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The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law

Edward J. Imwinkelried

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The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law

EDWARD J. IMWINKELRIED*

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"All men *are* liars."
—*Psalms* 116:11

I. INTRODUCTION

One of the perennial questions in Evidence scholarship is whether Evidence law has an organizing principle.¹ If such a princi-

* Professor of Law, University of California at Davis; former Chair, Evidence Section, American Association of Law Schools.

1. See Ronald J. Allen, *The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other Than Those Employed in the Codification*, 79 NW. U. L. REV. 1080 (1985).

ple² exists, the principle would have great utility. To begin with, the principle could function as an explanatory framework,³ helping us to better understand⁴ individual evidentiary rules. Once a worker appreciates the grand architectural design of a structure, the role of each building block becomes more understandable. Moreover, the discovery of such a principle would better enable us to critique particular evidentiary rules: it would act as a rationalizing principle.⁵ When an individual rule deviated from that rationale, the rule would be a likely candidate for reconsideration and revision. Finally, in the Grand Tradition of the common law,⁶ if the rationale of that organizing principle were discredited by empirical research or on some other basis, there would be a strong case for the wholesale reform of Evidence law.

Until recently, the received orthodoxy was that the organizing principle of Evidence law was a fear that lay jurors would misuse certain types of evidence. Two of the giants of Evidence law, Thayer,⁷ and later, Wigmore,⁸ championed the so-called jury control principle.⁹ They urged the notion that rules such as the hearsay doctrine reflect the common-law judges' fear that untrained jurors will attach undue weight to particular kinds of evidence such as un-cross-examined testimony. However, even giants can err. Recent historical scholarship indicates that Thayer and Wigmore overstated the extent to which that fear influenced the evolution of evidentiary doctrine.¹⁰ More importantly, as Professor Dale Nance ably demonstrated in an often-cited 1988 article, the jury control hypothesis has limited explanatory power; the hypothesis simply does not rationalize many accepted evidentiary rules.¹¹

In addition to attacking the jury control principle, Professor Nance proposed an alternative hypothesis: the best evidence principle. Nance contended that the common-law courts were vitally concerned about the quality of evidence.¹² Nance conceived of the

2. For a discussion of the difference between a principle and a rule, see generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22-28 (1977).

3. See Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 294-95 (1988).

4. *Id.* at 270.

5. *Id.* at 248.

6. See PAUL J. MISHKIN & CLARENCE MORRIS, *ON LAW IN COURTS: AN INTRODUCTION TO JUDICIAL DEVELOPMENT OF CASE AND STATUTE LAW* 88-89 (1965).

7. Nance, *supra* note 3, at 278-79.

8. *Id.* at 277.

9. *Id.* at 229.

10. *Id.*

11. *Id.* at 281-84.

12. *Id.* at 276.

principle as a doctrine squarely within the rationalist tradition.¹³ According to his hypothesis, common-law judges shaped evidentiary doctrine with a preference for the epistemically best,¹⁴ reasonably available¹⁵ evidence. As Professor Nance correctly pointed out, the best evidence principle can easily serve as a unifying idea¹⁶ that animates¹⁷ the best evidence, opinion, and hearsay rules.¹⁸ Each of those rules prefers one type of evidence over another: the production of a document over a paraphrase of the document's contents, a recitation of fact rather than an opinion, and a witness' live testimony over a reference to the person's out-of-court statements.¹⁹ In each case, the former type of evidence is preferred because it is deemed better or more trustworthy.²⁰ Furthermore, in each case, the preference yields when the former type of evidence is unavailable and the latter type of evidence is demonstrably reliable.²¹ Professor Nance contends that the best evidence principle is superior to the jury control hypothesis and has greater power as an interpretive device for explaining extant evidentiary rules.²²

The thesis of this article is that while there is substantial merit in both the jury control and the best evidence hypotheses, neither is the best organizing principle for Evidence law. For their part, Thayer and Wigmore were correct in thinking that common-law evidentiary doctrine reflects a profound skepticism. However, they misidentified the primary object of the common-law judges' skepticism: rather than primarily fearing the misevaluation of evidence by jurors, the judges were principally concerned about perjury by witnesses. For his part, Professor Nance is correct in surmising that, in large part, evidentiary rules are based on a concern about the quality of evidence. However, the common-law courts were not affirmatively pursuing a rationalist objective of ensuring the admission of only the best evidence. Instead, common-law evidence doctrine was driven chiefly by a more pessimis-

13. See generally William Twining, *The Rationalist Tradition of Evidence Scholarship*, in WELL AND TRULY TRIED 211 (Enid Campbell & Lewis Waller eds., 1982).

14. Nance, *supra* note 3, at 240.

15. *Id.* at 241.

16. *Id.* at 248, 276, 286.

17. *Id.* at 230.

18. *Id.* at 286 n.282. As authority for this position, Professor Nance cites the appropriate passages in RONALD L. CARLSON ET AL., *MATERIALS FOR THE STUDY OF EVIDENCE* (2d ed. 1986) [hereinafter *MATERIALS*], the predecessor to RONALD L. CARLSON ET AL., *EVIDENCE IN THE NINETIES: CASES, MATERIALS AND PROBLEMS FOR AN AGE OF SCIENCE AND STATUTES* (3d ed. 1991) [hereinafter *AGE OF SCIENCE*].

19. CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 507-08.

20. *Id.*

21. *Id.*

22. Nance, *supra* note 3, at 293.

tic, negative goal, namely, preventing, deterring, and exposing perjury.

A worst evidence principle—a concern about witness perjury—is the best explanatory hypothesis for the logical structure of Evidence law. The first section of this article reviews the jury control and best evidence principles. This section of the article demonstrates the historical weaknesses and limited explanatory power of both principles. The second section of the article develops the competing worst evidence principle. This section of the article initially marshals the historical proof that in formulating evidentiary rules, the common-law courts' foremost concern was the prevention and exposure of perjury. The article then employs the worst evidence principle to explicate individual evidentiary rules. The worst evidence principle helps account for more rules and more troublesome features of the rules than either the jury control or the best evidence principle can rationalize. The third and concluding section of the article highlights the important implications of the identification of the worst evidence principle for the future reform of evidentiary doctrine.

II. THE INADEQUACY OF THE JURY CONTROL AND BEST EVIDENCE PRINCIPLES

A. *The Jury Control Hypothesis*

The traditional hypothesis for the structure of common-law Evidence is that evidentiary rules emerged because of the judges' distrust of lay jurors' competence.²³ Under this hypothesis, judges formulated the rules with a view toward restraining the irrational behavior of weak-minded jurors.²⁴ As previously stated, Thayer was a proponent of this theory. He characterized the common law of Evidence as "the child of the jury system."²⁵ Thayer was somewhat hostile to the institution of the jury,²⁶ and he may have projected that hostility into his analysis of the origin of the common law of Evidence. Thayer's view mightily influenced Dean Wigmore.²⁷ One of the leading students of Wigmore's writings, Professor Peter Tillers, asserts that Wigmore's doubts about the jury's capacity "inform" Wigmore's treatment of virtually every branch of Evidence.²⁸

23. *See id.* at 230, 260, 283.

24. *Id.* at 229.

25. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266 (1898).

26. *See id.* at 534-35 (proposing a reduction in the use of juries).

27. Nance, *supra* note 3, at 278.

28. 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW xii (1983); *see also* Nance, *supra* note 3, at 277-78.

However, the jury control hypothesis suffers from several weaknesses. First, the hypothesis is at odds with contemporary historical research,²⁹ especially that of Professor John Langbein. In 1978, Langbein published his classic article on the evolution of adversary procedure in criminal trials.³⁰ Langbein focused on developments in criminal trial procedure in eighteenth-century England. He relied heavily on the Old Bailey Sessions Papers.³¹ Although Langbein found evidence that common-law judges were distrustful of lay jurors, his findings undercut the assumption that these judges fashioned evidentiary rules as a means of jury control.³² His research indicated that judges employed other techniques for this purpose, such as judicial comment to the jury³³ and outright rejection of jury verdicts.³⁴ In Langbein's words, common-law "judges did not need [to resort to] anything as clumsy as the rules of admissibility to keep juries to heel."³⁵

While Langbein mounted a historical case against the jury control principle, Nance convincingly attacked the principle on the ground that it has minimal utility as an organizing theory, or at least less explanatory force than the best evidence principle.³⁶ He illustrates his attack with two well-settled evidentiary requirements, oath and cross-examination. Nance argues that the jury control hypothesis fails to rationalize either requirement. He contends, for example, that "[i]f anything, the jury is more likely to be misled by *sworn* [perjurious] testimony"³⁷ Nance then points out that when a witness fails or refuses to answer questions on cross-examination, the case law permits the trial judge to consider a number of factors in deciding whether to strike the witness' direct testimony—factors which Nance believes are "incongruen[t] to any concern about misleading the jury."³⁸ The cases announce, for instance, that if the witness cannot be cross-examined due to the witness' illness and without any wrongdoing on the part of the witness' proponent, the judge may allow the

29. Nance, *supra* note 3, at 229.

30. See John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978).

31. *Id.* at 267-72.

