

Evidence Law as a System of Incentives

John Leubsdorf*

ABSTRACT: Evidence law is usually considered ex post, from the standpoint of a judge deciding whether to admit evidence offered by a party. This Article examines the law ex ante, considering how it affects the behavior of parties contemplating or conducting litigation. Seen from this perspective, the rules of Evidence give rise to a variety of incentives and disincentives. After discussing the more familiar of these, notably those arising from the adversary system, the Article explores many unfamiliar incentives and disincentives affecting the creation, preservation, and presentation of evidence. In conclusion, it considers some objections to viewing Evidence law as a system of incentives.

I. ADVERSARINESS AND ITS LIMITS.....	1624
II. THE BEST EVIDENCE PRINCIPLE.....	1631
III. IMPROVING EVIDENCE: INCENTIVES AND DISINCENTIVES TO CREATE, PRESENT AND DESTROY EVIDENCE.....	1635
A. RULES ENCOURAGING AND DISCOURAGING THE CREATION OF EVIDENCE.....	1636
B. ENCOURAGING AND DISCOURAGING THE INTRODUCTION OF EVIDENCE.....	1641
1. Burdens of Coming Forward and Persuasion	1642
2. Blocking Evidentiary Consequences of Testimony in Order to Encourage It	1642
3. Nonevidentiary Incentives to Testify.....	1644
4. Disincentives to Testify	1646
5. Conclusion.....	1649
C. DISCOURAGING THE DESTRUCTION AND HIDING OF EVIDENCE	1650
IV. QUESTIONING THE INCENTIVES APPROACH.....	1656

* Professor of Law, Rutgers School of Law—Newark. My thanks to Dale Nance and William Stuntz, whose writings helped give rise to the thoughts expressed here, to the participants in a Cardozo Law School colloquium, and to Bernard Bell and Jon Hyman.

V. CONCLUSION1661

Evidentiary rules are often appraised from the viewpoint of a judge who must decide whether to admit evidence at trial. From this perspective, the judge should admit relevant evidence unless its contribution to a correct decision is outweighed by the likelihood that it will seduce the trier of fact to decide on improper grounds, by its harm to extrinsic policies such as those underlying the evidentiary privileges, or by its imposition of excessive cost or waste of time. Needless to say, current law does not limit itself to such ad hoc balancing, but deploys, with questionable rationality, a complex structure of rules.¹ Nevertheless, in applying or criticizing those rules we still often put ourselves in the shoes of a judge asking John Maguire's classic question: "Shall we let it in?"²

The discussion here starts from a different question: Will adopting this rule encourage or discourage parties from seeking and presenting evidence that the trier of fact should consider? In other words, this Article will appraise Evidence law *ex ante*, as it shapes parties' incentives up to the moment when evidence is presented and objected to, rather than *ex post*, as it governs rulings on the objection. This means that evidentiary rules must be considered from the perspective of parties and advocates as well as from that of a judge. Although other scholars have started this discussion,³ many instances of incentives and disincentives in Evidence law remain unexplored and unsystematized.

My goal here is to contribute to an *ex ante* rethinking of Evidence law which—as when one views a landscape through ultraviolet binoculars—will reveal it in an unfamiliar and instructive light. Seen in this way, Evidence law may lose its familiar appearance as a plane demarcated by linear boundaries, assuming instead the appearance of a space suffused by fields of force pulling in various directions.

This Article considers a variety of incentives and disincentives to the introduction of evidence. Part I briefly appraises the incentives created by the adversary system, showing that these incentives fall short of ensuring the optimal presentation of evidence. Part II continues the discussion by analyzing the Best Evidence Principle and the ways in which it encourages the presentation of evidence and in which it too falls short. Part III discusses three different ways in which incentives provided by Evidence law can affect the quantity and quality of evidence. Incentives can encourage or discourage the creation of evidence, they can encourage or discourage its presentation

1. See generally John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209 (2006) (discussing the complexities of different norms of evidence law).

2. JOHN MACARTHUR MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 2 (1947).

3. See, e.g., Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 244–47 (1988) (debating the merits of exclusion of evidence to induce submission of better evidence); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1487–93 (1999) (discussing adversary system incentives). See generally *infra* Parts I–II (discussing the general adversary system and the Best Evidence Principle).

in court, and they can encourage or discourage forgery and spoliation of evidence. Next, Part IV reviews some objections to the approach pursued here, especially the claim that Evidence law should seek to influence primary behavior in the real world, not just the creation and presentation of evidence in adjudicative proceedings. The Article concludes that lawmakers, lawyers, and scholars should be more alert to the ways in which rules of evidence reach forward to help shape peoples' behavior in preparing for and conducting disputes.

I. ADVERSARINESS AND ITS LIMITS

Adversary incentives provide a familiar and powerful, but ultimately incomplete, justification for entrusting the presentation of evidence to the parties rather than to the courts. Each litigant has motives to search out and introduce all evidence that might help persuade the trier of fact while shunning evidence that an opponent with similar incentives will be able to demolish. Rules excluding evidence can impede the operation of these incentives and, ever since Jeremy Bentham, reformers have urged that courts should not keep evidence from juries on the ground that it is inferior or may be overvalued. Reformers argue that we should rely on the adversary system and the jury's common sense to give evidence the weight it deserves. Carried to its logical conclusion, this implies that courts should exclude evidence only when its reception wastes time and money or inflicts collateral harm such as invasion of privacy or harassment of witnesses.

