance that the jury's verdict will not be considered acceptable. See supra note 94.

105 Allen, supra note 102, at 36-37 (pointing out that jurors bring their experience, knowledge, and perspectives to the decisionmaking process).

106 See Amar, supra note 102, at 1186-87 (discussing "jurors as pupils"); Massaro, supra note 103, at 515 ("Jury duty educates citizens in the mechanics of their justice system and palpably demonstrates the responsibility of citizens for the quality of government. . . . A powerful reminder of the educative aspect of jury trials is the positive reaction many citizens have to their service as jurors.").

Lest some readers conclude otherwise, I am fully aware of the vast amount of scholarship that has been written about the role of the jury in our system of adjudication, much of which references nonrationalist considerations. Furthermore, I recognize that some of this scholarship has been produced by individuals who, in at least some contexts, fit the description of evidence scholar. This state of affairs does not contradict my thesis, however, because the vast majority of scholarship about the jury has been situated in the field of constitutional law, not evidence; the authors of this scholarship have directed their attention to the interpretation of the constitutional provisions guaranteeing the right to trial by jury in light of the text and history of the Constitution and the pertinent Supreme Court jurisprudence. An examination of the most recent scholarship in this area, much of which is centered upon the issue of jury representativeness, bears this out. See, e.g., King, supra note 91 (using the results of empirical studies to assess the adequacy of Supreme Court jurisprudence regarding racial discrimination by jurors); Barbara D. Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 COLUM. L. REV. 725 (1992) (contending that race-based jury discrimination should be viewed primarily as a violation of the rights of the excluded jurors); Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. CHI. L. REV. 153 (1989) (conducting a critical examination of Supreme Court jurisprudence concerning jury selection and the review of jury verdicts); Laurie Magid, Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts, 24 SAN DIEGO L. REV. 1081 (1987) (arguing that the Sixth Amendment's fair cross-section analysis, and not equal protection analysis, is needed to protect fully a defendant's right to a fair and impartial jury); Massaro, supra note 103 (examining the history and policy behind the Sixth Amendment right to a jury trial and proposing the elimination of prosecution peremptories to further this right); Sheri Lynn Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1611 (1985) (reviewing empirical evidence indicating that racial prejudice affects jury verdicts and proposing constitutional doctrine to protect minority defendants). Among the cited group, Professors King and Massaro could certainly lay claim to the title "evidence scholar." See ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 1992-93, at 1076-77 (including Professors King and Massaro in national list of evidence teachers).

The examination of nonrationalist justifications for the institution of the jury in scholarship outside the field of evidence does nothing, of course, to correct the paucity of such considerations within evidence scholarship itself. Scholars' failure to address these considerations when evaluating rules of evidence leads to the problem identified in the next section of the text as "micro-distortion." Moreover, removal of the debate over such issues as jury representativeness from evidence scholarship is an example of "macro-distortion." To the extent that legal scholars have a better chance of influencing the development of evidence doctrine than the Supreme Court's interpretation of the Constitution, this macro-distortion has not been without cost. Cf. J. Alexander Tanford, Racism in
C. The Resulting Distortion of Evidence Scholarship

Evidence scholars' preoccupation with rationality has distorted their scholarship in two different ways. First, it has caused scholars arguing for or against any given reform proposal to narrow artificially the scope of the debate; they either ignore nonrationalist values completely or give them considerably less than careful and systematic attention. This phenomenon might be termed "micro-distortion." Second, foundational rationalism has diminished the global scope of evidence discourse. It has led to the systematic failure of evidence scholars to see, let alone attempt to solve, many evidence-related issues. This consequence of rationalism can be labeled "macro-distortion."

One example of micro-distortion has already been discussed in another context: Professor Wellborn's analysis of demeanor evidence. 107 If Professor Wellborn had approached the issue of demeanor from a nonfoundationalist perspective he would not have found himself scrambling to avoid the unacceptable consequences of his implicit logic. Rather, Professor Wellborn would have started from the position that, because verdict accuracy is only one goal of evidence doctrine, his exploration of the relationship between demeanor and accuracy, no matter how enlightening, would not call into question the general efficacy of live trials. Professor Wellborn would have recognized that live trials are critical to some of the other important goals of the law of evidence; among other things, they facilitate the acceptability of verdicts by the parties and the public, provide a forum through which the public can experience catharsis and cleansing, and define a place where citizens interact with their government. 108

Another example of micro-distortion occurs in Professor Tanford's article regarding jury instructions. 109 One issue Professor Tanford examines is the use of admonitions, that is, judicial instructions that the jury should disregard evidence or use it for a limited purpose. 110 He expresses dismay that appellate courts have approved the use of admonitions in approximately 21,000 cases since 1958, the year in which the first of numerous empirical studies indicating admonitions' ineffectiveness was published. 111 "The very fact that [admonitions] are still used with such regularity, despite the empirical evidence that they do not work, suggests that a problem exists." 112 As diagnosed by Professor Tanford, the prob-

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107 See supra text accompanying notes 73-85.
108 See supra text accompanying notes 94-106.
109 Tanford, supra note 18, passim.
110 Id. at 95-99.
111 Id. at 95.
112 Id.
lem is that judges and lawyers remain inexplicably ignorant about the worthlessness of admonitions. Thus, he proposes the following remedy, among others: "[C]ourts must accept that admonitions do not work and may be counterproductive. . . . The presumption should be that, because of the danger, no admonition should be given even if asked for by an affected attorney."113

By remaining true to his rationalist perspective, Professor Tanford fails to consider whether admonitions serve a function quite apart from enhancing the accuracy of verdicts. Indeed, admonitions are probably best understood as a part of the ritual associated with the trial process. If a court erroneously admits evidence and then sustains an objection, its failure to strike the inadmissible evidence leaves the issue effectively unresolved. An admonition brings closure, a sense that the system has done its best to make things right.114 Viewed in this light, the jury's incapacity to abide by the admonition is simply irrelevant. Not incidentally, this explanation accounts for the resilience of admonitions better than Professor Tanford's theory that generations of trial participants have exhibited intractable ignorance on a fundamental issue of trial practice. Fully aware that admonitions fail to enhance and may even impede accurate factfinding, practitioners and judges employ them nonetheless because they are useful in preserving a sense of integrity surrounding the trial performance.115

Taken in their entirety, micro-distortions greatly reduce the chance that evidence discourse focusing upon particular doctrinal issues will be a lively exchange through which scholars (and judges and practitioners) tease out all possible arguments for and against specific doctrinal choices as they work toward consensus. Instead, in most doctrinal debates, a number of critical issues remain in the background, buried in the subconscious of the participants. The interested parties evaluate doctrine on the linear scale of promotion of accuracy until, perhaps, extreme rationalism threatens to lead to a patently absurd result. Overall, micro-distortion accounts at least in part for the stagnation of evidence scholarship lamented by Professor Park.116 It has made traditional doctrinal scholarship largely predictable and uninteresting. More problematic, the

113 Id. at 107-08 (emphasis added).
114 Of course, the perfect result for a pure rationalist would be a mistrial. But this is where rationalism meets pragmatism in almost everyone's book: mistrials are simply too costly in terms of both time and money to be used in anything but the most exceptional cases.
115 Many of Professor Tanford's recommendations concerning admonitions—for instance, that a request for an admonition should not be required to preserve one's position on appeal, see Tanford, supra note 18, at 109—seem eminently reasonable. I am emphatically not passing judgment on these recommendations. It is simply my purpose to demonstrate that the issue whether admonitions ought to be retained as a part of the trial process is significantly more complex than Professor Tanford acknowledges because his view is distorted by foundational rationalism.
116 See supra note 2.
product of such a skewed discourse—i.e., evidence doctrine—is result-
ingly suspect.

The second harmful effect of foundational rationalism is macro-dis-
tortion. By limiting the goal of evidence doctrine to the pursuit of accu-
rate verdicts, evidence scholars have defined themselves as irrelevant to
the consideration of a number of difficulties faced by our judicial system.
For example, one acute contemporary problem is the overcrowding of
court dockets nationwide.117 In many jurisdictions, the delay in trying
civil cases is many years; in some, the trying of civil cases has been peri-
odically suspended.118 As a result, litigants have turned with increasing
frequency to alternative forms of dispute resolution. Evidence scholars
have consistently steered clear of ADR issues, ceding this territory to
others, primarily judges and experts in civil procedure.119 The failure of
evidence scholars to engage this debate has had a very specific detrimen-
tal effect: ADR techniques designed by nonevidence scholars have ad-
dressed evidence issues in a uniformly simplistic manner.