32. *Id.* at 306.

33. *Id.* at 285.

34. See *id.* at 291-96.

35. *Id.* at 306. See generally Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1149-51 (1990).

36. Nance, *supra* note 3, at 281-83.

37. *Id.* at 281.

38. *Id.* at 282.

direct testimony to stand.³⁹ In Nance's view, the oath and cross-examination procedures exemplify the many evidentiary rules which are "hard to reconcile with a jury distrust theory."⁴⁰

B. *The Best Evidence Hypothesis*

At first blush, Professor Nance not only succeeds in undermining the jury control hypothesis but also constructs a persuasive case for the alternative best evidence principle. This principle is unquestionably evident in the writings of Sir Geoffrey Gilbert, the author of one of the first English evidence treatises.⁴¹ In the eighteenth century, it was Gilbert who wrote that, "The first . . . and most Signal Rule, in Relation to Evidence, is this, That a Man must have the utmost Evidence, the Nature of the Fact is capable of"⁴² Simply stated, Gilbert "attempted to subsume the whole of the law under a single principle, 'the best evidence rule.'"⁴³ In the nineteenth century, Greenleaf followed suit and made the best evidence principle a central notion in his conception of the structure of evidence law.⁴⁴

Furthermore, Professor Nance exemplifies the explanatory value of the best evidence principle. He goes to great length to demonstrate that the principle stands "behind an impressive array of" evidentiary rules,⁴⁵ including both numerous evidentiary requirements (oath,⁴⁶ cross-examination,⁴⁷ personal knowledge,⁴⁸ and authentication⁴⁹) and the most prominent preferential exclusionary rules (opinion, hearsay, and best evidence).⁵⁰ Professor Nance concludes that all these evidentiary doctrines have " 'best evidence' foundation[s]."⁵¹

In summary, Nance asserts that the best evidence principle is a better organizing principle for the common law of evidence than the traditional jury control hypothesis. In a relative sense, the best evidence principle does appear to be the sounder hypothesis. Yet the best evidence principle itself has major deficiencies.

One deficiency is historical. In two 1990 articles, Professor

39. *Id.*

40. *Id.*

41. Landsman, *supra* note 35, at 1151-52.

42. *Id.* at 1152 (citing GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 3-4 (1754)).

43. Twining, *supra* note 13, at 213.

44. Nance, *supra* note 3, at 248.

45. *Id.* at 291.

46. *Id.* at 281.

47. *Id.* at 282-83.

48. *Id.* at 285 n.279 (citing CARLSON ET AL., *MATERIALS*, *supra* note 18, at 161-73).

49. *Id.*

50. *Id.* at 286 n.282 (citing CARLSON ET AL., *MATERIALS*, *supra* note 18, at 419-20).

51. *Id.* at 289.

Landsman demonstrated that although Gilbert attached overarching importance to the best evidence principle,⁵² other English evidence writers gradually depreciated the principle.⁵³ After the publication of Gilbert's treatise in 1754,⁵⁴ Thomas Peake, William Evans, S.M. Phillips, and Jeremy Bentham all undertook to write substantial texts or essays about the common law of Evidence.⁵⁵ Although Peake acknowledged Gilbert's best evidence principle, that principle did not dominate his text as it had Gilbert's treatise.⁵⁶ Evans, who wrote a few years after Peake, attempted to confine the best evidence principle to documentary proof.⁵⁷ A decade later, Phillips further diminished the significance of the best evidence principle.⁵⁸ In his work, the best evidence rule does not surface until Chapter VII—176 pages into the text.⁵⁹ Finally, Bentham repudiated the best evidence principle as a basis for excluding testimony.⁶⁰

Furthermore, while the principle may have more explanatory power than the jury control hypothesis, its explanatory value is also limited. Professor Nance concedes that the best evidence principle cannot rationalize the privilege rules.⁶¹ The *raison d'être* of a privilege is the promotion of an extrinsic social policy such as the facilitation of communication between client and attorney or patient and physician.⁶² Privileges do not rest on considerations of the quality of the evidence in question. Quite the contrary is true; the invocation of a privilege can result in the suppression of highly relevant, trustworthy evidence.⁶³

Likewise, the best evidence principle falls short of explaining some of the most troublesome aspects of the common law of Evidence. By way of example, consider one of the most embarrassing features of common law evidence: the gross inconsistency between the liberal admissibility of character evidence on a credibility theory and its virtual exclusion on the historical merits.

A hypothetical case will suffice to explain this inconsistency.

52. Landsman, *supra* note 35, at 1152-53.

53. Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 596 (1990).

54. See Landsman, *supra* note 35, at 1152.

55. *Id.* at 1160-85.

56. *Id.* at 1161.

57. *Id.* at 1162.

58. *Id.* at 1163.

59. *Id.*

60. *Id.* at 1176-77.

61. Nance, *supra* note 3, at 229, 294-95.

62. CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 731-34.

63. *Id.* at 731.

Assume that an accused, charged with perjury, testifies at his trial. Once the accused testifies, his credibility becomes a fact of consequence in issue in the case. To impeach the accused, the prosecutor may then call a second witness to testify that the accused has a reputation as an untruthful person.⁶⁴ The trial judge would admit the testimony on a credibility theory and, on timely request, the judge would give the jury a limiting instruction⁶⁵ to the effect that they could consider the testimony only in deciding whether the accused testified truthfully on the stand.

Suppose, however, that the prosecutor argued alternatively that the testimony should be received on the historical merits of the case to increase the probability that the accused committed the charged act of perjury. Unless the accused has placed his character in issue,⁶⁶ the judge would summarily reject the prosecutor's argument.

The irony is that in both variations of the hypothetical, the prosecutor is relying on essentially the same theory of logical relevance: introducing reputation testimony to prove the accused's character and, in turn, employing character as circumstantial proof of conduct.⁶⁷ In one case, the prosecutor argues that the accused's character trait of untruthfulness strengthens the inference that the accused's current testimony is perjurious. In the other case, the prosecutor contends that the character trait increases the likelihood that the accused committed the charged offense. In both cases, the prosecutor is attempting to use the accused's character trait as a predictor of conduct on a specific occasion. Yet the common law treats the two cases "very differently."⁶⁸ The differential treatment seems indefensible, because there is no empirical evidence that there is greater consistency in the character trait of untruthfulness than in other traits.⁶⁹ For our purposes, the telling point is that the best evidence principle offers no possible justification for the disparate treatment of character on a credibility theory and the historical merits. Why would the use of character evidence comport with the principle when the evidence is offered for credibility purposes but run afoul of the principle when

64. FED. R. EVID. 404(a)(3), 405, 608(a). See generally Richard C. Wydick, *Character Evidence: A Guided Tour of the Grotesque Structure*, 21 U.C. DAVIS L. REV. 123, 173-81 (1987).

65. FED. R. EVID. 105.

66. FED. R. EVID. 404(a)(1). See generally Wydick, *supra* note 64, at 139-50.

67. See CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 384-86, 451-52.

68. *Id.* at 385.

69. *Id.* at 385-86 (collecting the psychological studies); Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 514, 521 (1991); see also Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian[?]? Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 645-54 (1991).

offered on the merits? As this hypothetical illustrates, when we turn to some of the more problematic evidentiary rules, the best evidence principle fails as a rationalizing theory.

III. THE CASE FOR THE WORST EVIDENCE PRINCIPLE

The worst evidence principle is that the common law of Evidence was shaped by and is largely explicable in terms of the early judges' desire to prevent, deter, and expose the worst type of evidence, perjury. This principle not only has solid historical support, it has more extensive explanatory power than either the jury control or the best evidence hypothesis.

A. *The Historical Support for the Worst Evidence Principle*

In the eighteenth century, England witnessed the birth of an elaborate system of common-law evidentiary rules.⁷⁰ It is true that the advent occurred at roughly the same time as the Enlightenment or Age of Reason.⁷¹ The rationalists had "unquestioning confidence in the power of . . . logic" to solve human problems.⁷² The coincidence of the Age of Reason with the emergence of the body of evidence law initially seems to cut in favor of the best evidence principle with its rationalist grounding. However, it must also be remembered that the common-law judges who fashioned these evidentiary rules had already been exposed to the philosophy of Hobbes, "one of the most influential men of his day among persons who were open to ideas."⁷³ Hobbes had a less than idealistic conception of human behavior.⁷⁴ Hobbes stated that without a strong government to keep men "in awe," the human condition would degenerate into "a war . . . of every man against every man."⁷⁵ Embracing the skeptical spirit of the Renaissance,⁷⁶ he viewed human beings as "motivated by complete selfishness"⁷⁷

This pessimistic view of human motivation was probably in the back of the minds of many of the judges who gave birth to the com-

70. Landsman, *supra* note 53, at 537-43; Landsman, *supra* note 35, at 1149; John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 2 (1983); Nance, *supra* note 3, at 248.