Although even radical reformers in the United States have not been willing to go this far,⁴ many reforms adopted in the nineteenth and twentieth centuries depend on adversary incentives to seek and sift evidence. Two obvious examples of reliance on the parties to find and introduce evidence that they deem valuable are repealing rules that disqualified many witnesses from testifying⁵ and liberalizing the hearsay rule.⁶ Beyond the scope of Evidence law, broadening discovery in civil cases⁷—and to some extent criminal cases⁸—and recognizing a Constitutional right to effective

4. See, e.g., MODEL CODE OF EVIDENCE (1942); WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 27–28 (1985) (describing Bentham's theory of evidence); see also *infra* Part II (discussing and analyzing the Best Evidence Principle).

5. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 659 (1997) (describing the downfall of witness competency rules). See generally C.J.W. ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND (1997) (describing similar English reforms).

6. Federal Rules of Evidence 801(d)(1), (2)(D); 803(2), (4), (16), (18); 804(b)(2)–(3) and 807 are among the Federal Rules pressing beyond the limits of the common-law hearsay rule, as the Advisory Committee notes explain.

7. FED. R. CIV. P. 26–37.

8. See, e.g., FED. R. CRIM. P. 12.1–.3, 16 (requiring attorneys to take additional procedural steps in investigating and trying a case); *Kyles v. Whitley*, 514 U.S. 419, 431–40 (1995) (discussing prosecution's duty to disclose exculpatory evidence).

assistance of counsel in criminal cases⁹ reflect a similar reliance on adversary incentives.

So why do we need multiple rules curtailing the admissibility of evidence rather than one rule allowing each party to introduce all relevant evidence?¹⁰ Six sets of replies show why adversary incentives are ultimately inadequate.

First, bringing relevant evidence before the trier of fact is not the judicial system's only goal. Rather, the system also seeks goals that the parties cannot always be relied on to vindicate. For example, privilege rules seek to encourage certain confidential relationships and to protect those who enter them.¹¹ Privileges thus exist under judicial systems, like the German one, which place few restrictions on the admissibility of evidence.¹² Other rules encourage post-incident remedial measures, settlement, and related activities.¹³ Similarly, some exclusionary rules seek to deter improper police conduct.¹⁴ We will return later to such extrinsic goals.¹⁵ Adversary incentives alone do not vindicate all these other goals, and therefore require supplementation.

Second, the judicial system must be concerned with cost in addition to completeness. This concern is vindicated by rules allowing the judge to exclude needlessly cumulative or time-consuming evidence.¹⁶ Adversary incentives will not control costs. Of course, parties consider the costs they themselves bear, but they do not internalize the costs that their use of evidence imposes on other parties, or its costs and benefits for the legal system. Indeed, parties may seek to increase an opponent's costs in order to coerce a settlement.¹⁷ Evidence rules provide some slight protection against such efforts to escalate costs, though a serious effort to force internalization

9. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 377 (2005) (requiring counsel to investigate).

10. See FED. R. EVID. 401–402 (allowing introduction of all relevant evidence unless another rule excludes it).

11. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (lawyer–client privilege); *Jaffee v. Redmond*, 518 U.S. 1, 18 (1995) (psychotherapist–patient privilege); *Pennsylvania v. Muniz*, 496 U.S. 582, 605 (1990) (privilege against self-incrimination).

12. OSCAR G. CHASE ET AL., *CIVIL LITIGATION IN COMPARATIVE CONTEXT* 226–27 (2007) (quoting in translation from the German civil procedure statute, *Zivilprozeßordnung* [ZPO], sections 383–84); PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 269–80, 298–306 (2004).

13. FED. R. EVID. 407–11; see also Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1255–57 (2001) (arguing that excluding most character evidence encourages criminals to reform).

14. See, e.g., *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348–49 (2006) (stating that the exclusionary rule's main purpose is deterring Fourth and Fifth Amendment violations).

15. See *infra* notes 195–200 (discussing goals of specific evidence rules).

16. FED. R. EVID. 403; see also FED. R. CIV. P. 26(b)(2)(C), (c) (recognizing cost limits on discovery).

17. See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61 (1995).

would require much more—or something quite different, such as cost-shifting rules.

Just as adversary incentives fail to control external costs, they fail to account for external benefits. Rules requiring litigants to use more expensive evidence or risk losing the case¹⁸ might reflect a conclusion that the public benefits of an accurate decision exceed the costs to the parties.¹⁹ But identifying instances of party underinvestment would require lots of unavailable information, and exclusionary rules would usually be a clumsy and ineffective way to cure them. In short, cost considerations warrant qualifications to relying on the parties to find and introduce relevant evidence unhampered by evidentiary rules, but in our present judicial system, these qualifications are usually marginal ones.

Third, limiting the parties' freedom of proof can be justified by endemic inequalities in the adversary system.²⁰ Sometimes, one party has greater access than the other to decisive evidence. The availability of discovery tends to equalize the parties in this respect, but not always.²¹ A party with more money and more at stake can often out-investigate, out-discover, out-conceal, and out-introduce its opponents.²² And even two wealthy and motivated parties will not always enjoy representation of equal caliber. When such inequalities predominate within an identifiable class of cases, the inequalities can justify rules requiring the advantaged party to produce witnesses whose statements it proposes to use²³ or to carry a burden of

18. See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (holding that a criminal defendant may exclude lab-test certificate unless its author is produced in court); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. g (expert testimony required in most legal-malpractice cases).