First, much of what falls under the rubric of ADR, such as media-
tation and some forms of arbitration, are settlement techniques; they sim-
ply do not count factfinding—the sine qua non of courtroom litigation
(and evidence rules)—as among their goals.120 Even more telling, alter-
native forms of dispute resolution that seek to find facts treat the law of
evidence as an all or nothing proposition: either the “rules of evidence”
apply in their entirety, or they do not apply at all. For instance, Judge
Thomas D. Lambros pioneered what has come to be known as the Sum-
mary Jury Trial (SJT), which consists of the presentation of a case to
actual jurors whose decision is nonbinding.121 The presentation is made
in argument form by attorneys; no witnesses may be called, although
exhibits may be used. Counsel “are limited to presenting representations
of evidence that would be admissible at trial,” though “[f]ormal objec-

that from 1984-90 civil caseloads increased 30% and criminal caseloads increased 33%; in 1990,
there were a record 18.4 million civil cases and 13 million criminal cases on state court dockets).
(reporting the possibility that a budget crisis in the federal courts might result in the suspension of
civil jury trials).
119 For instance, recent experiments set up by the federal courts to deal with problems in civil
litigation have focused on issues of civil procedure (such as mandatory discovery) and alternative
dispute resolution. Rethinking evidence doctrine as part of these experiments does not appear to
have occurred to anyone involved. See DeBenedictis, supra note 97, at 16-17.
120 See Irving R. Kaufman, Reform for a System in Crisis: Alternative Dispute Resolution in the
Federal Courts, 59 FORD. L. REV. 1, 27 (1990) (noting that the ADR techniques discussed in the
article, including court-sponsored mediation, early neutral evaluation, summary jury trials, and
court-annexed arbitration “are intended to foster settlement”); Judith Resnick, Failing Faith: Adju-
dicatory Procedure in Decline, 53 U. CHI. L. REV. 494, 528 (1986) (noting that many ADR enter-
prises “advertise themselves as facilitating settlement—not adjudication”).
121 See Thomas D. Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute
tions are not encouraged." Thus, an SJT is essentially composed of extended opening and closing statements about admissible evidence.

At the other end of the spectrum is a proposal for what was originally called an "Information Exchange" but has been referred to as the "Mini-trial." Designed for complex litigation, the mini-trial consists of an elaborate presentation of evidence and argument to a private judge by attorneys and expert witnesses. At a mini-trial, the rules of evidence are suspended.

If evidence scholars removed their rationalist blinders and addressed the task of designing a summary factfinding/dispute resolution procedure that took the multitude of policies underlying evidence doctrine seriously, the result would be proposals more sophisticated and satisfying than those set out above. Experts in the traditional form of dispute resolution—i.e., jury trials—would presumably have much to say about the trade-offs between the adjudicatory goals of accuracy, efficiency, tradition, ritual, acceptability, and legitimacy. A robust dialogue in the evidence community about efficient dispute resolution would address such questions as: Is the goal of creating an abbreviated jury trial, designed to give litigants their day in open court while preserving the acceptability of verdicts, realistic and worthwhile? If so, which particulars of evidence doctrine would merit retention and which ought to be discarded or altered? Would completely reconceptualizing aspects of current practice help in accomplishing this task?

Moreover, a dialogue concerning the development of sophisticated ADR techniques could lead scholars to a different perspective on evidence doctrine as a whole. An intermediate result might be experimentation with different forms of dispute resolution in our courts. In the end, our trial processes, and the doctrine guiding them, might be fundamentally altered. But none of this is likely or even possible if evidence scholars direct their energies elsewhere and if they reflexively dismiss any proposed reform that threatens to impair the pursuit of accuracy—no matter how slight or theoretical the impairment and no matter how great the gain in efficiency.

This discussion of the limits of contemporary evidence scholarship has demonstrated that discourse in the evidence community has been artificially narrowed by an almost monolithic perspective grounded in foundational rationalism. Rationalism has been shown to lead scholars

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122 Id. at 471.

123 See Eric D. Green et al., Settling Large Case Litigation: An Alternate Approach, 11 Loy. L.A. L. Rev. 493 (1978); see also Lambros, supra note 121, at 467 (referring to Professor Green's "mini-trial").

124 See Green, supra note 123, at 504.

125 Another example of macro-distortion is evidence scholars' failure to engage in a debate regarding the critical issue of jury representativeness parallel to the debate currently raging among constitutional law experts. See supra note 106.
to the brink of extreme conclusions and to be much more indeterminate than scholars sometimes realize. Moreover, it causes evidence scholars to ignore or discount other values inherent in the process of adjudication. This latter phenomenon has caused an artificial narrowing of the discourse among members of the evidence community regarding the contours of evidence doctrine as well as the scope of litigation problems that evidence scholarship ought to address.

Once foundational rationalism is confronted and discarded, however, a new problem arises, one that was effectively obscured by the prior consensus. Given that values such as accuracy, acceptability, legitimacy, and efficiency are all implicated by evidence doctrine, how are doctrinal choices to be made? Consideration of these values will often point in conflicting directions. With rationalism as a foundational principle, the answer at least appeared simple: pursue accuracy (until it leads to an extreme result). What replaces that age-old formula? The next section develops an answer to this question.

IV. PRACTICAL REASON AND EVIDENCE SCHOLARSHIP

The law is a practical, as opposed to a scientific or theoretical, enterprise. The distinctions between practical and scientific or theoretical endeavors are several. First, law is practical because it requires action, even in the face of tremendous uncertainty about which course of action is best. Whereas scientists can suspend belief pending the outcome of experimentation and theorists can simplify problems or simply ignore those that are intractable, actors in legal settings do not have a parallel choice. In the practical world, inaction is simply one form of action.\footnote{126 See Posner, Skepticism, supra note 7, at 836; Burton, supra note 90, at 716; Steven J. Burton, Comment on 'Empty Ideas': Logical Positivist Analyses of Equality and Rules, 91 YALE L.J. 1136, 1151 (1982) ("A philosopher has the luxury to . . . stop writing, and contemplate life in silence. . . . Lawyers cannot. The untouched problems of life remain. Disputes must be settled, lest we return to the blood feud."); see also Paul E. Meehl, Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist, 27 J. SOC. ISSUES 65, 89 (1971) ("[I]n the pragmatic contexts of law and clinical practice . . . something will be decided, with or without adequate evidence, good or bad, scientific or anecdotal."); id. at 92 ("[I]n [pragmatic] matters, not doing anything or not changing anything we now do is itself a powerful form of action.").}

Second, because law is a practical endeavor, the techniques used in nonpractical domains do not supply answers to legal questions. The legal realists and their successors, particularly scholars in the cls tradition, have convincingly demonstrated that formal deductive logic is of little use in solving legal problems.\footnote{127 Judge Posner takes the position that deductive reasoning can and does solve the vast majority of legal questions, provided that the validity of the legal rule used to answer the question is assumed. See Posner, Problems, supra note 7, at 42-43; Posner, Skepticism, supra note 7, at 832. In my opinion, this statement, though true, is a bit misleading. Deducing an answer to a legal question from an existing rule is the last step in a process that inevitably involves practical reason, for it is through practical reason that one determines that the legal rule is both applicable and valid. In easy
much legal reasoning sounds syllogistic; the syllogism is usually the last step in a legal argument, making an outcome appear to be logically compelled when in fact it rests on some other basis.\textsuperscript{128}

Similarly, the techniques of empirical (sometimes called synthetic) science cannot ordinarily be employed to answer legal questions.\textsuperscript{129} This lack of fit stems primarily from the difference between normative and positive endeavors. Empirical science is exclusively concerned with determining "what is"; law is ultimately concerned with "what ought." In other words, as a practical enterprise, law seeks to change the empirical world, not merely to describe it. The techniques of empirical science may tell us that thousands of persons are victims of homicide in the United States each year, but they cannot tell us whether and what kinds of homicide ought to be a crime.\textsuperscript{130}

The conclusion that legal reasoning cannot be founded upon either analytic or empirical science is neither a reason for despair nor an invitation to nihilism. Those who despair of legal reasoning's inability to produce scientific outcomes are making the fundamental mistake of attempting to measure the results of a practical endeavor with a positivist yardstick.\textsuperscript{131} On the other hand, law is not reducible to politics or pure


\textsuperscript{129} It is here that neopragmatism parts company with traditional legal realism. The realists did not reject the notion of law as science; rather, they sought to replace what they saw as the fallacious use of analytic science in the law with empirical science. See Burton, \textit{supra} note 7, at 777-81 \& n.116; Rubin, \textit{supra} note 7, at 1855-56 (Legal realism was "positivist because it claimed that the existing legal rules were a fixed reality that could be discovered by empirical methods. Such empiricism could not be sustained, because of the inherent normativity of law.") (citation omitted).

\textsuperscript{130} See Burton, \textit{supra} note 90, at 714-16; Burton, \textit{supra} note 7, at 784-88. For those who do not equate "practical" with "normative," see \textit{infra} note 131, there is another fundamental reason why empirical science cannot answer most legal questions: a difference in time frames. Law requires swift action. Science may be unable to provide an answer without decades of research. See Posner, \textit{Problems}, \textit{supra} note 7, at 62 ("Society is unable or at least unwilling to allow legal judgments to be deferred until the results of patient scientific research are available."); Posner, \textit{Skepticism}, \textit{supra} note 7, at 836 ("[M]ainly because society is unwilling to allow legal judgments to be deferred until the results of patient scientific research are available, scientific methods do not yet play a significant role in legal reasoning.").

\textsuperscript{131} Thus Professor Burton criticizes Judge Posner's posture of skepticism on the ground that skepticism about the practical enterprise of the law comes only when one makes the mistake of trying to measure law's successes by criteria imported from the sciences. See Burton, \textit{supra} note 90, at 781-83.