71. WILL DURANT, *THE STORY OF PHILOSOPHY* 254 (1962).

72. *Id.*

73. ALBUREY CASTELL, *AN INTRODUCTION TO MODERN PHILOSOPHY* 106 (2d ed. 1963).

74. *Id.* at 111.

75. *Id.* at 360.

76. DURANT, *supra* note 71, at 207.

77. CASTELL, *supra* note 73, at 106.

mon law of Evidence. Any judge who subscribed to the Hobbesian philosophy would understandably be on guard against witness perjury. More importantly, a number of historical developments during the eighteenth century riveted the attention of both the public and the legal community on the problem of perjury.

Crown witnesses. The most pressing crime problem facing the urban centers in England during the eighteenth century was robberies and other thefts committed by gangs.⁷⁸ Gang members were hardened, professional criminals.⁷⁹ A "mainstay" of the government's battle against the gangs was the crown witness system.⁸⁰ After a gang member was arrested, a magistrate could designate that member a crown witness.⁸¹ If the arrestee was willing to betray fellow gang members by testifying against them,⁸² the magistrate would promise the arrestee nonprosecution.⁸³ The magistrate lacked a formal pardon power,⁸⁴ but evidently, in practice, nonprosecution promises were generally kept.⁸⁵

Hobbes would undoubtedly have regarded the crown witness practice as proof of his theory of selfish human motivation. The practice gave rise to a cycle of betrayal.⁸⁶ Over the course of a long criminal career, a given individual might serve as a crown witness to betray his colleagues and later be betrayed.⁸⁷ If the police arrested several gang members, they would compete to be designated as the crown witness.⁸⁸ When the offense was a capital crime, the competition became a life-or-death race to win the magistrate's favor.⁸⁹

In Professor Langbein's words, this practice obviously "labored under a material incentive to commit perjury . . ."⁹⁰ Given the large number of capital offenses, the crown witness system could easily provoke perjury.⁹¹ The legal community began to appreciate that when the prosecution relied on a crown witness, there was good reason to suspect perjury.⁹² There were cases in which crown witnesses suc-

78. Langbein, *supra* note 70, at 85, 105.

79. *Id.* at 84.

80. *Id.* at 94.

81. *Id.* at 85, 95.

82. *Id.* at 84.

83. *Id.* at 92, 94.

84. *Id.* at 94-95.

85. *Id.* at 95.

86. *Id.* at 86.

87. *Id.* at 84-85.

88. *Id.* at 88.

89. *Id.*

90. *Id.* at 97.

91. *Id.* at 114.

92. *Id.* at 105.

cessfully framed other suspects.⁹³ Innocent defendants were sometimes convicted on the basis of crown witness testimony.⁹⁴ These incidents became public scandals.⁹⁵ The contemporary press sensationalized the incidents,⁹⁶ and large mobs sometimes attended the pillorying of crown witnesses who had perjured themselves and were found out.⁹⁷ Some particularly notorious scandals remained in the public eye for years.⁹⁸

These scandals had a profound influence on the judges who sat during the formative era of the common law of Evidence; these incidents were “much in the air”⁹⁹ and “loomed large” in the judges’ minds.¹⁰⁰ In their courts, they became accustomed to hearing the defense level the accusation that the crown witness would “‘say anything to save his own life’”¹⁰¹ or was endeavoring to “purchase[] impunity by falsely accusing others.”¹⁰² Judges made mention of the scandals in their own writings.¹⁰³ In short, judges became gravely concerned that the crown witness system encouraged perjury.¹⁰⁴ Langbein concludes that the rise of the mandatory corroboration requirement—“[t]he [f]irst [r]ule of [e]vidence”¹⁰⁵—was at least in part a judicial response to that concern.¹⁰⁶

Thief catchers. Another historical development during this period was the creation of a cadre of professional thief catchers.¹⁰⁷ To curb the growing problem of stealing, the Parliament passed a series of statutes offering rewards to people who aided in the prosecution of thieves.¹⁰⁸ Many people went into the business of catching thieves.¹⁰⁹ Such conduct seemed to further support the Hobbesian view of human motivation. The public came to view thief catchers as

93. *Id.* at 97, 108-10.

94. *Id.* at 106, 108-10.

95. *Id.* at 105-06.

96. *Id.* at 112.

97. *Id.*

98. *Id.*

99. *Id.* at 105.

100. *Id.* at 86.

101. *Id.* at 97 (quoting OBSP (Apr./May 1756, #203), at 169, 170).

102. *Id.* (quoting *Regina v. Farler*, 8 C. & P. 106, 108, 173 Eng. Rep. 418, 419 (Worcester assizes 1837)), cited in 4 J.H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2037, at 358, § 2059, at 362.

103. *Id.* at 114.

104. *Id.* at 2.

105. *Id.* at 96.

106. *Id.* at 96-103.

107. Landsman, *supra* note 53, at 573.

108. Landsman, *supra* note 53, at 573; Langbein, *supra* note 70, at 106.

109. Landsman, *supra* note 53, at 573.

"entirely self-interested individual[s]." ¹¹⁰ Thief catchers pursued their business for profit rather than out of any sense of civic responsibility. ¹¹¹ At the trials of their arrestees, they became both witnesses and advocates for the prosecution. ¹¹²

As in the case of the crown witnesses, there were scandals involving thief catchers. ¹¹³ It became clear that some thief catchers had fabricated testimony against innocent defendants. ¹¹⁴ A few thief catchers were even prosecuted and jailed for their perjury. ¹¹⁵

Like the crown witness scandals, the thief catcher scandals made the legal community even more conscious of the problem of perjury. ¹¹⁶ Commentators such as Evans referred to the "suspicion of fabrication . . . commonly attendant upon" professional thief catchers. ¹¹⁷ Judges and jurors alike became skeptical of prosecution cases resting primarily on thief catcher testimony. ¹¹⁸ The defense often raised the spectre of perjury ¹¹⁹ and would attack a thief catcher witness as a "liar." ¹²⁰ As a general proposition, the trial judges gave the defense wide latitude on cross-examination to expose the witness' motivation to lie. ¹²¹ Acquittals in these cases were frequent. ¹²² Just as Professor Langbein characterizes the corroboration requirement as a partial response to the crown witness scandals, Professor Landsman concludes that notorious thief catcher misconduct played an important role in spurring evidentiary reform in eighteenth-century England. ¹²³

The public and judges did not think that perjury was confined to criminal cases. In 1676, the Parliament enacted the original Statute of Frauds for civil Contract disputes. ¹²⁴ The preamble to the statute stated that there were "many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of per-

110. *Id.* at 577.

111. *Id.*

112. *Id.* at 576.

113. *Id.* at 580.

114. *Id.* at 573, 577.

115. *Id.* at 579.

116. *Id.* at 577.

117. *Id.* at 577 n.406 (citing William D. Evans, *Appendix XVI—On the Law of Evidence*, in 2 M. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS 225 (William D. Evans trans., 1826)).

118. *Id.* at 567 n.354.

119. *Id.* at 541.

120. *Id.* at 553.

121. *Id.* at 555, 579.

122. *Id.* at 576.

123. *Id.* at 577, 580.

124. E. ALLAN FARNSWORTH, CONTRACTS § 6.1, at 370 (1982).

jury.”¹²⁵ Preambles to earlier statutes had included assertions such as the statement that “perjury . . . horribly continues and daily increases in the kingdom.”¹²⁶

Professor Nance himself acknowledges that some of the older texts placed a conspicuous emphasis on the prevention of perjury and fraud.¹²⁷ Judges and commentators alike assumed not only that perjury was rampant but also that perjury was the most common cause of erroneous trial testimony.¹²⁸ As the following subsection demonstrates, those assumptions pervade the common law of Evidence—to an even greater extent than the assumptions underlying either the jury control or the best evidence principle.

B. *The Superior Explanatory Power of the Worst Evidence Principle*

As we shall now see, the vast majority of the common-law evidentiary rules reflect a concern about witness perjury. Most of the rules are explicable in terms of a concerted judicial effort to prevent, deter, and expose perjury and allied evils such as forgery and fraud.¹²⁹

1. THE COMPETENCY OF PROSPECTIVE WITNESSES

In evidence law, the threshold question is whether the person called to the stand is competent to testify as a witness. Before turning to the question of the permissible content of the person's proposed testimony, the judge must decide whether the person is qualified to give any testimony at all in the case.¹³⁰ Both the early common-law competency rules and their modern vestiges reflect the worst evidence principle.