19. Posner, *supra* note 3, at 1486–87.

20. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 50 (1988).

21. See, e.g., *United States v. Ramirez-Lopez*, 315 F.3d 1143, *opinion withdrawn*, 327 F.3d 829, 830 (9th Cir. 2003) (noting that the government deported potential defense witnesses); *Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-B (BLM), 2008 U.S. Dist. LEXIS 911 (S.D. Cal. 2008), *remanded*, No. 05CV1958-RMB (BLM), 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. 2008) (explaining that the party did not disclose crucial documents until after trial); see also FED. R. CIV. P. 26(b)(3), (4) (limiting access to work product of another party); Andrew F. Daugherty & Jennifer Reinganum, *On the Economics of Trials: Adversarial Process, Evidence, and Equilibrium Bias*, 16 J.L. ECON. & ORG. 365, 367 (2000) (arguing that civil defendants have lower search costs and greater incentives to investigate than plaintiffs).

22. See, e.g., Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Litigation*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 110 (Robert L. Rabin & Stephen D. Sugarman eds., 1993) (showcasing an example of a party overwhelming its opponent).

23. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004) (holding that the Confrontation Clause usually forbids prosecution use of a “testimonial” statement unless its maker is available for cross-examination); Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723, 727 (1992) (arguing that the central hearsay issue should be who has the burden of producing the maker of the out-of-court statement).

coming forward with evidence.²⁴ Likewise, Federal Rule of Evidence 801(d)(2)(D) reflects the reality that employers have greater access to their own employees' testimony than their opponents do. It therefore allows an employers' opponent to use employees' statements, when they were made during their employment and are about a matter within their employment's scope, against the employer.²⁵ More dramatically, the requirement of proof beyond a reasonable doubt in criminal cases tends to extract from the government the evidence that it has greater resources than most defendants to obtain—though it also encourages defendants to withhold their own evidence.

In principle, courts could also modify adversary incentives to remedy inequality in a particular case—for example, when one party is wealthier than the other. Some jurors may indeed consider the parties' wealth when appraising the absence of better evidence, but I know of no authority justifying this approach, much less incorporating it into procedural or evidence law. Many would consider it to violate the principle that a litigant's wealth should not affect his or her treatment—though one could also view it as giving life to precisely that principle.²⁶ In any event, the furthest the courts have gone is to authorize jurors to draw inferences against a party that fails to produce evidence more available to it than to its opponent.²⁷

Fourth, adversarial incentives can undermine justice by spurring a party to hide or destroy evidence harmful to its case. Here, the possibilities range from killing or deporting a potential witness to violating discovery requirements or misusing the attorney-client privilege.²⁸ If parties cannot

24. See *Gomez v. Toledo*, 446 U.S. 635, 636 (1980) (placing the burden of pleading on defendant when facts are "peculiarly within . . . [his] knowledge and control"); Burkhard Schafer, *Twelve Angry Men or One Good Woman? Asymmetric Relations in Evidentiary Reasoning*, in *LEGAL EVIDENCE AND PROOF* 255, 270–72 (Henrik Kaptein et al. eds., 2009) (analyzing criminal burdens of proof and pretrial disclosure from this perspective). *But see* *Taylor v. Sturgell*, 128 S. Ct. 2161, 2179–80 (2008) (declining to place burden of establishing claim preclusion defense on plaintiff with superior access to facts).

25. See, e.g., *Ruszyk v. Sec'y of Pub. Safety*, 517 N.E.2d 152, 155 (Mass. 1988) (discussing opponent's use of employee's statements); 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 420 (2d ed. 1994) (same).

26. See Civil Procedure Rules and Practice Directions of England and Wales, rule 1.1(2): "Dealing with a case justly includes, so far as is practicable—(a) ensuring that the parties are on an equal footing; . . . (c) dealing with the case in ways which are proportionate . . . (iv) to the financial position of each party . . ."

27. See, e.g., *United States v. Perez*, 299 F.3d 1 (1st Cir. 2002) ("missing witness" instruction); *Littlefield v. McGuffey*, 954 F.2d 1337, 1346–47 (7th Cir. 1992) (argument of counsel); Erin Murphy, *Inferences, Arguments, and Second Generation Forensic Evidence*, 59 *HASTINGS L.J.* 1047, 1049 (2008) (discussing inferences from failure to present or obtain expert evidence).

28. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 861, 866–73 (1982) (considering asserted violation of Sixth Amendment and denial of due process after an alien witness was deported prior to testifying); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 968–69 (7th Cir. 1983) (Posner, J.) (discussing incentive of party with weak case to use worthless evidence to

obtain relevant material because an opponent has hidden or destroyed it, we cannot expect the adversary process to yield correct results. The impact is still more damaging when parties resort not to suppressing good evidence, but to creating bad evidence by promoting perjury or falsifying documents.