The differences between the versions of practical reason offered by Professor Burton and Judge Posner are mainly semantic. To Professor Burton, practical reason is by definition a normative process through which action is justified. To the extent that legal reasoning also depends upon descriptive (i.e., positive) judgments about the world, it mixes practical and scientific elements. But
arbitrariness. Lawyers recognize that some legal arguments are more persuasive than others; that the outcome of many cases is predictable; and that some cases are decided correctly or appropriately, while others are not. Most lawyers also acknowledge the existence of a subset of cases where the correct outcome is unclear, that is, where reasonable persons might disagree.

How then are legal decisions (and scholarly arguments) made and supported? The answer is this: by the methods of practical reason. Practical reason is "the capacity of a human being to act intentionally in various circumstances on reasons for action, notably norms." It is a search for contextual justification for the best legal answer among potential alternatives. At its core, practical reason involves reasoning from ends to means. "In practical reasoning, we consider the merits of deci-

since the ultimate goal of legal reasoning is action (and not the formation of beliefs), Professor Burton categorizes law as a practical endeavor. Thus, the "scientific" judgments that form the bases of legal reasoning must be evaluated by different criteria than judgments made in scientific endeavors. He states: "Significantly, we can be warranted in forming beliefs ancillary to action on weaker evidence (e.g., a preponderance) than would be required when claiming scientific knowledge." Id. at 716.

Judge Posner defines practical reason operatively as "the methods by which people who are not credulous form beliefs about matters that cannot be verified by logic or exact observation." POSNER, PROBLEMS, supra note 7, at 71-72. To Judge Posner, practical reason forms the basis for both normative and (most) positive beliefs in practical endeavors such as the law. His skepticism stems from his disappointment that law can be scientific on only the rarest of occasions; from Professor Burton's point of view, disappointment is not warranted because the law is by definition practical, not scientific.

I adhere to the pragmatic view that both science and law are socially contrived "practices," that is, "a system of socially constituted modes of argument shared by a community of scholars." Rubin, supra note 7, at 1841; see also Grey, supra note 8, at 798-805 (detailing the pragmatic view of human endeavors as practices that are habitual, unconscious, collective, situated, historical, and instrumental). These practices differ with respect to their communities, discourses, and objectives—and perhaps with respect to our current perception of their relative success in achieving their objectives. From this perspective, Professor Burton's emphasis on law's normativity and action orientation and his disdain of skepticism are both warranted; the enterprise of law is simply different—not better or worse—than the enterprise of science. On the other hand, Judge Posner's position, which includes within its scope the observation that some descriptive judgments generated through practical reason can be at least as persuasive as many scientific ones, see POSNER, PROBLEMS, supra note 7, at 74, is more in accord with neopragmatists' rejection of logical positivism. See infra text accompanying notes 173-75. Although Professor Burton professes a rejection of logical positivism because "it [has] failed to confine all legitimate knowledge to the scientific," Burton, supra note 90, at 714, he seems ready to concede that descriptive judgments made in the course of a practical enterprise are inferior to those of the sciences; his position being that this is of no import. See id. at 716.

132 See Eskridge & Frickey, supra note 7, at 380 ("[T]he failure of [the quest for objective foundations of knowledge] does not consign us to nihilism or ad hoc relativism. . . . A . . . lesson of modern pragmatism is that the opposition between objectivism and relativism is false.").

It is really at this juncture that scholars who identify themselves as "practical" differ from most of those identified with cls. See Stick, supra note 7, at 332-38; Feinman, supra note 7, at 728-31. 133 Burton, supra note 7, at 747.

134 See Farber & Frickey, supra note 7, at 1647; see also Frank I. Michelman, The Supreme Court, 1985 Term—Forward: Traces of Self Government, 100 HARV. L. REV. 4, 28-29 (1986).

135 Wellman, supra note 7, at 87-88; see also Posner, Skepticism, supra note 7, at 852-53.
sions and plans of action. We are not concerned whether some state of affairs is true or false, but whether instead the plan or decision will serve our purposes and gratify our desires.\textsuperscript{136}

The methods of practical reason are not neat or categorical; rather, they are all the devices by which individuals make practical decisions in every facet of their lives. Judge Posner has summarized the techniques of practical reason as follows:

Practical reason... is... a grab bag of methods, both of investigation and of persuasion. It includes anecdote, introspection, imagination, common sense, intuition... , empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, “induction”... , “experience.”\textsuperscript{137}

This list, as Judge Posner notes, is inexact. It is both duplicative and incomplete.\textsuperscript{138}

In many circumstances, the methods of practical reason will produce definitive answers with little effort. A definitive answer to a practical question is one that reflects social consensus: some critical mass of the relevant discursive community, employing methods of practical reason, comes to the same conclusion.\textsuperscript{139} Thus, it can be said with certainty that the law ought to punish arson as a serious crime. This statement, being normative, cannot be proven in a scientific sense, but that does not

\textsuperscript{136} Wellman, supranote 7, at 90.
\textsuperscript{137} Posner, Skepticism, supranote 7, at 838.
\textsuperscript{138} Id.; POSNER, PROBLEMS, supranote 7, at 73.

Although he does not explicitly identify it as such, Joseph Singer has offered the following description of practical decisionmaking:

When judges decide cases, they should do what we all do when we face a moral decision. We identify a limited set of alternatives; we predict the most likely consequences of following different courses of action; we articulate the values that are important in the context of the decision and the ways in which they conflict with each other; we see what relevant people (judges, scholars) have said about similar issues; we talk with our friends; we drink enormous amounts of coffee; we choose what to do. There is nothing mysterious about any of this.

Singer, supranote 7, at 65. Professor Singer’s description strips away the pretense, making clear that practical reason is a fancy label for the mundane decisionmaking processes we all use everyday to understand and cope with life as best we can. \textit{See also} Ruth Anna Putnam, Justice in Context, 63 S. Cal. L. Rev. 1797, 1797-1810 (1990) (describing a general pragmatic approach to solving legal problems, based on the philosophy of John Dewey).

Professor Rubin argues that practical reason is appropriate for judges but not scholars. Rubin, supranote 7, at 1879. He claims that scholars’ “specialty is not practical judgment but structured argument, not general intuition but specialized knowledge, not ad hoc decision-making but systematic analysis.” \textit{Id.} I see no conflict between those methodologies that Professor Rubin identifies as appropriate for scholars and those that he scorns. I agree that scholars ought to accumulate specialized knowledge, conduct systematic analysis, and make structured arguments; in doing so, I believe they will inevitably employ judgment, intuition, and some ad-hoc decisionmaking. If Professor Rubin means to argue that scholars ought to strive to employ the former methodologies to a greater degree than at present, my reaction is pragmatic: they should do so only if it furthers their scholastic goals.

\textsuperscript{139} See Posner, Skepticism, supranote 7, at 839-40 (practical reason can answer some ethical questions with a high degree of certainty).
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affect its authoritative status in the realm of the practical.\textsuperscript{140} Similarly, it can be stated with certainty that no living human being can fly without resort to some kind of apparatus. This statement is descriptive, but it need not be based upon scientific analysis in order to be persuasive. Its practical strength comes from consensus. No sane human would take issue with its truth.\textsuperscript{141}

In more difficult situations, the methods of practical reason must be employed as part of a dialogue or conversation among the individuals participating in a practical endeavor.\textsuperscript{142} For some period of time, the techniques of practical reason will lead different participants to incompatible conclusions. As to issues of this sort, practical reason will not yield a definitive answer because there is a lack of consensus.\textsuperscript{143} If the issue is particularly intractable, consensus might take years or even generations to develop. In the meantime, since action cannot be suspended, participants in the dialogue will act upon their individual practical judgments. On the other hand, even supposedly definitive practical answers are subject to question and, if there is sufficient force behind the challenge, to amendment in conformity with a new consensus.

The pragmatic view is that human beliefs and actions ought to be evaluated by the extent to which they are successful “in helping people cope with the world”\textsuperscript{144} or the extent to which they produce “the desired practical consequences in application.”\textsuperscript{145} Thus, judgments reached in the practical realm of the law should not be measured by scientific criteria such as objectivity and determinacy. Professor Burton argues that exercises in practical reason should be tested for their “impartiality” and degree of “good judgment.”\textsuperscript{146} “Impartiality refers to the exclusion of ad hominem considerations, such as advantage to self, friends or groups with which one identifies.... Good judgment refers to action on the balance of reasons....”\textsuperscript{147} Professors Farber and Frickey stress that

\textsuperscript{140} Cf. \textit{id.} at 840 (arguing the certainty of the claim that Nazi racial policies were evil).

\textsuperscript{141} Cf. \textit{id.} at 839 (arguing the certainty of the proposition that no human being has ever eaten an adult elephant in one sitting—taking the example from PETER D. KLEIN, CERTAINTY: A REFUTATION OF SKEPTICISM 122 (1981)).


\textsuperscript{143} See Posner, \textit{Skepticism}, supra note 7, at 859-60 (tying determinative outcomes to a strong political and ethical consensus).

\textsuperscript{144} Grey, supra note 8, at 804 (citing WILLIAM JAMES, PRAGMATISM 197-236 (1907)).

\textsuperscript{145} Id. at 806 (citing, \textit{inter alia}, JOHN DEWEY, MY PHILOSOPHY OF LAW 73 (1941); John Dewey, \textit{Logical Method and the Law}, 10 \textit{CORNELL L.Q.} 17 (1924)).