In addition to barring certain mentally disordered persons from testifying,¹³¹ the common law rendered certain categories of persons per se incompetent as witnesses: interested persons,¹³² persons who had previously suffered specified felony convictions,¹³³ and persons

125. *Id.*

126. *E.g.*, 38 Edw. 3, ch. 12 (1363); 34 Edw. 3, ch. 8 (1360); 5 Edw. 3, ch. 10 (1331), cited in RONALD CARLSON, EDWARD IMWINKELRIED & EDWARD KIONKA, MATERIALS FOR THE STUDY OF EVIDENCE 551 (2d ed. 1986).

127. Nance, *supra* note 3, at 257-58.

128. Edward J. Imwinkelried, *The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt—and Quickly Forgotten*, 41 FLA. L. REV. 215, 219-20 (1989).

129. See Landsman, *supra* note 35, at 1179.

130. See MCCORMICK ON EVIDENCE §§ 61-69 (4th ed. 1992).

131. See *id.* § 62.

132. Nance, *supra* note 3, at 255; see also Landsman, *supra* note 35, at 1154, 1165.

133. Landsman, *supra* note 35, at 1154, 1165.

with aberrant religious beliefs.¹³⁴ The common law did so on the theory that the integrity of these persons was questionable.¹³⁵ Bentham put the matter bluntly when he wrote that the early common law altogether prevented these persons from testifying because it presumed that persons in the prohibited categories were "liars."¹³⁶

Although modern evidence law has abandoned most of these exclusions, some vestiges of the ancient competency rules survive; and like the antecedent exclusions, the vestiges support the worst evidence hypothesis.

One vestige is the fact that in a few jurisdictions, persons who have previously been convicted of perjury or subornation of perjury remain incompetent.¹³⁷

Another remnant of the early rules is that in roughly half the states there are still survivor's evidence or dead man statutes.¹³⁸ These statutes generally provide that in certain types of civil actions against a decedent's estate, the surviving party to a transaction such as a contract may not testify adversely to the estate. These statutes were enacted as safeguards against perjury.¹³⁹ Death had silenced the decedent and thereby deprived the estate of the most effective means of rebutting the survivor's testimony, and it was thought that the survivor would be tempted to resort to perjury.¹⁴⁰

Still another vestige of the early competency rules is the requirement that the prospective witness take an oath before testifying.¹⁴¹ The principal purpose of this requirement is to deter the witness from committing perjury.¹⁴² Taking the oath pricks the witness' conscience¹⁴³ and make the person more aware of the consequences of untruthful testimony. In that manner, the oath supposedly reduces the likelihood of perjury.¹⁴⁴

2. THE LOGICAL RELEVANCE OF THE PROPOSED TESTIMONY

If the proposed witness is competent, the focus shifts from the witness' personal qualifications to the substance of the contemplated testimony. To be admissible, all evidence must be logically rele-

134. *Id.* at 1154.

135. *Id.*

136. *Id.* at 1177-78.

137. MCCORMICK, *supra* note 130, § 64.

138. CARLSON ET AL., MATERIALS, *supra* note 18, at 176.

139. *Id.*

140. MCCORMICK, *supra* note 130, § 65.

141. FED. R. EVID. 601, 603.

142. FED. R. EVID. 603 advisory committee's note; *see also* Nance, *supra* note 3, at 281.

143. Landsman, *supra* note 35, at 1165.

144. *See* *People v. Haeberlin*, 77 Cal. Rptr. 553, 556 (Cal. Ct. App. 1969).

vant.¹⁴⁵ The common law insisted that the proponent of an item of evidence establish the logical relevance of the evidence in two respects.

First, the common law demanded that the testimony be material to the facts of consequence in the case. In Thayer's words, this requirement is "not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence"¹⁴⁶ When the proponent offers an item of evidence at trial, the judge queries the proponent to determine what the proponent claims the item to be.¹⁴⁷ The judge then asks this question: If the item is what the proponent claims it to be, does the item increase or decrease the probability of the existence of any fact in issue in the case?¹⁴⁸ If the item would affect the balance of probabilities, the item satisfies the first dimension of logical relevance. This dimension is sometimes styled the facial relevance of the evidence.¹⁴⁹

However, the common-law judges were not content with a showing of facial relevance; in the case of exhibits, they also demanded proof of the underlying relevance or authenticity.¹⁵⁰ For example, when the proponent offers a letter and claims that it is the contract offer authored by the defendant, the proponent must prove up that claim.¹⁵¹ Most courts refer to that mandate as the requirement for authentication.¹⁵² Both the existence and tenor of that requirement comport with the worst evidence principle.

Thayer was correct in characterizing the facial logical relevance doctrine as a dictate of any rational evidence system; if the purpose of a trial is to resolve a controversy, the only proof admitted at that trial should be evidence related to the underlying factual disputes. In contrast, there is no logical necessity for the underlying logical relevance doctrine. Quite to the contrary, in "everyday" life, if we receive a letter, we tend to take it at face value; we presume authenticity and dispense with extrinsic proof of genuineness.¹⁵³ However, the common-law judges were concerned about the possibility of perjury and the allied evil of forgery. They consequently imposed the authentication requirement as "a . . . check on the perpetration of fraud."¹⁵⁴ It

145. FED. R. EVID. 402.

146. THAYER, *supra* note 25, at 264-65.

147. CARLSON ET AL., AGE OF SCIENCE, *supra* note 18, at 189-98.

148. *Id.* at 190, 197.

149. *Id.* at 203; United States v. Southland, 700 F.2d 1, 23 (1st Cir. 1983).

150. See generally CARLSON ET AL., AGE OF SCIENCE, *supra* note 18, at 203-05, 207-19.

151. See FED. R. EVID. 901.

152. CARLSON ET AL., AGE OF SCIENCE, *supra* note 18, at 204.

153. MCCORMICK, *supra* note 130, § 218.

154. *Id.*

is, of course, possible that accidentally or as a joke, a third party will create a letter which purports to be a contract offer relevant to the instant suit, but that possibility is remote. Realistically, it is much more likely that any such letter would be a deliberate forgery. Thus, the very existence of the general authentication doctrine fits into the pattern of the worst evidence principle.

The specific features of the application of the doctrine to certain types of exhibits also fall into the same pattern. The doctrine applies to both audiotapes¹⁵⁵ and motion pictures.¹⁵⁶ If the proponent claims that an audiotape represents an accurate recording of a particular conversation, the proponent must establish that claim. Or when the proponent claims that a motion picture faithfully depicts certain action, again the proponent must prove the claim. In theory, the proponent can establish such a claim by marshalling any set of circumstantial evidence which would rationally support a permissive inference of authenticity.¹⁵⁷ However, in the case of audiotapes and motion pictures, the common law was more restrictive.¹⁵⁸ When the proponent proffered an audiotape, some courts rigidly insisted on proof of the custody of the tape.¹⁵⁹ Several authorities similarly required proof of custody of the film in the case of motion pictures.¹⁶⁰ In large part, the courts added these foundational requisites out of fear of deliberate tampering and manipulation with the exhibit.¹⁶¹ In this light, the imposition of these requirements was based on the skepticism and concern about perjury at the core of the worst evidence principle.¹⁶²

3. LEGAL IRRELEVANCE RESTRICTIONS ON THE ADMISSION OF LOGICALLY RELEVANT EVIDENCE

Assume that the proposed witness is competent and the contem-

155. See generally CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 266-68.

156. See generally *id.* at 275-80.

157. See FED. R. EVID. 104(b), 901(a).

158. Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 143 (1987).

159. Edwin Conrad, *Magnetic Recordings in the Courts*, 40 VA. L. REV. 23, 34-35 (1954); Amelia K. Sherman, *A Foundational Standard for the Admission of Sound Recordings into Evidence in Criminal Trials*, 52 SO. CAL. L. REV. 1273, 1279-80 (1979); see also *United States v. Biggins*, 551 F.2d 64 (5th Cir. 1977); *United States v. Cianfrani*, 448 F. Supp. 1102, 1103 n.2 (E.D. Pa. 1978), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1980); *United States v. McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958), *rev'd on other grounds*, 271 F.2d 669 (2d Cir. 1959).

160. Pierre R. Paradis, *The Celluloid Witness*, 37 U. COLO. L. REV. 235, 238 (1965).

161. See Conrad, *supra* note 159, at 33-34; Paradis, *supra* note 160, at 240, 254; Sherman, *supra* note 159, at 1277-78.

162. CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 277.

plated testimony is logically relevant. The showing of the logical relevance of the item of evidence establishes that it possesses some probative value or worth in the case. However, before deciding whether to admit the item, the common-law judges inquired whether the logically relevant item should nevertheless be excluded as being "legally irrelevant;"¹⁶³ that is, the judges balanced that probative value against incidental probative dangers such as prejudice and distraction. Even if the item was logically pertinent, the judge might exclude the item on the ground that the item was prejudicial in the technical sense that it might tempt the jury to decide the case on an improper basis.¹⁶⁴ That risk of prejudice is one of the major reasons for the limitations on the admissibility of bad character evidence.¹⁶⁵ A juror might find a litigant's character so repulsive that the juror would be inclined at a subconscious level to vote against that litigant even if the case against the litigant were weak. Likewise, in her discretion the judge might bar the item on the theory that its admission would divert the jury from the central issues in the case.¹⁶⁶ This danger of distraction is one of the principal rationales for the restrictions on credibility evidence.¹⁶⁷ The courts fear that if the parties deluge the jurors with evidence relevant only to the witnesses' credibility, the jurors will lose sight of the historical merits of the case.¹⁶⁸

This discussion gives us the opportunity to revisit one of the most troublesome aspects of the common law of evidence: the seeming inconsistency between the liberal admissibility of character evidence on credibility and its virtually complete exclusion on the historical merits. As previously stated,¹⁶⁹ this inconsistency appears indefensible; there is no hard evidence that there is greater consistency in the character trait of untruthfulness than in other traits. Moreover, as Part I of this article observed, the inconsistency cannot be rationalized under either the jury control or the best evidence principle. If the relevant risk is the danger that the jury will misuse evidence of a party's bad character and decide the case on an improper basis, the risk arises whether the judge formally admits the evidence on credibility or the merits. Likewise, if character is a better, preferred method of proof on the question of whether a witness is lying, it is difficult to

163. *Id.* at ch. 16.

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

165. CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 449-50.

166. *Id.* at 317.

167. *Id.* at 317, 337-38.

168. *Id.* at 317.

169. *See supra* note 69 and accompanying text.

understand why character should be forbidden on the historical merits.

However, under the worst evidence principle, the seeming inconsistency disappears; the principle makes it easily understandable why the early judges admitted character evidence so readily when it was offered on a credibility theory of logical relevance. The judges were acutely interested in both deterring and exposing perjury.¹⁷⁰ The liberal admissibility of character evidence of untruthfulness advances both objectives. Initially, a norm of liberal admissibility should discourage the commission of perjury. If a person is considering committing perjury, he must take into account the impeachment techniques at the disposal of the opposing attorney; he may calculate the risk that the opposing attorney will successfully unmask the perjury. Further, if the person decided to perpetrate perjury—and the common-law judges assumed that such decisions were common¹⁷¹—the opposing attorney needed forensic tools to counteract the perjury. While some impeachment techniques target deficiencies in the witness' perceptual ability or memory,¹⁷² character evidence of untruthfulness is the technique best suited to unmasking perjury.¹⁷³ Whatever form the evidence takes (reputation,¹⁷⁴ opinion,¹⁷⁵ or specific acts¹⁷⁶), the ultimate inference from the character evidence is the witness' commission of perjury.¹⁷⁷ In short, the courts' heightened concern about perjury explains why the common-law judges were especially receptive to character evidence on a credibility theory. The worst evidence principle rationalizes the inconsistency which confounds the jury control and best evidence principles.

4. THE PREFERENTIAL EXCLUSIONARY RULES (BEST EVIDENCE, OPINION, AND HEARSAY)

One of Professor Nance's most cogent arguments for the best evidence principle is the principle's power in explaining the best evidence, opinion, and hearsay rules.¹⁷⁸ Each rule prefers one type of evidence over another and, hence, has an obvious "‘best evidence’ foundation."¹⁷⁹ However, the rules are equally consistent with the

170. Landsman, *supra* note 35, at 1179.

171. *Id.* at 1178 ("examples of violation of the oath abounded in the law courts").

172. MCCORMICK, *supra* note 130, § 44.

173. CARLSON ET AL., AGE OF SCIENCE, *supra* note 18, at 384-86.

174. FED. R. EVID. 405(a), 608(a).

175. *Id.*

176. FED. R. EVID. 608(b), 609.

177. CARLSON ET AL., AGE OF SCIENCE, *supra* note 18, at 385.

178. See Nance, *supra* note 3, at 286.

179. *Id.* at 289.

worst evidence principle. The general structure of each rule furthers the policies of deterring and exposing perjury. If unscrupulous in-court witnesses had *carte blanche* to state conclusory opinions and relate purported paraphrases of writings, they could perpetrate perjury far more easily. In the same vein, if an out-of-court declarant could be confident that he could level accusations without ever having to face a cross-examiner in court, the declarant might be emboldened to foist untruthful hearsay on the court.

However, the preferential rules make it more difficult for the witness or declarant to perpetrate a fraud on the court. The operative effect of each rule is to provide the trier of fact with data facilitating the detection of perjury. The witness cannot simply state a final opinion; the witness must also furnish the trier with some of the underlying, hard factual data.¹⁸⁰ The trier can make his or her own judgment as to whether the data dictate or are at least consistent with the opinion. Nor can a witness indiscriminately allude to the contents of out-of-court writings. The witness must ordinarily produce the writing.¹⁸¹ Its production enables the trier to independently assess the language. Finally, by virtue of the hearsay rule, an out-of-court declarant may be forced to appear, testify under oath, and subject himself to cross-examination in the trier's presence. The appearance and cross-examination put the trier in a better position to make a more informed decision as to whether the testimony is truthful or perjurious. Hence, the general effects of the exclusionary rules are to give any would-be perjurer pause and to make it easier for the trier to detect perjury.

Moreover, as in the case of the differential treatment of character evidence on credibility and the merits, the worst evidence principle also accounts for particular, troublesome features of the rules which defy the best evidence principle.

The best evidence rule. Courts¹⁸² and commentators have long recognized that the best evidence rule rests on a twofold rationale: "the sanctity of the written word" and fraud prevention.¹⁸³ More importantly, some of the most controversial aspects of the rule are best explained by the worst evidence principle. One such aspect is the early common law's treatment of mechanically prepared copies as sec-

180. FED. R. EVID. 701, 703.

181. FED. R. EVID. ART. X.

182. See, e.g., *United States v. Manton*, 107 F.2d 834, 845 (2d Cir. 1939).

183. David W. McMorrow, *Authentication and the Best Evidence Rule Under the Federal Rules of Evidence*, 16 WAYNE L. REV. 195, 218-19 (1969); see also Harlan B. Rogers, *The Best Evidence Rule*, 1945 WIS. L. REV. 278; see generally CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 546-48.

ondary evidence.¹⁸⁴ If the solitary concern were guarding against innocent errors in transmitting a writing's terms,¹⁸⁵ mechanically prepared copies would be treated as preferred, primary evidence; the general reliability of mechanical means of reproduction virtually eliminates the possibility of unintentional mistransmission.¹⁸⁶ The only satisfactory rationale for the common-law position on these copies is "the ancillary purpose of fraud prevention."¹⁸⁷ Thus, in another "hard" case—a common-law evidentiary rule which had been severely criticized—the explanatory value of the worst evidence principle exceeds that of the best evidence hypothesis.

The opinion prohibition. The traditional restrictions on expert opinion testimony contain a number of rather peculiar rules. For example, as in the case of thief catchers, the common-law courts granted the attorney cross-examining an expert extremely broad latitude.¹⁸⁸ The jury control and best evidence principles are at a loss to explain why the common law singled out the expert for such special treatment. Once again, to rationalize the rule, we must fall back to the worst evidence principle. In the common-law world, there has long been a widespread perception that many expert witnesses are venal and willing to manipulate the truth to the advantage of the attorney who hires and pays them.¹⁸⁹ In civil-law systems, the judge typically selects the expert.¹⁹⁰ However, in common-law countries, expert testimony has been privatized; ordinarily the experts are chosen by the attorneys representing the parties.¹⁹¹ Writing early in the nineteenth century, Williams Evans charged that in many cases, experts were little more than advocates themselves.¹⁹² At the turn of the century, Judge Hand repeated the charge.¹⁹³ In his words, the nature of the system pressures the expert to become "a hired cham-

184. See MCCORMICK, *supra* note 130, § 236.

185. See generally Nance, *supra* note 3, at 259.

186. MCCORMICK, *supra* note 130, § 236 at 417.

187. *Id.*

188. State v. Goodrich, 564 A.2d 1346, 1351-52 (Vt. 1989) ("wide latitude"); Miceikis v. Field, 347 N.E.2d 320 (Ill. App. Ct. 1976); Winsor C. Moore, *Cross-Examining the Incompetent Document Examiner*, in TRIAL LAW GUIDE 315, 320 (John J. Kennedy et al. eds., 1963); see also EDWARD J. IMWINKELRIED, THE METHODS OF ATTACKING SCIENTIFIC EVIDENCE § 1-2 at 18 (2d ed. 1992).