These problems are not solved by an adversary's ability to counter such tactics by searching for hidden evidence, unmasking false evidence, or resorting to its own suppressions and forgeries. At best, competition of this kind reduces litigation to a costly and unproductive game of hide and seek. At worst, it rewards the least-honest parties and yields results only randomly related to truth and justice. Competition to obtain evidence can promote the public good only when the law limits what is permitted. We will survey those limits later.²⁹

Fifth, the legal system should not rely on unrestrained adversary incentives that induce parties to introduce evidence in the hope of obtaining improper advantages. It is obviously difficult to decide what advantages should, as a matter of principle, be considered improper, and to ascertain as a matter of fact what evidence yields such advantages. An example of this difficulty is the assertion that jurors will overvalue certain kinds of evidence. This claim can, and has been, invoked to justify almost any exclusionary rule—whether the evidence in question is hearsay, expert testimony, probability analysis, character evidence, or unauthenticated documents. Its appeal to John Henry Wigmore and others is matched only by the failure of empirical evidence to support it.³⁰ But the questionable use that some have made of the claim that jurors will overvalue evidence does not show that the claim is always and necessarily false. Indeed, research on the effects of varying presentations of DNA and other forensic evidence indicates that there is indeed room for useful judicial regulation of the adversary system to ensure that evidence is presented in the form least liable to misinterpretation.³¹

Evidence with two uses—one proper and one improper—poses a serious problem, usually described as one of prejudicial impact. A law of

confuse jury); John Leubsdorf, *Using Legal Ethics To Screw Your Enemies and Clients*, 11 GEO. J. LEGAL ETHICS 831, 839–41 (1998) (describing how tobacco lawyers manipulated the attorney–client privilege to hide evidence harmful to their clients).

29. See *infra* Part III.C (describing methods to combat destruction of evidence).

30. See Richard Friedman, *Minimizing the Jury Over-Valuation Concern*, 2003 MICH. ST. L. REV. 967, 969 (describing the lack of empirical evidence of whether and when juries over-value evidence); Leubsdorf, *supra* note 1, at 1248–49 (describing lack of empirical evidence for this claim).

31. See generally Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Advocacy and Impact*, 59 HASTINGS L.J. 1159 (2008) (discussing the various ways to present forensic evidence to jurors in criminal trials); Dale A. Nance & Scott B. Morris, *Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Small Random-Match Probability*, 34 J. LEGAL STUD. 395 (2005) (same).

evidence that allows parties to introduce all relevant evidence encourages evidence that, although relevant, fosters decisions based on race, previous misconduct, or other factors that the law hopes to exclude from consideration. The adversary system would not prevent decisions based on such factors except in the rare instances in which the opposing party could undermine the forbidden inference—for example, by showing that the alleged sinner was indeed a saint—or appeal to an equal and opposite prejudice. Moreover, instructing the jury to disregard the improper inference would seldom prevent the harm and might sometimes increase it.³²

How often this problem arises depends in part on which uses of evidence the law does or should forbid. Sometimes the improper inference is forbidden only because of the fear that the jury will give it too much weight, a fear I have just criticized because of its feeble empirical basis. For example, the forbidden inference may be the use of an out-of-court statement to prove the truth of what it asserts—a violation of the hearsay rule that might not bother a legal system relying more on the adversary process.³³ In other instances, it is possible to redact parts of the evidence that give rise to the improper use or to use alternative methods of proof that avoid that use.³⁴ This infringes on freedom of proof, but if properly done, the infringement is costless. Finally, even if one can misuse the evidence and the misuse is unavoidable, the proper use may be so vital that, in the absence of adequate alternative evidence, excluding it is unacceptable.³⁵ The evidence must then be admitted with whatever safeguards against misuse can be mustered.

These considerations help explain the limits on our evidentiary system's willingness to exclude evidence that has a proper use on the ground that it

32. AMINA MEMON ET AL., *PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY* 162–64 (2d ed. 2003) (citing mixed evidence); Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1863–66 (2001) (discussing various ways in which an attempt to withhold information from a jury can fail); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1270–76 (2005) (citing mixed evidence). *But see* Kamala London & Narina Nunez, *The Effect of Jury Deliberations on Jurors' Propensity to Disregard Inadmissible Evidence*, 85 J. APPLIED PSYCHOL. 932, 933–34 (2000) (concluding that jury deliberation removes impact of evidence jurors are told to disregard).

33. *See, e.g.*, *Shepard v. United States*, 290 U.S. 96, 104 (1933) (stating that even if deceased's statement that defendant poisoned her was only admissible to show she did not wish to commit suicide, jury would use it to prove what it asserted).

34. *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172, 180–85 (1997) (requiring the prosecution to accept the defendant's offer to stipulate to facts that prejudicial evidence would prove).

35. *See, e.g.*, *United States v. Abel*, 469 U.S. 45, 53–56 (1984) (concluding that the defense witness could be impeached by showing that he and defendant belonged to group whose members were obliged to lie and kill for each other; the trial court excluded evidence of the group's racism).

also has an improper one, and hence, the limits to its deviation from reliance on adversary incentives. The court does, of course, have discretion to exclude such evidence on the basis of an ad hoc balancing of probative value against prejudicial impact.³⁶ Rules that purport to lay down a more stringent rule, for example those on “bad acts,” usually require exclusion only of evidence that has improper uses but no proper ones.³⁷ If there is a proper use, and courts have gone very far in identifying such uses,³⁸ ad hoc balancing resumes its sway.³⁹ More stringent exclusionary rules seem to be reserved for situations in which the law’s concerns go beyond preventing the misuse of evidence having both a proper and an improper use.⁴⁰

Sixth, relying on the parties to introduce the best evidence they can find and to rebut any weak evidence their opponents offer may result in the parties’ failure to use evidence that has something of value to contribute to the trier’s decision because each party fears that it may backfire against the party using it. It is true that, in law, a party no longer “vouches for” the credibility of the witnesses it calls,⁴¹ but in courtroom reality, jurors may well reject wholesale the contentions of a party calling a dubious witness.