\textsuperscript{146} Burton, supra note 90, at 715-16; Burton, supra note 7, at 789. Professor Burton also includes the requirement of “normativity,” which he defines as basing one’s action on “standards of conduct that are claimed to prescribe what one ought to do.” \textit{Id.}; Burton, supra note 90, at 716.

\textsuperscript{147} Burton, supra note 90, at 716. In a similar vein, Professors Farber and Frickey proffer nonarbitrariness as a criterion of sound practical reason. \textit{See} Farber & Frickey, supra note 7, at 1652.
valid practical reason requires careful deliberation\textsuperscript{148} and evinces a concern for “history and context; a desire to avoid abstracting away the human component in judicial decisionmaking; an appreciation of the complexity of life; some faith in dialogue and deliberation; a tolerance for ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies; and overall humility.”\textsuperscript{149}

In considering the validity of practical outcomes, some scholars have focused less on individual instances of decisionmaking and more on the means through which social consensus on practical matters are developed. For example, Richard Bernstein has emphasized that practical discourse depends upon the existence of true “dialogical communities” based upon “solidarity, participation, and mutual recognition.”\textsuperscript{150} It is only within such communities that “non-distorted, reciprocal communication” among all interested individuals can take place.\textsuperscript{151} Moreover,\textsuperscript{148, 149, 150, 151}

\textsuperscript{148} Farber & Frickey, supra note 7, at 1647.

\textsuperscript{149} Id. at 1646. Contrary to the view of Judge Posner, I do not believe that Professors Farber and Frickey are advocating an alternative to practical reason, which Judge Posner labels “new conventionalism.” See Posner, Skepticism, supra note 7, at 887; see also Posner, Problems, supra note 7, at 452 (including Professors Farber and Frickey in the category of neotraditionalists). Judge Posner interprets their article as offering an antidote to skepticism, and he criticizes the indeterminacy of what they offer in the place of foundationalism. See Posner, Skepticism, supra note 7, at 887. As the text makes clear, I believe that Professors Farber and Frickey are merely advocating criteria by which to judge applications of practical reason, and I think that their criteria are of some value. Moreover, they do not claim that practical reason carried out in accordance with their criteria will produce definitive outcomes in tough cases—quite the contrary. See Farber & Frickey, supra note 7, at 1647. Thus their position provides an antidote to skepticism only in the same sense that Professor Burton’s view rejects skepticism, i.e., they take the position that, since practical reason is our only tool to solve practical problems, there is nothing to be skeptical about. See id. at 1652.

In a vein similar to that of Professors Farber and Frickey, Professors Minow and Spelman explore the importance of context in pragmatic decisionmaking. Minow & Spelman, supra note 63, at 1625-52. They note that the real question is not whether one makes a decision “in context,” but “what context should matter” to the decisionmaker. Id. at 1629, 1651. They conclude that “in many contemporary political and legal discussions, the demand to look at the context often means a demand to look at the structures of power, gender, race, or class relationships, or the effects of age and physical vulnerability on people’s abilities to protect themselves. . . . Looking at context could mean a constant reminder of the human beings connected and separated by moments of judgment, acts of decision, requests for solution.” Id. at 1651-52.

\textsuperscript{150} Bernstein, Philosophical Profiles, supra note 8, at 223-24.

\textsuperscript{151} Richard J. Bernstein, Introduction to Habermas and Modernity 1, 11 (Richard J. Bernstein ed., 1985).

Professors Eskridge and Frickey note that undistorted communication requires the members of a dialogical community to be candid about the reasons for choosing a particular course of action. Without candor, practical decisions cannot be fairly evaluated by others engaged in the conversation. See Eskridge & Frickey, supra note 7, at 363-64, 378-84.

In tension with this viewpoint, Judge Posner wonders whether the lack of candor by our courts is itself a practical method of ensuring that the judgments of courts will be respected by the public. See Posner, Skepticism, supra note 7, at 865. I think that his musing on this point stems from his (unjustified) angst over his apparently belated discovery that law is not scientific. As I see it, the public need not be shielded from the fact that the law rests on practical decisionmaking because this is far removed from arbitrariness or whim. Indeed, I think more candor in judicial decisionmaking
Professor Bernstein contends that this kind of communication is impossible unless "we realize and initiate the material social conditions that are required for mutual communication." In a similar vein, other scholars have noted the connection between a robust participatory democracy and the goal of achieving freely formulated agreement on social and political matters.

This discussion of practical reason allows the earlier examination of evidence scholarship to be placed in a fuller context. For the most part, modern evidence scholars have achieved consensus concerning the main contours of evidence doctrine. This consensus has been based, however, not on practical reason, but on a shared foundationalism. The consensus is thus illegitimate. This Article calls upon the evidence community to renew its dialogue over evidence policy and doctrine in the spirit of pragmatism and practical reason. This dialogue must be conducted with more sensitivity to the complexities of human life and to the competing values that are at stake in our system of justice. It also must reflect a heart-felt desire to examine, re-examine, and call into question our fundamental perspectives and assumptions. If this call is heeded, the evidence academy will undoubtedly face a period of disagreement and uncertainty unparalleled in recent times; but as a new consensus emerges, the resulting doctrine will have the benefit of resting on valid practical judgments (that are always subject to re-examination).

would ultimately engender more respect for our courts. In addition, as I have expressed elsewhere, a candid view of the legal enterprise would reduce the amount of cynicism among those who practice law. See Seigel, supra note 13, at 945-50.

Bernstein, supra note 151, at 11; see also Swan, supra note 8, at 374-75 (discussing Bernstein's pragmatic philosophy and making the further point that Bernstein recognizes that communication within contemporary American society is fundamentally distorted by prevalent forms of domination).

See, e.g., Singer, supra note 7, at 66 ("The alternative to 'foundations' is not 'chaos' but the joint reconstruction of social life... the quest of participatory democracy.") (quoting Gerald E. Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276, 1386 (1984)); see also Margaret J. Radin, The Pragmatist and the Feminist, 63 S. Cal. L. Rev. 1699, 1710-11 (1990) (emphasizing that to pragmatic (as well as feminist) scholars, a critical question when one is determining whether “we” have reached consensus is, “Who is ‘we’?”).

In addition, given the long history of race and gender discrimination on the part of legal institutions of all kinds, there can be no question that this consensus has been reached without the free and full participation of all individuals affected by our adjudicatory system. This is another basis upon which to conclude that the consensus is illegitimate. See supra text accompanying notes 150-53.

Cf. Rubin, supra note 7, at 1843-44 (The “critique of methodology” (in the case of this Article, neopragmatism) requires that participants in scholarly endeavors “recognize the limits of our mental frameworks” and “comprehend the way that we construct or select these frameworks. This difficult but necessary project requires collective self-awareness, the ability of a community of scholars to develop an understanding of their own pattern of thought, and to evaluate its operation.”).

I am aware that some readers are thinking at this point, to quote an old song, “Is that all there is?” The answer, I’m afraid, is “Yes.” In many respects, pragmatism, and its derivative practical reason, are—to use the term currently in vogue—banal. First, pragmatism is mostly, as Professor Grey has put it, “freedom from theory-guilt.” Thomas C. Grey, Hear the Other Side: Wallace Ste-
Unfortunately, there is one additional barrier to the development of a lively, practically oriented dialogue within the evidence community. In the last two decades, evidence scholars have directed much of their energy toward empirical research. The next section takes a close look at this development.

V. RATIONALITY, LOGICAL POSITIVISM, AND SOCIAL SCIENCE

A. A Brief History and Analysis of Law and Social Science

The history of the relationship between law and social science in twentieth-century America has been marked by distinctive ebbs and flows. Beginning with the “yellow psychology” of Hugo Münsterberg, and repeated during the legal realist movement and periodically ever since, some segment of the social scientific community, or the legal academic community, or both, has critiqued legal actors’ general failure to investigate scientifically the descriptive assumptions upon which legal doctrine is based. For a period of time following such criticism, some subset of legal scholars and social scientists embarked on the mission of scientizing the law. On every occasion, these efforts met with general failure and ended in a round of mutual recriminations. Some amount of time later, the cycle began anew.

Legal scholars and social scientists are currently experiencing a period of unprecedented harmony and mutual respect. This period, which began in the mid-1970s, has fostered the creation of a number of law and

\footnotesize{\textit{vances and Pragmatist Legal Theory}, 63 S. CAL. L. REV. 1569 (1990). That is, it is a response to and a rejection of earlier views espoused in both philosophy and law that these human endeavors can and should be built on formal theories or methodologies that are more than merely pragmatic. On the other hand, legal pragmatism rejects the radical nihilistic implications of its close cousin, critical legal studies. To individuals not engaged in the debate over the essence of law, my pragmatic description of legal discourse almost certainly appears superfluous and relatively vacuous. Moreover, if Professor Grey is correct in his claim that “pragmatism is the implicit working theory of most good lawyers,” id. at 1590, my description also appears obvious. My response to readers who have come to this view is twofold: (1) perhaps we will someday reach the point when all legal scholars are pragmatic, so that frequent discussions of pragmatism and practical reason will be unnecessary; (2) even then, given the natural human tendency to construct and admire elegant grand theories, occasional pragmatic exhortation will still be required.