189. See, e.g., Logan Ford & James H. Holmes, III, *Exposure of Doctors' Venal Testimony*, TRIAL LAW GUIDE 75 (1965).

190. Edward J. Imwinkelried, *A Comparative Law Analysis of the Standard for Admitting Scientific Evidence: The United States Stands Alone*, 42 FORENSIC SCI. INT'L 15, 21-22 (1989).

191. *Id.* at 22.

192. Landsman, *supra* note 35, at 1173 n.132.

193. See Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901).

pion of one side."¹⁹⁴ Leading contemporary commentators are leveling the identical criticism at expert testimony.¹⁹⁵ The critics are not merely alleging that financial interest biases experts at a subconscious level;¹⁹⁶ they go further and aver outright fraud and perjury.¹⁹⁷ Perhaps more than any other factor, this suspicion of perjury helps explain the extraordinary freedom accorded attorneys cross-examining expert witnesses.¹⁹⁸

The hearsay rule. Although the general contours of the hearsay rule are consistent with the best evidence hypothesis,¹⁹⁹ the worst evidence principle provides the best explanation for many of the hard cases in hearsay. The principle rationalizes not only controversial features of the hearsay definition but also troublesome questions about the hearsay exceptions.

One noteworthy feature of the hearsay definition is its inclusion of written as well as oral statements.²⁰⁰ One of the traditional justifications for the hearsay doctrine is akin to the rationale for the best evidence rule: the possibility of error in oral transmission of information.²⁰¹ Just as an in-court witness could err in paraphrasing a document, the witness might misstate the content of an out-of-court assertion. Of course, this justification is inapplicable to writings; the production of the writing eliminates the risk of an innocent misstatement of its contents. Yet it is well-settled that the hearsay rule extends to writings prepared out of court.²⁰² The reduction of the statement to writing does not remove the statement from the scope of

194. *Id.* at 53.

195. See MARGARET A. BERGER, *PROCEDURAL AND EVIDENTIARY MECHANISMS FOR DEALING WITH EXPERTS IN TOXIC TORT LITIGATION: A CRITIQUE AND PROPOSAL* 8 (1991); PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991); Peter W. Huber, *Quoth the Maven*, 23 *REASON* 41 (Nov. 1991).

196. See Michael H. Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest*, 53 *IND. L.J.* 35 (1977).

197. Edward J. Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 *VILL. L. REV.* 554, 555 (1983).

198. This factor may also help account for the common-law ultimate fact prohibition. The early judges at least purported to bar experts from testifying as to the ultimate issues in the case. MCCORMICK, *supra* note 130, § 12. Most jurisdictions have now repealed that bar. *FED. R. EVID.* 704. The kernel of truth underlying the bar was that an expert should not "merely tell the jury what result to reach . . ." *Id.* at advisory committee's note. Allowing an expert to do so would obviously be most dangerous when the expert is a venal witness, inclined to bend the facts and scientific truths for the side paying the expert's fee.

199. Nance, *supra* note 3, at 286-89.

200. MCCORMICK, *supra* note 130, § 248.

201. EDWARD IMWINKELRIED ET AL., *COURTROOM CRIMINAL EVIDENCE* § 1001 at 250 (1987).

202. See MCCORMICK, *supra* note 130, § 248.

the hearsay definition.²⁰³ The scope of the definition thus indicates that the common-law judges were concerned about more than the in-court witness' innocent mistakes. The breadth of the definition suggests that judges also wanted to accord the opposing party an opportunity to cross-examine the out-of-court declarant to test, *inter alia*, the declarant's sincerity.²⁰⁴

Another feature of the hearsay definition carries the same suggestion. The principal modern controversy surrounding the definition is whether the definition should encompass implied statements, sometimes dubbed "Morgan hearsay."²⁰⁵ The classic nineteenth century English case, excerpted in almost all Evidence coursebooks, is *Wright v. Doe d. Tatham*.²⁰⁶ In that case, the question was whether a deceased person had testamentary capacity when he executed his will. The proponent of the will offered testimony that several of the decedent's friends had written him serious letters. Baron Parke ruled that the testimony amounted to implied statements by the friends, and thus was subject to the hearsay rule. To begin with, the testimony evidenced the friends' belief in the decedent's sanity; they would not have performed the act of sending him serious letters if they had not entertained that belief. Next, the proponent of the will was offering the testimony as proof of the truth of that belief; the proponent in effect contended that if the decedent's friends considered him competent, the decedent likely was competent. *Wright* can to be viewed as authority for the proposition that the hearsay definition extends to nonassertive conduct, actuated by a belief, when the conduct is offered to prove the truth of the belief.²⁰⁷ Professor Morgan later wrote approvingly of this expansion of the definition.²⁰⁸ He argued that the opponent needed an opportunity to cross-examine the out-of-court actor to test the caliber of the actor's perception, memory, and narrative ability.

However, when it came time to frame the Federal Rules of Evidence, the drafters rejected Morgan's view; they opted to exclude implied statements from the hearsay definition.²⁰⁹ Their reasoning is significant. The drafters conceded Morgan's point that the evidence

203. *United States v. McCall*, 740 F.2d 1331, 1343 (4th Cir. 1984).

204. *IMWINKELRIED ET AL.*, *supra* note 201, § 1001 at 250-51.

205. Roger C. Park, "I Didn't Tell Them Anything About You": *Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783 (1990).

206. 7 Ad. & E. 313, 112 Eng. Rep. 488 (Ex. Ch. 1837).

207. CARLSON, *AGE OF SCIENCE*, *supra* note 18, at 569-74.

208. See Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 214, 217 (1948).

209. FED. R. EVID. 801(a) advisory committee's note.

in question "is untested with respect to the perception, memory, and narration . . . of the actor" ²¹⁰ However, the drafters emphasized that if the actor is willing to act on personal beliefs, for all practical purposes their willingness to do so "eliminate[s] questions of sincerity." ²¹¹ The old bromide, "actions speak louder than words," persuaded the drafters. To their way of thinking, the actor's willingness to act serves as an indicium of sincerity and, conversely, insurance against possible perjury. ²¹² Like the inclusion of written statements, the exclusion of implied statements from the definition points to an overriding concern about the prevention of fraud and perjury.

Similarly, the common-law stance on several of the longstanding disputes over hearsay exceptions indicates an emphasis on insuring subjective sincerity and precluding perjury. The controversy over the excited or startled utterance exception is a case in point. Psychologists have taken the courts to task for recognizing this exception; for decades psychologists have argued that emotional stress frequently results in error and distortion. ²¹³ However, the courts have adamantly upheld the exception, reasoning that when the declarant speaks under the sway of a startling event, there is a strong inference that the declarant is speaking sincerely. ²¹⁴ Their fears of perjury allayed, the common-law judges decided to include the excited utterance doctrine within the list of hearsay exceptions.

In contrast, until the adoption of the Federal Rules, ²¹⁵ the common-law courts hesitated to recognize the present sense impression exception. ²¹⁶ The courts acknowledged that the timing of a present sense impression statement effectively eliminates doubts about the quality of the declarant's memory. However, they rejected the contention that the insurance of the caliber of the declarant's memory warrants admitting the evidence: "In the minds of most common law courts . . . that contention missed the mark. The leading hearsay danger was insincerity, and the contemporaneity of the statement did not

210. *Id.*

211. *Id.*

212. Imwinkelried, *supra* note 128, at 228 n.134.

213. Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 437 (1928); I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and The Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 28.

214. Mason Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271, 280 (1952).

215. FED. R. EVID. 803(1).

216. Jon R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 875 (1981); Kathryn E. Wohlsen, *The Present Sense Impression Exception to the Hearsay Rule: Federal Rule of Evidence 803(1)*, 81 DICK. L. REV. 347, 351 (1977).

ensure the declarant's subjective sincerity."²¹⁷ Accordingly, until the adoption of the Federal Rules, the exception was a distinct minority view at common law.²¹⁸ As in the case of the recognition of the excited utterance exception, the rejection of the present sense impression doctrine underscores that the courts' primary concern was insuring subjective sincerity and forestalling its antithesis, perjury.²¹⁹

5. PRIVILEGES

In the course of his argument for the best evidence hypothesis, Professor Nance concedes that the hypothesis does not explain privilege law.²²⁰ Privileges were fashioned to effectuate extrinsic social policies such as the promotion of the attorney-client relationship.²²¹ Like the best evidence hypothesis, the worst evidence principle fails to account for the existence of privileges. However, unlike the former hypothesis, the worst evidence principle is dramatically reflected in the specific detail of the common law of privileges.