To the extent that the parties do not introduce evidence because they simply do not want to explore certain issues, the question is whether the judicial system’s interest in factual and legal accuracy should prevail over the parties’ interests in defining the scope of their controversy any more than it would if the parties decided to settle without trial. If the judicial system’s interest should indeed prevail, that can best be accomplished by requiring parties to raise issues, calling witnesses not called by the parties⁴² or allowing those affected to intervene.⁴³

36. *E.g.*, FED. R. EVID. 403 (stating exclusion for “prejudice, confusion, or waste of time”).

37. *E.g.*, *id.* 404(b), 407–408 (stating the character evidence rule, the subsequent remedial measures rule, and the compromise rule).

38. *See generally*, EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (rev. ed. 1999) (providing examples of court acceptance of uncharged misconduct evidence).

39. *E.g.*, United States v. Whitney, 524 F.3d 134, 140–41 (1st Cir. 2008) (applying the Rule 403 balancing test); United States v. Beasley, 809 F.2d 1273, 1278–80 (7th Cir. 1986) (describing the balancing test lower courts must apply).

40. *See supra* notes 11–15 and accompanying text (describing the goals behind exclusionary rules).

41. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 466–73 (4th ed. 2009).

42. *Compare* United States v. Boegegrain, 155 F.3d 1181, 1188–89 (10th Cir. 1998) (stating that defense counsel must ordinarily raise the issue of a defendant’s competence to stand trial even against a defendant’s wishes), *with* Whitmore v. Arkansas, 495 U.S. 149, 165–66 (1990) (finding that a defendant may waive appeal of a death sentence). *See* FED. R. EVID. 614 (stating a judge may call a witness).

43. *E.g.*, Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135–36 (1967) (allowing intervention to enforce the Court mandates even when the parties settled their case); *see also* 18 U.S.C. § 3771 (2006) (discussing the participation rights of crime victims). For instances in which the parties avoided raising a relevant issue, *see State v. Hometown Lending, Inc.*, 826 A.2d 997, 1001–03 (Vt. 2003); and Geoffrey P. Miller, *Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases* 3–9 (N.Y. Univ. Sch. of Law Pub. Law & Legal

When a party's reluctance to introduce evidence depends on the availability of a less risky but more questionable form of evidence—for example a hearsay statement—excluding the inferior evidence might result in the introduction of the better evidence.⁴⁴ That is the argument for the Best Evidence Principle, to which we now turn.⁴⁵

II. THE BEST EVIDENCE PRINCIPLE

The Best Evidence Principle creates new incentives that modify the pure adversary system: it excludes certain evidence in order to press the parties to find and introduce other evidence deemed to be superior. Its proper scope, however, is limited, so that there are reasons to create still other evidentiary incentives and disincentives.

The history of the Best Evidence Principle might be simplified as Gilbert to Thayer to Nance. Baron Gilbert's pioneering eighteenth century treatise famously claimed 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."⁴⁶ James Bradley Thayer's equally important book sought to demolish Gilbert's broad generalization through historical analysis, reducing the principle to the rule—still known as the Best Evidence Rule—that a party seeking to prove the contents of a document must produce the document or show its inability to do so.⁴⁷ Finally, Dale Nance has proposed to broaden Thayer's formulation by recognizing the concept of best evidence—not just as a rule of law about the proof of documents, but as a broader principle justifying and explaining many evidentiary rules.⁴⁸ This is the Best Evidence Principle, as opposed to the Best Evidence Rule, which is still limited to proving the content of documents.

The Best Evidence Rule, governing proof of the contents of documents, exemplifies the limited circumstances in which an evidentiary rule can

Theory Research Paper Series, Working Paper No. 09-56, 2009), available at <http://ssrn.com/abstract=1495069>.

44. Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 916–24 (1992).

45. See *infra* Part II (discussing the Best Evidence Principle).

46. GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 3–4 (1754) (written several decades before its posthumous publication).

47. JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 484–507 (1898); see also CHARLES MCCORMICK, *EVIDENCE* § 195 (1954) (describing Thayer's work).

48. Nance, *supra* note 3, at 227–30 (introducing Nance's Best Evidence Principle); see also ALEX STEIN, *FOUNDATIONS OF EVIDENCE LAW* 39–40, 154–55 (2005) (same). For further explanation of Nance's theory, see generally Dale A. Nance, *Evidential Completeness and the Burden of Proof*, 49 HASTINGS L.J. 621 (1998) [hereinafter Nance, *Evidential Completeness*]; Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 TEX. L. REV. 51 (1996) [hereinafter Nance, *Verbal Completeness*]; Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825 (1995) [hereinafter Nance, *A Theory of Verbal Completeness*]; Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447 (1990).

usefully exclude one form of evidence in order to create an incentive for parties to produce a superior, more reliable form of evidence.⁴⁹ Several reasons warrant a general rule requiring a party wishing to prove a document's contents to introduce the document itself. First, examining a document is the best way to ascertain its contents except in rare situations, such as when someone has altered the document or the trier of fact cannot read it. Second, producing a document is usually as cheap and convenient as proving its contents in some other way, although here too there are exceptions: the document may have been destroyed, it may be permanently fixed elsewhere, or it may be too voluminous for the trier of fact to read. Third, because the Rule is limited to documents, it can state with precision and completeness the circumstances in which exceptions make sense—for example, because the two premises just described do not obtain, or because a photocopy or printout is as good evidence as its original.⁵⁰ Fourth, because parties often need to show a document's contents, framing and interpreting a rule limited to documents can be worth the trouble and cost it entails.