\footnotesize{157 The term was popularized by Professor Loh. See Wallace D. Loh, \textit{Psycholegal Research: Past and Present}, 79 Mich. L. Rev. 659, 660 (1981).}

\footnotesize{158 See HUGO MÜNSTERBERG, \textit{ON THE WITNESS STAND} (1908), and Professor Wigmore’s scathing response, John H. Wigmore, \textit{Professor Muensterberg and the Psychology of Testimony: Being a Report of the Case of Cokestone v. Muensterberg}, 3 ILL. L. REV. 399 (1909).}

\footnotesize{159 See John H. Schlegel, \textit{American Legal Realism and Empirical Social Science: From the Yale Experience}, 28 BUFF. L. REV. 459, 463 (1979) (describing legal realism as, in part, “an episode in the continuing confrontation between law and the social sciences over the past fifty years”).}

\footnotesize{160 This view of the cyclical nature of the relationship between law and social science was first set out by Harry Kalven, Jr. See Harry Kalven, Jr., \textit{The Quest for the Middle Range: Empirical Inquiry and Legal Policy}, in \textit{LAW IN A CHANGING AMERICA} 56, 58-59 (Geoffrey Hazard ed., 1968). It was expounded upon by Professor Loh. See Loh, supra note 157, at 660-77.}
social science journals and, not unrelatedly, an exponential increase in the number of law and social science articles and books.\textsuperscript{161} A disproportionate fraction of this scholarship has been situated in the law of evidence,\textsuperscript{162} including numerous studies of the adversary system,\textsuperscript{163} the functioning of the jury,\textsuperscript{164} witness testimony,\textsuperscript{165} and, most recently, the hearsay rule.\textsuperscript{166} Although legal scholars have occasionally criticized particular studies\textsuperscript{167} and have even questioned the validity of specified methods of applied social science on more than one occasion,\textsuperscript{168} support within the evidence community for the continuation of social scientific research efforts is, at present, widespread and firmly rooted.

Scholars have advanced two main theories to explain why empirical research has clustered around evidence doctrine. One is that legally unsophisticated social scientists are enamored with the jury trial, which of course implicates the law of evidence.\textsuperscript{169} The other proffered explanation is that social scientists find the trial process easy to simulate, especially compared to other legal settings.\textsuperscript{170} Although these hypotheses are helpful in understanding why social scientists want to study the law of evi-

\textsuperscript{161} See Loh, supra note 157, at 659-60 & nn.3-4 (detecting and documenting the "coming of age" of the relationship between law and psychology); John Monahan & Elizabeth F. Loftus, The Psychology of Law, 33 ANN. REV. PSYCHOL. 441, 441-42 (1982); June Louin Tapp, Psychological and Policy Perspectives on the Law: Reflections of a Decade, 36 J. SOC. ISSUES 165, 168-72 (1980) (charting the burgeoning field of law and psychology).

\textsuperscript{162} See Loh, supra note 157, at 678 (reviewing literature between 1973 and 1981 and concluding that most of it has focused on criminal trial process); Tapp, supra note 161, at 170-72 (noting that studies regarding the jury and the judicial process, particularly related to criminal trials, dominated the previous ten years of work in law and psychology); Michael J. Saks & Reid Hastie, Social Psychology in Court (1978) (collecting and analyzing almost 400 empirical studies related to the trial process).


\textsuperscript{164} For a review of this literature up to 1977, see Kathleen Gerbasi et al., Justice Needs a Blindfold: A Review of Mock Jury Research, 84 PSYCHOL. BULL. 323 (1977).


\textsuperscript{166} See, e.g., Miene et al., supra note 2; Kovera et al., supra note 2; Stephan Landsman & Richard F. Rakos, Research Essay: A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts, 15 LAW & PSYCHOL. REV. 65 (1991).

\textsuperscript{167} See, e.g., Martha L. Fineman & Annie Oppie, The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce, 1987 Wis. L. REV. 107, 150-52 (criticizing certain aspects of a father custody study); Loh, supra note 157, at 686-90 (criticizing certain aspects of eyewitness testimony studies).

\textsuperscript{168} See, e.g., Loh, supra note 157, at 699-704 (criticizing jury simulations on various grounds).

\textsuperscript{169} See Tapp, supra note 161, at 176 ("The seduction of the courtroom seems tied to the appeal of advocacy and the drama of the adversary.").

\textsuperscript{170} See Craig Haney, Psychology and Legal Change: On the Limits of a Factual Jurisprudence, 4 LAW & HUM. BEHAV. 147, 191 n.88 (1980) ("No topic in psychology and law has been so extensively studied as jury behavior. Yet, the jury forms a very small part of the legal system. It seems
dence, they do not account for the receptivity of evidence scholars to nonlegal interlopers. The explanation for this latter phenomenon, here-tofore overlooked, is the following: evidence scholars have become increasingly enamored with social science as they have grown more and more unified in their foundational rationalist outlook—because both are founded upon a deep faith in things “scientific.” In other words, evidence scholars are, by and large, logical positivists.

Logical positivism is the view that objective answers to empirical questions can be obtained only through scientific pursuits. Although evidence scholars recognize that the trial process will never replicate the methods of science, their rationalism can in large measure be characterized as a yearning for such an outcome. Thus, it should come as no surprise that, when given the opportunity, evidence scholars turn to science for answers to legal questions. The opportunity arises, of course, when they contemplate law reform.

Despite the prevalence of a contrary sentiment, this has not been a completely fortuitous development. Evidence scholars’ devotion to social science research has tended to rest on an unwarranted faith in the “objectivity” of science. In recent decades, philosophers of science have abandoned logical positivism for a more realistic assessment of scientific knowledge. They have argued quite persuasively that the scientific enterprise is not now, nor can it ever be, neutral or objective. Rather, the apparent that much of the disproportionate attention given this topic by research psychologists stems from the ease with which jury processes can be simulated in experimental settings.

Those who developed this tradition [logical positivism] sought to sustain a vision of science as the source of absolute truth.” Bert Black, A Unified Theory of Scientific Evidence, 56 Fordham L. Rev. 595, 615 (1988). The classic statement of logical positivism is ALFRED J. AYER, LANGUAGE, TRUTH AND LOGIC (2d ed. 1946). A thorough account of logical positivism by a legal scholar, with references to many original sources, may be found in Black, supra, at 616-18.

See, e.g., Park, supra note 1, at 851 (characterizing as “legal philistines” scholars who evince skepticism about the value of social science research to the development of evidence doctrine).

For a brief account of the rise and fall of logical positivism, see Rubin, supra note 7, at 1839-40.

The contemporary American break with logical positivism can be traced to THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). See Paul Horwich, Introduction to World Changes: Thomas Kuhn and the Nature of Science 1 (Paul Horwich ed., 1993) (noting that until the appearance of Structure, the logical positivist view of science was taken for granted); Farber & Frickey, supra note 7, at 1629-30 (characterizing Kuhn’s Structure as “one of the most influential books of the past thirty years”). As originally stated, Kuhn’s view was that, at any given moment in time, scientific inquiry is conducted in accordance with a set of widely shared assumptions about the nature of the world. He called this “normal science.” Periodically, a major scientific “revolution” reorients the scientific community’s shared understandings and initiates research in accordance with them—until another revolution takes place. During periods of “normal” scientific inquiry, it seems as though scientists are generating “objective” knowledge, but this is an illusion exposed by the next revolution. Kuhn identified Einstein’s theory of relativity as a revolution that replaced an understanding of the world based upon Newtonian physics.

The particulars of Kuhn’s philosophy have attracted wide attention during the thirty years since the publication of Structure. Horwich, supra, at 1 (“Kuhn’s radical views have been the focus of much debate not only by philosophers, historians, and sociologists of science but also by large num-

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scientific method necessarily encompasses a multitude of value-laden judgments that affect the outcome of research. For example, the initial decision to study a particular phenomenon is based upon subjective judgments concerning the importance of that phenomenon relative to all others. The collection and categorization of data are similarly subjective enterprises. Finally, the interpretation of data is also inherently value laden. Data can be used to explain an infinite number of hypotheses; choosing the “most plausible” hypothesis is simply not an objective endeavor.

Social science research places especially great strains on the objectivity of the scientific method because, by definition, it involves the study of human behavior. Social scientists usually choose between two methods of scientific inquiry: field research or laboratory study. Inherent in each of these methods are shortcomings that jeopardize the purity or “objectivity” of the results. When doing field research, the social scientist loses control over the multitude of variables upon which human behavior might depend. As a result, interpretation of data from field study is tricky because the social scientist must make essentially subjective judgments regarding whether and to what extent the data have been influenced by uncontrolled factors. In the language of social scientists, field study presents serious problems of “internal validity.”

bers of practicing scientists."). Much of the commentary on Kuhnian philosophy has been critical. See, e.g., TOULMIN, supra note 43, at 100-30 (1971). As a result, Kuhn has refined and perhaps redefined his original views. See id. at 107-17; Horwich, supra, at 5 (“Needless to say, Kuhn’s philosophy of science has not remained fixed since the first edition of Structure. Ideas have been clarified, misreadings corrected, emphases shifted.”); Thomas S. Kuhn, Afterword to WORLD CHANGES, supra, at 314 (setting forth “what my position has become in the years since Structure”).