Although we sometimes use the expression "privilege" in the singular, in reality, the privilege umbrella includes three different types of evidentiary doctrines. The paradigm is the true, absolute privilege such as the one shielding the attorney-client relationship. If the privilege attaches and there is neither a waiver nor an applicable special exception, the protection of the privilege is absolute; no matter how compelling the opposing party's need for the evidence may be, the opponent cannot penetrate the shield of the privilege.²²²

Other privileges such as the normal work product protection are conditional. As in the case of an absolute privilege, the rationale for recognizing the privilege is extrinsic social policy. However, the protection is conditional or qualified in the sense that the opponent may override the protection by showing a "substantial need" for the information.²²³ The opponent's contemplated use of the information at trial is simply one of the factors the judge weighs in assessing the

217. Imwinkelried, *supra* note 128, at 221.

218. Charles W. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 206 (1960); Waltz, *supra* note 216, at 875.

219. See Imwinkelried, *supra* note 128, at 220-22.

220. Nance, *supra* note 3, at 229, 279, 294.

221. CARLSON ET AL., AGE OF SCIENCE, *supra* note 18, at 731.

222. *Id.* at 750-51 (citing *Admiral Ins. Co. v. United States Dist. Ct. for the Dist. of Ariz.*, 881 F.2d 1486 (9th Cir. 1989)).

223. FED. R. CIV. P. 26(b)(3). Some jurisdictions also recognize a conditional privilege for confidential government information which does not qualify under the absolute privilege for state or military secrets. See CAL. EVID. CODE § 1040(b)(2); CARLSON ET AL., AGE OF SCIENCE, *supra* note 18, at 876-77 (citing *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980)).

extent of the opponent's need.²²⁴

Finally, there are analogous doctrines sometimes styled "quasi-privileges."²²⁵ This category includes the exclusionary rules for evidence of subsequent remedial measures,²²⁶ compromise statements made during negotiations to settle civil claims,²²⁷ and plea bargains.²²⁸ Here, too, the underlying rationale for the existence of the privilege is an extrinsic policy; the courts developed these doctrines to affect behavior outside the courtroom by removing disincentives for safety improvements and settlement negotiations. Moreover, as in the case of conditional privileges, the judge considers the party's contemplated use of the evidence at trial in deciding whether to override the quasi-privilege. The difference is that in the case of the quasi-privileges, the intended trial use of the evidence is usually dispositive rather than being merely a relevant factor.²²⁹ Thus, the prevailing view is that the subsequent repair doctrine comes into play only when the proponent of the evidence attempts to use testimony about the later repair as proof of antecedent fault.²³⁰ If the proponent has any other theory of logical relevance, tenable on the facts of the case, the evidence is admissible.²³¹ Although the three types of privileges differ in many respects, the law governing all three types reflects that prevention of perjury and related evils is a paramount concern.

In the case of the absolute privileges, the reflection takes the form of the well-recognized fraud exception to the scope of the privileges.²³² For example, even if the attorney-client privilege would otherwise attach to suppress the information in question, the opposing party can defeat the privilege by showing that the client sought the legal advice to facilitate the commission of a future fraud.²³³ The exception has ancient lineage;²³⁴ and although the Federal Rules do not expressly codify the exception, the Supreme Court recently reaffirmed the viability of the exception in federal practice.²³⁵ When the

224. CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 889.

225. 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5213 (1978).

226. *See* FED. R. EVID. 407.

227. *See* FED. R. EVID. 408-09.

228. *See* FED. R. EVID. 410.

229. CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 889.

230. *See* FED. R. EVID. 407.

231. CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 893-95.

232. *See* James A. Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A. J. 708 (1961).

233. MCCORMICK, *supra* note 130, § 95.

234. *See id.* § 95, n.2.

235. *United States v. Zolin*, 491 U.S. 554, 563 (1989).

extrinsic social policy underlying the privilege collides with the social interest in preventing fraud, the privilege yields.

Many courts have also subjected conditional privileges such as the work product protection to the fraud exception.²³⁶ Summarizing the current state of the case law, one court asserted that every federal court of appeals "which has considered the question has held or assumed" that the exception is equally applicable to the work product privilege.²³⁷

Lastly, there are similar exceptions to some of the quasi-privileges. For instance, after setting out the exclusionary rule for statements made during plea bargaining negotiations, Federal Rule of Evidence 410 states in pertinent part: "However, such a statement is admissible . . . (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel."²³⁸ In the drafters' judgment, the policy of facilitating plea bargaining is weighty enough to warrant the protection of a legal privilege. Yet that policy has been subordinated to the fundamental objective of curbing perjury.

Even this superficial review of evidentiary rules compels the conclusion that in formulating those rules, common-law jurisdictions have been concerned—almost obsessed—with the prevention of perjury and kindred evils such as fraud and forgery.²³⁹ That concern has influenced virtually every area of evidentiary doctrine. In making the threshold decision whether to permit a person to testify as a witness, the early common-law judges were inclined to completely bar testimony by any person with a significant motive for perjury. After deciding to allow a person to take the witness stand, the judges wanted to maximally deter the witness from committing perjury. To that end, the judges fashioned rules which liberally admit evidence of a witness' character trait of untruthfulness; if the witness is determined to give perjurious testimony, the witness must be prepared for a frontal assault on his credibility. The preferential rules such as the best evidence and hearsay doctrines operate to frustrate attempted perjury or fraud, and many of their most controversial features are explicable only under the worst evidence principle. Even the privileges can be surmounted when they conflict with the primary interest

236. See CARLSON ET AL., *AGE OF SCIENCE*, *supra* note 18, at 809 (citing *In re Sealed Case*, 676 F.2d 793, 811 n.67 (D.C. Cir. 1982)). But see *BP Alaska Exploration v. Superior Ct.*, 245 Cal. Rptr. 682, 695 (Cal. Ct. App. 1988); CARLSON, *id.* (citing *In re Grand Jury Proceedings*, 867 F.2d 539 (9th Cir. 1989)); *Whose Work Product Is It?*, 9 CAL. LAW. 114 (Jan. 1990).

237. *In re Sealed Case*, 676 F.2d at 811 n.67.

238. FED. R. EVID. 410.

239. See Imwinkelried, *supra* note 128, at 219-22.

in preventing fraud. In summary, although the explanatory power of the best evidence principle exceeds that of the jury control hypothesis, the power of both pales in comparison to the rationalizing force of the worst evidence principle.

IV. CONCLUSION

It would be a mistake to overstate the case for the worst evidence principle. For example, it would be exaggerated to claim that every common-law evidentiary rule is reducible to the worst evidence principle. Ours is not a civil-law system in which courts systematically endeavor to deduce their decisions from a comprehensive body of doctrine. Rather, the common law, including the law of evidence, has gradually developed by an evolutionary process spanning centuries.²⁴⁰ As Holmes cautioned, in the study of the common law, a page of history is often worth more than a volume of logic.²⁴¹ The genesis of evidentiary law was such a lengthy process, impacted by so many influences,²⁴² that it would be impossible to reduce it to a single organizing principle.

In addition, it must be conceded that Professor Nance's best evidence hypothesis may still be the soundest organizing principle for the legal sufficiency rules in the common law of evidence.²⁴³ One of the most important sufficiency rules is the "missing witness" doctrine.²⁴⁴ Suppose, for example, that it is obvious from the facts in a case that the defendant's employee has firsthand knowledge of a key event but the defendant nevertheless fails to call the employee as a trial witness. Given the defendant's special relationship with the "missing witness," the trier of fact should carefully scrutinize the sufficiency of the defendant's evidence. Both in his original piece²⁴⁵ and in a more recent work,²⁴⁶ Professor Nance advances a powerful argument that the best evidence principle supplies the soundest rationale for the "missing witness" doctrine.

Further, there are other areas of law which reflect a concern about the prevention of perjury and fraud. For example, the Statute

240. For a discussion of the common law's development of the modern promissory estoppel doctrine, see E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CONTRACTS: CASES AND MATERIALS* 97-99 (4th ed. 1988).

241. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

242. Nance, *supra* note 3, at 296.

243. *Id.* at 290.

244. See Dale A. Nance, *Missing Evidence*, 13 *CARDOZO L. REV.* 831 (1991).

245. Nance, *supra* note 3, at 290.

246. See generally Nance, *supra* note 244.

of Frauds still plays a prominent role in both Contract²⁴⁷ and Property²⁴⁸ law. In both bodies of law, the parol evidence rule also manifests the policy of precluding untruthful testimony.²⁴⁹

However, when the focus shifts to the admissibility rules of common-law evidence, the stress on the prevention of perjury and fraud is even more pronounced—so marked that the worst evidence hypothesis is the best explanatory principle. As we have seen, the historical evidence supports that hypothesis. Moreover, the hypothesis has superior explanatory utility. The hypothesis not only rationalizes more doctrinal areas of evidentiary law than either competing principle; the hypothesis also helps account for some of the most troublesome aspects of those areas, such as the favorable treatment of testimony about the character trait of untruthfulness.