Notwithstanding these reasons for the Best Evidence Rule, one might question what the Rule adds to the usual adversary incentives. If a document is available—and the Rule only applies when it is⁵¹—will not the party that stands to benefit from proving its contents bring it in? If so, the Rule does no good. Instead, the Rule may harm the parties because litigating about its applicability imposes costs or may lead to the erroneous exclusion of evidence.

There is, however, an alternative rationale for the Best Evidence Rule based not on the creation of incentives (of dubious necessity) to produce superior evidence, but rather on the fair allocation of burdens. A party seeking to make use of a document's contents should ordinarily shoulder the costs of finding it, bringing it to court, and authenticating it.⁵² This theory of the Rule explains why the proponent need not produce a document when it is in the control of the opposing party or when the proponent uses the testimony of the party against whom the document is admitted to prove its contents.⁵³ In those situations, there is no unfairness in requiring the opposing party to produce the document itself, so the law does not compel introduction of the original but allows a party to use secondary evidence of the document's contents if the party wishes, while leaving the

49. For a survey of the rule, see KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* 85–120 (6th ed. 2006).

50. FED. R. EVID. 1001(3)–(4), 1003, 1004–1007.

51. More accurately, unavailability allows the use of secondary evidence of a document's contents unless the proponent lost or destroyed the document in bad faith. FED. R. EVID. 1004(1)–(2).

52. For authentication requirements, see FED. R. EVID. 901–903. For a similar explanation of the hearsay rule, see generally Friedman, *supra* note 23.

53. FED. R. EVID. 1004(3), 1007.

opponent free to introduce the document itself. On this view, the Best Evidence Rule's aim is ethical and economic, not the creation of incentives for superior evidence.⁵⁴

Whatever its merits in its documentary homeland, the Best Evidence Principle encounters problems as an explanation for other principles of Evidence law. It provides little or no support for the rules governing character evidence, bad acts, privilege, and impeachment, which rarely exclude one sort of evidence in order to encourage better evidence of the same point.⁵⁵ Most notably, the Best Evidence Principle does not explain the existing hearsay rule, which excludes a lot of hearsay even when the declarant is unavailable.⁵⁶ Likewise, in contradiction of the Best Evidence Principle, the existing hearsay rule admits some hearsay statements likely to be inferior to courtroom testimony even though the declarant is available to testify.⁵⁷ Admittedly, in practice, even when the declarant's unavailability is not a precondition to admissibility of hearsay, litigants often seek to use inferior hearsay only when the declarant is in fact unavailable.⁵⁸ This demonstrates that adversary incentives sometimes do a better job than evidence rules, specifically the hearsay rule, in securing better evidence.

Even if the hearsay rule were modified to better implement the Best Evidence Principle, it would often fail to yield superior evidence and would often allow inferior evidence. The circumstances allowing the Best Evidence Rule to function properly when it is applied to documents are ordinarily absent in the case of hearsay. For instance, it is not true that courtroom testimony is almost always better than hearsay: one might equally argue that statements made before a controversy arose, which are always hearsay, are generally superior to those made in court, despite the lack of cross

54. Cf. ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 39 (2005) (also relying on ethical and economic concerns).

55. FED. R. EVID. 404–415, 501, 608–613. *But see* FED. R. EVID. 613(b) (providing that opposing counsel must ordinarily confront a witness with any prior inconsistent statement before the court may consider the statement; this rule can be justified in Best Evidence terms).

56. For proposals to admit hearsay statements by unavailable declarants, see, for example, MODEL CODE OF EVIDENCE 503(a) (1942); James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamite View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932 (1962); and Seigel, *supra* note 44. For a case rejecting such an approach, with the result that the plaintiffs remained in slavery, see *Mima Queen v. Hepburn*, 11 U.S. 290 (1813).

57. Among the admissible but generally inferior out-of-court statements are coconspirator statements, excited utterances, and statements to a physician retained as an expert witness. FED. R. EVID. 801(d)(2)(E), 803(2), (4).

58. *E.g.*, *Palmer v. Hoffman*, 318 U.S. 109, 112 (1943) (holding that a party could not introduce as a business report an accident report that was completed by a witness who later died); *Mut. Life Ins. Co. v. Hillmon*, 145 U.S. 285, 296 (1892) (holding that a party could introduce a statement of an alleged victim under the state-of-mind exception); *Morgan v. Foretich*, 846 F.2d 941, 948–50 (4th Cir. 1988) (admitting statements of a nontestifying child); *United States v. Napier*, 518 F.2d 316, 318 (5th Cir. 1975) (admitting an excited utterance made by a victim two months after a crime; a brain injury prevented the victim from testifying).

examination.⁵⁹ Moreover, it is not true that live testimony is almost always so easily available that a rule requiring live testimony is likely to avoid undue burdens or failure of proof. Further, it is not true that the scope of the hearsay rule is sufficiently limited to make it possible to define with precision and completeness when exceptions should be allowed. Because of this impossibility, even a revised hearsay rule will lead to the loss of preferable evidence and to costly haggling about the rule's application.

Revised or unrevised, the hearsay rule helps to allocate with fairness the burdens of producing a witness or demonstrating her unavailability.⁶⁰ Other concerns, notably those underlying the Confrontation Clause, provide some support for the hearsay rule as well.⁶¹ But it is hard to conclude that, granted the adversary incentives to make the strongest practical case, the hearsay rule as it now exists improves the quality of evidence to an extent that could justify its costs.