For my purposes, the important point is that logical positivism has not survived Kuhn’s pragmatic attack; the continuing debate within the community of philosophers of science is over the contours and implications of a pragmatic approach. See Horwich, supra, at 2-7 (sketching out issues raised by Kuhn’s approach and how they are investigated by the authors of the other essays in the volume); TOULMIN, supra note 43, at 149-55 (setting forth his own essentially pragmatic version of the philosophy of science).

174 See David L. Faigman, To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy, 38 EMORY L.J. 1005, 1028 (1989) (“Scientists select problems on the basis of what seems important, and to this extent all science is culture-bound.”); Haney, supra note 170, at 189 (“It is axiomatic to psychologists as well as to lawyers that the form of a question in part determines its answer. The methods used in posing psychological questions similarly exercise a major influence over the kind of data that are collected and the information that may be obtained from them.”).

175 See Robert M. Bray & Norbert L. Kerr, Use of the Simulation Method in the Study of Jury Behavior, 3 LAW & HUM. BEHAV. 107, 115 (1979) (“One can, with a little thought, come up with alternatives to almost any explanation for a result. . . . [O]ur confidence in the validity of alternative explanations rests on their plausibility and not their mere existence.”); see also Black, supra note 171, at 618-20; Fineman & Oppie, supra note 167, at 124-27 (discussing biases inherent in social science research).

176 See Samuel M. Fahr, Why Lawyers Are Dissatisfied with the Social Sciences, 1 WASHBURN L.J. 161, 167 (1961) (noting that the scientific study of human behavior is particularly difficult).

177 See, e.g., Bray & Kerr, supra note 175, at 116 (“Jury research in the field setting maximizes
Laboratory research in the social scientific realm usually means placing human subjects in a simulated setting. Through the use of simulations the researcher gains significant control over the variables that may affect outcomes—but at an equally significant cost. The cost is the difficulty of applying data obtained in simulated settings to situations in the real world.178 The researcher must make subjective judgments about the extent to which differences between the simulated setting and the real world affect the generalizability of the research. This is the problem of “external validity.”179

Not surprisingly, social scientists have developed generally accepted methods for managing the problems of research validity and data interpretation. Ideally, studies are designed to minimize validity problems given the limitations inherent in any methodology and restricted by practical considerations such as funding and time.180 Once a study is completed, the results are reported in an article that conforms to a standard format: the initial hypothesis, methodology, and results must be fully set forth so as to facilitate critical evaluation by others in the field. A discussion section sets out the researcher’s interpretation of her data.181

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178 See Bray & Kerr, supra note 175, at 116 (“[U]se of the standard unrealistic simulation buys control, opportunity to observe deliberations, and affordability, but at a cost of realism.”).

179 See, e.g., id. at 107-15 (criticizing jury simulations on external validity grounds, though expressing cautious optimism about the informational value of many mock jury findings); Tapp, supra note 161, at 177-79 (discussing the serious external validity problems associated with experiments using mock juries); Wayne Weiten & Shari S. Diamond, A Critical Review of the Jury Simulation Paradigm, 3 LAW & HUM. BEHAV. 71 (1979) (harshly criticizing jury simulations in part on external validity grounds, although concluding that the methodological problems are not insurmountable); Monahan & Loftus, supra note 161, at 459 (“There can be little doubt that the bedrock methodological issue confronting the psychology of law in the 1980s is the external validity of laboratory simulations.”); id. at 459-61 (reviewing literature regarding issue of external validity); Meehl, supra note 126, at 76-77, 90-95 (reviewing the problem of external validity and concluding that “when we generalize from laboratory research . . . the situation is extraordinarily complex and few statements can be made unqualifiedly.”).

180 See, e.g., Monahan & Walker, supra note 177, at 503 (“Social scientists design their studies to minimize any factors that could compromise validity and make the results of the research equivocal or ‘poorly reasoned.’”); Laurens Walker & John Monahan, Social Facts: Scientific Methodology as Legal Precedent, 76 CAL. L. REV. 877, 886 (1988) (“A research design can be thought of as the blueprint of an empirical investigation. Researchers design their methods of collecting data to yield a true (or ‘valid’) estimate of some state of the world.”).

181 See, e.g., Miriam Schapiro Grososf & Hyman Sardy, A Research Primer for the Social and Behavioral Sciences 381-403 (1985) (specifying and discussing the three main parts
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Even if designed with the maximum of care, a single experiment does not yield conclusive results. Rather, the extent to which scientific research adds to the existing body of knowledge is the product of a subjective process that ends with consensus in the scientific community. Articles setting forth the results of research are subjected to "peer review"; that is, they are thoroughly examined by other scientists before they are even published. Once published, the research is, of course, critically evaluated by members of the relevant scientific community. In most instances, results are not accepted as true until they have been confirmed by other independent research, preferably research with an alternative design.

Thus understood, scientific knowledge is not objective fact; rather, it is the product of discourse within the scientific community. This discourse occurs within generally accepted parameters; significant deviation from the norm will almost surely result in the rejection of one's research. Moreover, knowledge is acquired by consensus, which may be disturbed or displaced completely by later study.

Rejection of logical positivism and recognition of the true nature of scientific inquiry places evidence scholars' ever-increasing reliance on social science research in a new light. The use of social science data to support or defend proposals concerning the shape of evidence doctrine amounts to nothing more than the displacement of one subjective discourse (i.e., legal reasoning) for another (i.e., social scientific methodology).

This conclusion about the value of social science research to evidence scholars can be stated yet another way. As noted above, reliance of a report of social scientific research: the problem statement, the methodology, and the results); George W. Fairweather & Louis G. Tornatzky, Experimental Methods for Social Policy Research 377-79 (1977) (describing the proper manner of publishing experimental results, specifically stating that the article "should present a clear description of the sample . . . ; a clear and lucid description of the models including all roles; a description of the internal processes and the external processes; comparisons of the models on the social change and other outcome criteria; a presentation of relationship and process analyses; and, finally, a description of all phases of the research").

182 See Monahan & Walker, supra note 177, at 500-01 ("The publication of research in refereed journals, or in books that have professional editorial boards, is an important indication of the weight that social scientists will accord a finding.").

183 Id. at 508 ("The trustworthiness of a study increases as independent investigators arrive at a common conclusion.").

184 In the language of pragmatism, scientific inquiry is simply one example of a scholarly practice. See Rubin, supra note 7, at 1842-45.

185 See Stanley Fish, Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin, in Pragmatism in Law and Society 47, 59 (Michael Brint & William Weaver eds., 1991) ("The advocate or jurist who moves from the conceptual apparatus in law to the apparatus of statistical methods and behaviorist psychology has not exchanged the perspective-specific facts of an artificial discursive system for the real, unvarnished facts; rather, he or she has exchanged the facts emergent in one discursive system—one contestable articulation of the world—for the facts emergent in another.").

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upon social scientific data in evaluating law reform necessitates the application of scientific findings to real world legal settings. Determining whether research results are generalizable between places and over time—that is, overcoming the problem of external validity—requires the use of reasoning techniques that include analogy, imagination, common sense, experience, and induction. These are the very methods of practical reason. In other words, applied social science, though a positive endeavor, is—at least at some stages—predominately an exercise in practical reason.186

An illustration of this point can be found in *Demeanor*. Professor Wellborn faces squarely the problem of assessing the extent to which results from laboratory studies provide insight into the ability of jurors to make use of demeanor evidence in the courtroom. He begins his analysis by noting the strength of the analogy between the two settings: “Courtrooms have more in common with laboratories than with ‘real life.’ Courtroom testimony, like respondent interviews in the experiments, is nonspontaneous, highly structured, self-conscious, and public.” He then identifies the primary differences between the laboratory and the courtroom: “context, cross-examination, deliberation, and [witness] preparation.”187 Although he notes that more research is needed regarding the significance of these differences, he nevertheless argues that they do not affect the experiments’ generalizability. In so doing, he relies upon a variety of practical techniques, including common sense, precedent, and authority.188

186 This is simply another way of stating the point made above: scientific methodology is not objective. Scientific inquiry always involves techniques of practical reason to one degree or another. The application of social science research to law reform is, however, a place where “nonscientific” (i.e., practical) techniques are of particular importance. It is also of particular relevance to the subject matter of this article.

A semantic clarification might be necessary here. Professor Burton would, I think, take exception to my characterization of applied social science as an exercise of practical reason. He defines practical reason as applying only to endeavors that are primarily normative, a category into which applied social science does not fit. My use of the term “practical reason” is closer to that of Judge Posner: it includes the methods by which people make both normative and positive decisions in everyday life. See supra note 131.

187 Wellborn, supra note 18, at 1079.

188 Id.

189 On the issue of context, Professor Wellborn argues that, compared to a discrete simulated event, the nature of a real trial—involving the presentation of successive witnesses in an adversarial setting—probably makes it even more difficult for factfinders to process demeanor evidence, and he cites to a similar comment by Professor Edward H. Cooper. See id. at 1080 & n.16. Regarding cross-examination, Professor Wellborn invokes the authority of McCormick for the proposition that cross-examination is more likely to make the weak or timid witness out to be a liar, as opposed to the rogue. See id. at 1080-81. Addressing the issue of deliberation, Professor Wellborn argues essentially from common sense that, even if some jurors were better at interpreting demeanor evidence than others, there is no reason to believe that their superior judgment would prevail. See id. at 1081. Finally, on the issue of witness preparation, Professor Wellborn uses precedent (the words of Professor Applegate) and another common sense argument: that coaching, by making the lying witness
The strength of Professor Wellborn's ultimate conclusion—that demeanor evidence is worthless—is dependent not only upon the strength of the relevant social scientific data, but also upon the persuasiveness of his practical arguments concerning the application of this data to the courtroom setting. This proves an essential point. Because applied social science necessarily involves the use of practical reason, it provides answers to questions related to law reform that are, on average, no more authoritative than answers derived from other techniques of practical reason. This does not mean, of course, that the results of social scientific study are not sometimes appropriately regarded as definitive. Just like answers derived from other processes of practical reason, answers supplied by the application of social science to law will appear to be conclusive to the extent that they command a consensus among interested observers.