The conclusion that the worst evidence hypothesis is the best organizing principle is of more than academic interest. That conclusion has profound implications for the future of American evidence law. As noted at the outset of this article, the identification of an organizing principle is critical for several reasons. One reason is that if such a principle is identified but later discredited on some basis such as empirical research, the whole body of law animating that principle must be reexamined.²⁵⁰ It is, of course, possible that a new, alternative rationale can be discovered to uphold the extant body of law. Common-law courts often resort to the technique of *post hoc* rationalization.²⁵¹ However, absent the presentation of a convincing, new justification for the existing doctrines, a wholesale revision may be necessary.

Suppose that in a discussion of the necessity for reforming evidence law, the starting point was the jury control hypothesis. On that supposition, the necessity for reform would be highly debatable. The underlying assumption of the jury control hypothesis is that lay jurors often have difficulty critically evaluating evidence. It is an understatement

247. FARNSWORTH & YOUNG, *supra* note 240, at ch. 3.

248. See JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 160-61, 220, 237-38, 387-89 (3d ed. 1989).

249. See FARNSWORTH, *supra* note 124, §§ 7.2-.6.

250. See *supra* note 6 and accompanying text.

251. The development of the prevailing *Frye* standard for the admissibility of scientific evidence is a perfect illustration. The Court of Appeals for the District of Columbia handed down the *Frye* decision in 1923. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the court announced that an expert may base her testimony on a scientific theory only if the theory is generally accepted within the relevant scientific circles. At the time of the decision, the holding was pure *ipse dixit*; the court "neither cited authority nor offered an explanation for adopting the general acceptance test" PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 1-5, at 10 (1986). Subsequent courts have endeavored to develop a rationale for the general acceptance standard. *Id.* § 1-5(A).

ment to say that that hypothesis has not been thoroughly discredited. In the 1970s, a large number of courts denied demands for jury trial in complex cases on the ground that the difficulty of the case exceeded the typical lay juror's capacity.²⁵² In the 1980s, a controversy arose over the relaxation of the standards for admitting expert testimony.²⁵³ One of the contentions frequently voiced by the opponents of relaxed standards was that lay jurors cannot separate the wheat from the chaff of expert testimony. Research into the question of jury competence is ongoing,²⁵⁴ and that research may eventually establish that the fears of juror incapacity are well-founded.

Change the starting point in the discussion of the need for reform; begin with the premise of the best evidence principle. With this premise, the case for major reform is even weaker. Recent developments have arguably strengthened the case for the rationalist preferences underlying such exclusionary rules as the best evidence and opinion doctrines. The past two decades have witnessed the advent of the so-called "documents" case²⁵⁵—complex civil cases in which the relevant documents may number in the tens of millions.²⁵⁶ This type of litigation has greatly magnified the risk of relying on a witness' paraphrase of dispositive language in writings. Professor Nance's case for the best evidence rule is stronger than ever before. Moreover, there have been startling revelations of significant error margins in scientific analysis.²⁵⁷ These revelations lend more substance to the preference underlying the opinion prohibition. The epistemic considerations informing the best evidence principle have certainly not been discredited.

In contrast, to a significant degree, the fears inspiring the worst evidence principle have been debunked. It is true that some commentators still describe our system as "perjury-plagued."²⁵⁸ However, the

252. Imwinkelried, *supra* note 197, at 563.

253. Troyen A. Brennan, *Helping Courts with Toxic Torts: Some Proposals Regarding Alternative Methods for Presenting and Assessing Scientific Evidence in Common Law Courts*, 51 U. PITT. L. REV. 1 (1989).

254. See, e.g., Neil J. Vidmar, *Foreword: Empirical Research and the Issue of Jury Competence*, 52 LAW & CONTEMP. PROBS. 1 (1989).

255. EDWARD J. IMWINKELRIED & THEODORE Y. BLUMOFF, *PRETRIAL DISCOVERY: STRATEGY AND TACTICS* § 2:29 (1986).

256. *Id.* § 1:01, at 2.

257. See Edward J. Imwinkelried, *The Debate in the DNA Cases Over the Foundation for the Admission of Scientific Evidence: The Importance of Human Error as a Cause of Forensic Misanalysis*, 69 WASH. U. L.Q. 19, 25-27 (1991) (collecting the studies).

258. See Barry Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 HASTINGS L.J. 917 (1975).

consensus among legal psychologists²⁵⁹ and experienced litigators²⁶⁰ is that perjury is a relatively rare phenomenon. By a wide margin, misrecollection appears to be the more important cause of testimonial error.²⁶¹ Empirical research has undermined the underlying assumptions of the worst evidence principle to a much greater extent than it has called into question either the doubts inspiring the jury control hypothesis or the epistemic concerns supporting the best evidence principle. Long ago Evans²⁶² and Bentham²⁶³ took the position that the early courts had overestimated the magnitude of the problem of witness perjury, and the contemporary research seems to vindicate their position. The upshot is that the identification of the worst evidence hypothesis as the organizing principle for evidence law adds special impetus to the reform of evidence law.

The evidentiary doctrines resting most squarely on the worst evidence principle must be rethought. The survivor's evidence competency rules have long been a target of criticism.²⁶⁴ The critics have argued that on balance, the statutes produce more injustice than they prevent; according to the critics, in the typical case, the application of the statute results in the suppression of truthful testimony about a valid claim rather than in the preclusion of perjury about a fabricated claim. The empirical research undermining the worst evidence principle lends new force to that criticism.

Serious consideration should also be given to the modification of the authentication requirement. If forgery were rampant, the requirement would be justifiable; but it is doubtful that forgery is widespread. Some jurisdictions have already moved in this direction and generally presume the authenticity of exhibits proffered at trial.²⁶⁵

Likewise, the rule that routinely admits character evidence of untruthfulness should be subjected to careful scrutiny. The inconsistency of that rule with the treatment of character evidence on the merits is obvious. The inconsistency might be defensible if, as the early judges assumed, perjury was commonplace. However, that assumption is suspect. It may be time to eradicate the inconsistency by sharply restricting the admission of character evidence on a credi-

259. Imwinkelried, *supra* note 128, at 224.

260. See Ladd, *supra* note 214, at 286.

261. Imwinkelried, *supra* note 128, at 224.

262. See Landsman, *supra* note 35, at 1166.

263. See *id.* at 1179.

264. Roy R. Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89 (1963).

265. See, e.g., *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 n.20 (3d Cir. 1985) (discussing a local court rule).

bility theory.²⁶⁶

At first, it may be disturbing to come to grips with the proposition that many evidentiary rules rest on the unflattering assumption that deliberate perjury is a common occurrence. However, the acceptance of that proposition produces a fascinating paradox. As stated above, modern research has discredited that assumption to a greater extent than it has effectively impeached the premises of either the jury control or the best evidence hypothesis. The identification of the worst evidence hypothesis as the organizing principle cuts most strongly in favor of the liberalization of American evidence law. Despite the changes effected by the Federal Rules of Evidence, the United States still has the most complex, restrictive set of evidentiary rules in the world.²⁶⁷ Paradoxically, the acceptance of the worst evidence principle—the hypothesis resting on pessimistic Hobbesian psychology—gives us the greatest cause to be optimistic about the future reform of evidence law.

V. EPILOGUE

After drafting this article, I turned my attention to another writing project. While researching that project, I happened to reread the American Law Institute's Model Code of Evidence, adopted in 1942.²⁶⁸ The code is one of the most revolutionary documents in the history of American evidence law; the code proposed sweeping away many of the common-law restrictions on the admission of logically relevant evidence.²⁶⁹ The Foreword attributes many "of the deformities" in the common law of evidence "to the obsession of early judges . . . that perjury can be prevented by exclusionary rules."²⁷⁰ In the next breath, though, the Foreword attacks that obsession and argues that "[n]o rational procedure" would "sanction an exclusionary rule supported only by its supposed efficacy to hinder or prevent false testimony."²⁷¹ On the very same page, the Foreword calls for "radical reformation of the law of evidence."²⁷² Given the Foreword's recognition of the worst evidence principle, it is no accident that the code is so thoroughly reformist.

266. See Friedman, *supra* note 69.

267. CARLSON ET AL., AGE OF SCIENCE, *supra* note 18, at 1.

268. AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE (1942).

269. CARLSON ET AL., AGE OF SCIENCE, *supra* note 18, at 22.

270. *Id.*

271. *Id.*

272. *Id.*