Although it does not fully describe existing Evidence law or provide a complete theory for improving it, the Best Evidence Principle can usefully supplement adversary incentives in order to improve the quality of evidence in situations beyond those covered by the Best Evidence Rule.⁶² The Principle, for example, justifies giving the court a significant role in deciding whether to admit expert scientific and technical testimony, though not necessarily the expansive role now in fashion.⁶³ The court, when assisted by adversary presentation, can usually reach a better decision about the quality of such testimony than can a jury. The court's decision to exclude one expert also leaves a party (at least a party with resources) free to find a better one—if its position indeed has scientific support. The court's intervention may therefore push the parties to pay more attention to the validity of their experts' testimony as opposed to other witness characteristics likely to persuade juries. When that intervention excludes inferior expert testimony,

59. Leubsdorf, *supra* note 1, at 1227–28, 1240–41 (suggesting also that a rule privileging statements by disinterested witnesses might be equally plausible).

60. Friedman, *supra* note 23.

61. *E.g.*, Richard D. Friedman, *Minimizing the Jury Over-Valuation Concern*, 2003 MICH. ST. L. REV. 967, 975–78.

62. I will not explore here all the rules of evidence that Dale Nance traces to the Best Evidence Principle. *See* sources cited *supra* note 48 (discussing, among others, the rules of conditional relevance, verbal completeness, and lay opinions); Nance, *Evidential Completeness*, *supra* note 48, at 630 n.25 (collecting decisions holding against parties who failed to introduce important evidence).

63. *E.g.*, FED. R. EVID. 702; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141–42 (1999) (holding that courts have flexibility in determining the reliability of expert testimony). For one among many critiques, see DAVID STANLEY CAUDILL & LEWIS H. LARUE, *NO MAGIC WAND: THE IDEALIZATION OF SCIENCE IN LAW* 15–48 (2006).

it may, therefore, give some parties incentives to develop better evidence for future cases.⁶⁴

Likewise, threatening to exclude real evidence when the government does not establish its chain of custody may provide incentives for the government, as a repeat player, to set up procedures for preserving and labeling evidence that will improve its quality.⁶⁵ The same is true for pretrial identification procedures, which are usually in the government's control. Admitting lineup identifications only when the lineup is not suggestive will induce the government to arrange for better lineups.⁶⁶ Similar reasoning supports some other criminal-procedure decisions—for example, the recent Confrontation Clause holding that the government may not, over objection, introduce laboratory test results obtained for a prosecution without producing the tester for cross-examination.⁶⁷ The result, or at least one result, will be to make it easier for defendants to place before the jury fuller information of the reliability of the test results than an unregulated adversary process would provide.

III. IMPROVING EVIDENCE: INCENTIVES AND DISINCENTIVES TO CREATE, PRESENT AND DESTROY EVIDENCE

The incentives provided by the adversary system and Best Evidence Principle are only a few of the legal arrangements providing incentives and disincentives that affect the quantity and quality of evidence introduced at trials. Some of these legal arrangements are usually classified as Evidence law, but many are not. To take a trivial example, civil litigants can require others to create admissible evidence by sending interrogatories or taking depositions.⁶⁸ Little thought has been given to how legal provisions inside and outside Evidence law work together as a system or fail to do so. Nor has much thought been given to how such provisions might spur litigants to

64. See Friedman, *supra* note 61, at 984 (discussing reasons why some expert evidence should be excluded as a matter of law); Roger C. Park, *Signature Identification in the Light of Science and Experience*, 59 HASTINGS L.J. 1101, 1107–08 (2008) (encouraging judges to consider alternative forms of expert testimony when more trustworthy evidence exists).

65. *E.g.*, *Suttle v. State*, 565 So. 2d 1197, 1199–1200 (Ala. Crim. App. 1990); *People v. Catlin*, 26 P.3d 357, 390–92 (Cal. 2001); *People v. Rivera*, 592 N.Y.S.2d 697, 699–700 (App. Div. 1993). But cases like these, in which courts actually exclude evidence because of breaks in the chain of custody, are very rare.

66. *E.g.*, *Manson v. Brathwaite*, 432 U.S. 98, 112 (1976) (noting that excluding identifications made at suggestive lineups will encourage better lineup procedures); *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1262–64 (Mass. 1995) (stating that only unnecessarily suggestive lineups should be excluded).

67. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539 (2009); see also *State v. Scales*, 518 N.W.2d 587, 593 (Minn. 1984) (finding suspect's statements inadmissible when police interrogation was not recorded).

68. On the admissibility of depositions and interrogatory answers, see FED. R. CIV. P. 32, 33(c); and FED. R. EVID. 804(b)(1).

create, preserve, and introduce desirable evidence. Here, I will seek to address these important subjects.

A. *RULES ENCOURAGING AND DISCOURAGING THE CREATION OF EVIDENCE*

Many legal rules encourage or discourage the creation of evidence. For example, legal requirements that wills must be reduced to writing and that marriage certificates must be executed and recorded ensure that evidence is created for two frequent and important transactions. These requirements exemplify what Jeremy Bentham discussed as “preappointed evidence.”⁶⁹ The testator’s or spouse’s main purpose is not the creation of evidence: his or her goal is to have a valid will or marriage. But the law has arranged that attaining this personal goal will create evidence, and that in turn creates an incentive to preserve the document for possible evidentiary use.