Having reached the conclusion that applied social science is merely one form of practical reason, an evaluation of evidence scholars' increasing devotion to empirical research is now possible. This issue is taken up in the next section.

B. The Costs and Benefits of Social Science Research

The theoretical value of social scientific inquiry to the reform of evidence law is obvious. Each normative decision about evidence doctrine is necessarily grounded in a multitude of assumptions about the empirical world. Social scientific research is a discourse devoted to developing increasingly refined consensuses concerning the nature of empirical reality. When research produces a new consensus relevant to the law of evidence, scholars can advocate appropriate doctrinal modifications and pride themselves on being champions of progress.

Indeed, this rosy scenario is not foreign to the history of evidence scholarship. For instance, empirical study has played a key role in the development of contemporary attitudes toward the admission of expert testimony on the issue of eyewitness identification. Decades of research

more sure of himself (and possibly by causing him to believe his lies), is likely to reduce rather than enhance the efficacy of demeanor evidence. See id. at 1081-82.

Professor Meehl made a similar observation a generation ago. Meehl, supra note 126, at 77 ("Without denigrating [social scientific] data [regarding the deterrent effect of swift and certain punishment], I cannot say that they are clearly more persuasive than introspection and the (remarkably uniform) anecdotes about the Scandinavian drunk-driving sanctions.").

Although the context is quite different, Professors Walker and Monahan have also noted the similarity between the practical endeavors of law and applied social science. See Laurens Walker & John Monahan, Social Frameworks: A New Use of Social Science in Law, 73 VA. L. REV. 559, 590-91 (1987) (concluding that in assessing social scientific research, courts can evaluate the scientific data "along dimensions analogous to the... criteria used to evaluate precedent").

Cf. Meehl, supra note 126, at 95-97 (noting that decisions in the law will inevitably be based upon a combination of "fireside inductions" and social science data, depending upon judgments regarding the strength of each).
persuaded a critical mass of legal actors, including scholars, that many common intuitions about eyewitness testimony—for instance, that stress increases accuracy—run contrary to empirical fact.\textsuperscript{192} As a result, the law has undergone reform.\textsuperscript{193}

The example of eyewitness identification, however, is the exception rather than the rule. As a general matter, normative judgments about evidence doctrine are relatively impervious to changes in empirical understandings. Despite oft-repeated lamentations to the contrary, this is not primarily the result of legal academics’ unwillingness or inability to master the nuances of social scientific discourse.\textsuperscript{194} Nor is it due to social scientists’ naivete regarding legal processes—though that is sometimes a problem.\textsuperscript{195} Rather, social science has had minimal impact on the reform of evidence doctrine because, contrary to common perceptions, social scientific study does not simplify legal problems or provide easy answers to legally relevant empirical questions. Social scientific data are meaningless unless they survive the processes of practical reason; that is, unless and until the evidence community reaches a consensus that (1) a given interpretation of the scientific data yields an accurate empirical depiction of reality and (2) this interpretation affects an assumption underlying legal doctrine in a particular way.

Consensus on these two points is a necessary but not sufficient condition for empirical data to result in doctrinal change. In addition, the evidence community’s new consensus about empirical reality must translate into an altered view of the efficacy of the doctrine itself. This is not likely in the short term because the configuration of any particular facet of evidence doctrine, if properly analyzed as the product of practical reason, is unlikely to rest upon a single normative justification. Rather, it is

\textsuperscript{192} See Loh, supra note 157, at 679-91 (reviewing the literature concerning the psychology of eyewitness identification testimony).

\textsuperscript{193} See, e.g., United States v. Downing, 753 F.2d 1224, 1230-32 (3d Cir. 1985) (reviewing the cases and concluding that expert testimony on eyewitness identification can be helpful evidence).

\textsuperscript{194} See, e.g., Philip R. Lochner, Jr., Some Limits on the Application of Social Science Research in the Legal Process, 5 LAW & SOC. ORD. 815, 824 (1973) (“The single most important barrier to the use of social science research in the practice of law is ignorance.”); Mehl, supra note 126, at 67 (describing lawyer who refused to acknowledge value of social scientific research to the law); Kalven, supra note 160, at 58 (arguing that “we in the legal world need some literacy as to scientific method”). But see Walker & Monahan, supra note 190, at 589 (noting that they are “more sanguine” about the ability of legal actors, specifically judges, to evaluate the validity of empirical claims); Monahan & Walker, supra note 177, at 511 n.119 (arguing that acquiring sophistication in social science is not more difficult than tackling difficult legal problems: “Anyone who can comprehend the Federal Tort Claims Act can learn what standard deviation and statistical significance mean.”).

\textsuperscript{195} See, e.g., Mehl, supra note 126, at 70-71 (criticizing the “fuzzy-headedness” of some social scientists addressing legal issues); Haney, supra note 170, at 167 (“[P]sychologists have perfected no methodology (or technology) by which laboratory findings can be translated into real-world applications. They typically avoid—and are therefore often naive about—the power struggles that precede policy change.”).
(or should be) based on a web of beliefs, each providing separate support for the doctrinal choice.\textsuperscript{196} In contrast, social scientific research, if faithful to its discourse, is narrowly focused; social scientists can examine only one or two empirical assumptions at any given time. Thus, the results of social scientific study typically call into question only one strand within any given web of beliefs, leaving the other justifications for the doctrine intact. A change of consensus about the empirical world, therefore, will not necessarily translate into a change of consensus about legal doctrine.\textsuperscript{197}

Furthermore, it is often difficult or impossible to pinpoint a singular empirical assumption underlying any given strand of belief. Research that misses the mark will be of little use. Consider, for example, the recent social scientific studies examining the rule against hearsay.\textsuperscript{198} These studies attempt to measure the ability of jurors to recognize hearsay and to discount its value in light of its derivative status. Their results are consistent: contrary to the assumption underlying hearsay doctrine, jurors appear to be very capable of identifying and devaluing hearsay evidence.\textsuperscript{199} Although all the researchers are careful to stress the tentative nature of their results,\textsuperscript{200} they all ultimately claim that their empiri-

\textsuperscript{196} See Eskridge & Frickey, supra note 7, at 348 (explaining the pragmatic view that "[w]e all accept a number of different values and propositions that, taken together, constitute a web of intertwined beliefs . . . . Decisionmaking is, therefore, polycentric, and thus cannot be linear or purely deductive. Instead it is spiral and inductive: We consider the consistency of the evidence for each value before reaching a final decision, and even then check our decision against the values we esteem the most.").

\textsuperscript{197} Cf. Kalven, supra note 160, at 68 (noting the difficulty in pinning down a legal premise for testing because "[l]egal rules and especially legal institutions do not have a single avowed end or purpose against which their performance can be tidily measured").

We have already seen this phenomenon with respect to Professor Wellborn’s analysis of demeanor evidence and Professor Tanford’s critique of limiting instructions. Even if one accepts the validity of the social scientific data on which they rely, and one accepts the applicability of the simulations to the real world of the courtroom—neither inconsequential matters—one’s view of evidence doctrine is not likely to change. This is because in both cases the social scientific research calls into question only one justification for the doctrine. But other justifications of the doctrine remain. In the case of demeanor evidence, there is the prophylactic effect of live testimony and the nonrationalist values served by live trials. In the case of limiting instructions, there is the nonrationalist value of preserving a sense of closure, coupled with the inability to start a case over every time an attorney or witness makes reference to inadmissible evidence.

\textsuperscript{198} See Miene et al., supra note 2; Kovera et al., supra note 2; Landsman & Rakos, supra note 166.

\textsuperscript{199} Miene et al., supra note 2, at 699 ("[T]he data from this study suggests that hearsay as a form of testimony is not overvalued by jurors . . . . "); Kovera et al., supra note 2, at 719 ("[J]uries rely more heavily on eyewitness testimony than hearsay testimony."); Landsman & Rakos, supra note 166, at 76 ("[H]earsay that was not highlighted as inappropriate, and that was introduced within the context of a substantial volume of other evidence, appeared to exert minimal influence on the ultimate outcome of the trial.").

\textsuperscript{200} Miene et al., supra note 2, at 699 ("The fact that subjects in this study did not give much weight to hearsay evidence does not conclusively make the case for hearsay reform."); Kovera et al., supra note 2, at 722 ("This article addresses only one of the many issues underlying calls for hearsay reform."); Landsman & Rakos, supra note 166, at 77 ("The preliminary findings described [in the
cal data provide more than minimal support for the abolition or amendment of the rule against hearsay.201

The empirical findings, however, provide considerably less support for reform than even these cautious researchers suggest. None of the studies addresses the fact that hearsay evidence never appears at trial in some neutral manner. Rather, like all other evidence, hearsay statements are offered by a party, presumably for some particular reason. Sometimes a skillful trial lawyer will use hearsay to camouflage a weakness in her case; sometimes it will be the only available evidence on point; sometimes it will be the best evidence to prove its assertive content.202 By failing to measure the ability of jurors to evaluate hearsay evidence in light of the reasons a party might be offering it, the recent social scientific research is not likely to cast serious doubt on the usefulness of the hearsay rule.

The foregoing discussion of the limited benefits to be derived from social science inquiry has assumed the internal validity of the social scientific studies at issue. Unfortunately, this assumption is probably inaccurate; the social scientific studies relied upon in legal literature are often seriously flawed. That this is so despite decades of literature critiquing social scientific methods, particularly as they have been applied to the law, is especially troubling. The benefit of social scientific research to the process of law reform is, of course, correspondingly reduced.

Examples of evidence scholars relying upon social scientific studies plagued by internal validity problems abound. Professor Wellborn relies on several studies of this type in Demeanor. Although purporting to measure the ability of individuals to detect others' deception from facial and body language, at least half of the studies cited by Professor Well-

201 See Miene et al., supra note 2, at 700 (“At the very least, this study has significant policy implications for cases in which an appellate court must decide whether the reception of hearsay . . . constituted reversible error. If jurors in fact give little or no credence to hearsay evidence, then the admission of hearsay . . . should be treated as harmless error.”); Kovera et al., supra note 2, at 722 (claiming that the study's findings "provide some empirical support for the notion that the legal system should provide jurors with any information that may assist them in resolving the case, including hearsay evidence"); Landsman & Rakos, supra note 166, at 77 ("If correct, [the study's findings] signal a strong argument for the reevaluation of the hearsay rule.").

To their credit, Professors Landsman and Rakos published a later version of their hearsay article in which they did not succumb to overstatement regarding the importance of their empirical data to the viability of the hearsay rule. Richard F. Rakos & Stephan Landsman, Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions, 76 MINN. L. REV. 623 (1992). In this article, they examine the limitations of empirical research and discuss strategies for maximizing its success. See id. at 654-76. But they conclude by overestimating the importance of social scientific study to the enterprise of law reform yet again, this time by suggesting that hearsay doctrine should remain unchanged until the completion of a comprehensive program of empirical research. Id. at 677; see infra text accompanying note 209.

202 See Seigel, supra note 13, at 916-24, 928-38.
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born did not involve a face-to-face confrontation between witness and liar. Instead, these studies used witnesses who viewed videotapes. As more important, in all the experiments, the individuals who lied were either role playing or were placed in a setting in which lying was clearly an appropriate behavior. As a result, none of the studies in fact measured the ability of human subjects to detect deception when the liar fears exposure, which is surely what they were trying to assess.

The authors of the three hearsay studies referenced above make a similar mistake. None of these studies made use of live witnesses; their “eyewitness testimony” took the form of either a videotape or transcript. Thus, although each of the studies purports to examine the ability of human subjects to differentiate and discount hearsay in comparison with witness testimony, they actually measure individuals’ abilities to differentiate among different types of hearsay and hearsay within hearsay. Remarkably, the articles are silent on this critical issue concerning their internal design.

Social scientific research is thus much less useful than evidence scholars commonly imagine. It certainly is not a panacea. Rarely does it narrow the area of debate surrounding the advisability of doctrinal reform; on the contrary, it usually raises even more issues—concerning the validity, interpretation, and impact of the empirical data—than it resolves. In addition, to the extent that some legal scholars employ such research without a sufficiently critical attitude and others accept it because of its scientific status, empirical evidence is as likely to lead to detrimental doctrinal outcomes as to beneficial ones. Thus, the misuse of social scientific research can be costly.

Unwarranted faith in the efficacy of social scientific evidence can

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203 Wellborn, supra note 18, at 1082-88. I invite those readers who fail to see the difference between a face-to-face confrontation and a review of a videotaped performance to recall the remarkably different impact a play has when it is viewed in the theater compared to when it is videotaped and watched on television.

204 In one of the studies, for instance, the “liars” were contestants on the television show “To Tell the Truth”; in another, the “liars” were police academy students who were instructed to lie under the pretense that good police officers must sometimes lie in the line of duty (presumably referring to undercover investigative work). See id.

205 See supra text accompanying notes 198-202.

206 See Miene et al., supra note 2, at 689-91 (describing the use of videotaped testimony in the design of their experiment); Kovera et al., supra note 2, at 707-10 (same); Rakos & Landsman, supra note 201, at 657-64 (describing the use of transcripts in the design of their experiment).

207 Even in their later article, Professors Rakos and Landsman fail to notice that “videotaped presentations” are hearsay. Rakos & Landsman, supra note 201, at 673 (discussing the need to use videotaped presentations—rather than written transcripts—in future simulations).

208 Cf. Meehl, supra note 126, at 88 (noting that “reliance on . . . fireside inductions may yield better results than the intermediate level sophistication which knows enough to ask a psychologist’s or psychiatrist’s opinion, but does not know enough to take what he says cum grano salis”).

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also lead to an extremely conservative attitude toward doctrinal reform. Indeed, some evidence scholars have argued that reform should not be undertaken unless it is fully supported by empirical study.\textsuperscript{209} The status of applied social science as one of many methods of practical reason militates against delaying dialogue and experimentation until a program of scientific study is complete.

The greatest cost resulting from the increasing tendency of evidence scholars to turn to empirical study, however, is probably the opportunity cost, that is, the cost of expending so much of the evidence community's finite resources on unpromising endeavors. Without question, social scientific research is time consuming and costly. Such research certainly ought not to be terminated, but evidence scholars should employ it with a full understanding of its limitations and potential for abuse.\textsuperscript{210}

VI. CONCLUSION

This Article is not the first to start from the premise that modern evidence scholarship has been, in at least some respects, uninteresting and ineffective. Richard Lempert made the now well-known (and perhaps infamous) comment that, since the enactment of the Federal Rules of Evidence, too many articles have followed the model, "What's Wrong

\textsuperscript{209} See, e.g., Rakos & Landsman, \textit{supra} note 201, at 677 ("In the hearsay setting... [n]othing should be done until experimental work reveals that the admission of hearsay poses little threat to the actual or perceived integrity of jury deliberation.").

\textsuperscript{210} In general, I agree with Professor Rubin's assessment that, if scholars reach a sufficient point of self-awareness, through which they directly confront and justify their normative positions in a systematic manner, they will be able to "make more extensive, but more controlled use of empirical data." Rubin, \textit{supra} note 7, at 1896. I also believe, however, that for empirical study to benefit legal scholarship, legal scholars who develop programs of empirical research must adopt some of the salutary practices of social scientists. For instance, they should plan long-term strategies of empirical inquiry rather than employ the hit-or-miss approach so prevalent today. More importantly, they should report the findings of empirical studies in \textit{short articles} focusing solely on the research and its results and not in long-winded articles setting forth (often unjustified) expositions of the implications of the data. Such a paradigm shift in legal scholarship would undoubtedly require a change in the tenure requirements of most law schools (which typically recognize only long and exhaustively footnoted textual articles as tenure pieces) and perhaps a partial abandonment of student-edited law reviews. It might also require, I think, the development of masters degree programs in the field of "empirical legal studies" so that law professors who were so inclined could be adequately trained in law-related social scientific methodology and discourse. \textit{But see id.} at 1898-1900 (indicating that legal scholars could set the agenda but rely on independent social scientists to carry out the empirical research).

In the case of evidence scholarship, the inevitability of external validity problems engendered by the use of simulated experiments raises a serious question about the value of even the most carefully planned course of empirical study. Upon careful reflection, evidence scholars might conclude that the persuasiveness of empirical research depends on the corroboration of simulated findings with results from controlled experimentation in the field. This will require the scholarly community to persuade judges that such field experimentation is worthwhile and can be accomplished without harm to real world participants in the adjudicatory process. Currently, the notion of using field study to examine the efficacy of evidence doctrine is generally disregarded.
With the Twenty-Ninth Exception to the Hearsay Rule and How the Addition of Three Words Can Correct the Problem." Professor Lempert, however, expressed optimism about what he described as the transformation of evidence from "a field concerned with the articulation of rules to a field concerned with the process of proof." He saw redemption in the "new evidence scholarship" that was beginning to focus on this latter subject. At roughly the same time, other evidence scholars turned to empirical research for redemption from the tedium of narrow and dry doctrinal analysis.

This Article is, of course, considerably less sanguine about these recent developments in evidence scholarship. It has demonstrated that even "interesting" evidence scholarship has been consistently distorted by the twin vices of foundationalism and logical positivism. The Article thus seeks to initiate an exchange within the community of evidence scholars that will result in the displacement of foundationalism and logical positivism with pragmatism and practical reason. Such an intellectual shift would help scholars avoid misuses of empirical data in arguing for evidence reform. Even more important, it would cause members of the academy to devote more of their finite cognitive resources to robust practical discourse regarding the optimal shape of evidence doctrine.

The success of this Article will depend upon the extent to which others in the field heed this call rather than condemn or ignore it. In other words, the pragmatic measure of the value of this Article, like most others, will be whether it facilitates dialogue and withstands the test of time.

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211 Lempert, supra note 13, at 439.
212 Id.