As it happens, the law of Evidence treats wills and marriage certificates differently. Someone wishing to enforce a will must produce the will in court, or overcome several distinct obstacles in order to probate a copy—a heightened Best Evidence Rule that will usually ensure production.⁷⁰ Testators and beneficiaries thus have a powerful incentive to create and preserve written wills. A marriage, by contrast, can be proven in a variety of ways without producing a copy of the marriage certificate,⁷¹ but some states give litigants at least a mild incentive to use a certified copy of the marriage certificate by making it prima facie evidence of the facts it states.⁷² A more frequent, but still weaker, incentive for parties to create documentary evidence of this sort is provided by making a certified copy of government records self-authenticating and admitting it under an exception to the hearsay rule.⁷³

When the person creating evidence can be harmed by it, the government may require its creation and impose sanctions for disobedience. The Fair Labor Standards Act, which establishes the federal minimum wage, provides an example. The Act requires the employers it covers to keep detailed records of each employee’s hours and wages.⁷⁴ The government may seek criminal sanctions and injunctive relief when employers fail to

69. 2 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 435–700 (London, Hunt & Clarke 1827). Other obvious examples include birth certificates and motor vehicle registration. *See, e.g.*, N.J. STAT. ANN. §§ 26:8-28, -30, -40.6 (birth certificate); MASS. GEN. LAWS ANN. ch. 90, §§ 11, 30 (motor vehicle registration).

70. *Compare In re Estate of Phillips*, 833 N.E.2d 895 (Ill. App. 2005) (holding that probate was blocked by presumption of destruction and Dead Man’s Act), *with In re Estate of King*, 817 A.2d 297 (N.H. 2003) (holding that probate was allowed).

71. *See, e.g.*, CAL. FAM. CODE § 305 (2004) (allowing marriage to be proved under the same general rules of evidence as in other cases).

72. *See, e.g.*, MICH. COMP. LAWS ANN. § 551.110 (2005) (making a marriage certificate “prima facie evidence” of a marriage); N.Y. DOM. REL. LAW § 14-a(4) (2008) (same).

73. FED. R. EVID. 803(12), 902(4).

74. 29 U.S.C. § 211(c) (2006); 29 C.F.R. § 516.2 (2009).

comply.⁷⁵ In addition, an employer's failure to maintain these records reduces the plaintiff's burden of proof in suits brought by employees⁷⁶ or the government to recover wages that the employer improperly withheld.⁷⁷ The employer's wage and hour records can, of course, be used as evidence against the employer—either as admissions or as business records.⁷⁸ The Act thus provides an integrated enforcement scheme in which employers are required to keep records that can then be used as evidence against them. Although such a scheme may be rare, the government requires businesses to keep many other kinds of records⁷⁹ which are admissible in evidence against their makers, even though the records are required mainly to facilitate government inspection and regulation.

Without commanding the execution or recording of a document, the law may reward parties that produce written evidence and thus encourage parties to create it. For example, in civil-law systems, even when a notary is not required, using one to authenticate and preserve a contract enhances its evidentiary status and bars certain challenges to its validity.⁸⁰ The United States, however, has no similar plan for encouraging written and authenticated transactions.⁸¹ Instead, U.S. law is more likely to spur parties to create evidence by wielding a stick against those who fail to execute and preserve documents rather than offering a carrot to those who do.

Either a carrot or a stick can encourage proper documentation and, consequently, evidence of transactions. The statute of frauds, for example, encourages documentation not by commanding that agreements within its scope be in writing, but rather, by preventing parties from enforcing oral agreements unless the defendant acknowledges them in writing, fails to

75. 29 U.S.C. §§ 211(a), 216(a), 217; *United States v. Darby*, 312 U.S. 100, 125–26 (1941); *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 343–44 (4th Cir. 2005).

76. 29 U.S.C. § 216(b).

77. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 684 (1946). What is said in the text also applies to the Equal Pay Act, 29 U.S.C. § 206(d) (2006), which is part of the Fair Labor Standards Act.

78. See FED. R. EVID. 801(d)(2)(C)–(D) (pertaining to admissions and business records); FED. R. EVID. 803(6) (excepting records of a regularly conducted activity from hearsay exclusion); *Shapiro v. United States*, 335 U.S. 1, 54 (1948) (rejecting Fifth Amendment objection to introduction of governmentally required records).

79. *E.g.*, 8 U.S.C. § 1324a(a)(1)(B), (b) (2006) (requiring documentation of an employee's employment authorization and identity); 40 C.F.R. §§ 64.9(b), 70.6(a)(3) (2009) (imposing reporting requirements to ensure compliance with laws limiting emission of air pollutants).

80. See, *e.g.*, C. CIV. arts. 1317, 1319 (Fr.) (stating that an authentic act can serve as proof of an agreement); MURRAY & STÜRNER, *supra* note 12, at 276 (describing documentary proof in Germany); James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 470–71 (1986) (explaining pre-constituted proof in French law).

81. Louisiana is the predictable exception. See LA. CIV. CODE ANN. arts. 1833, 1835, 1840 (2008) (stating requirements for an authentic act, its proof between parties, and the acceptability of a copy).

plead the statute of frauds defense, or partial performance has already occurred.⁸² If the agreement is for the sale of an interest in land, failure to execute and record a deed exposes the buyer to the additional risk that the land can be sold a second time to someone to whom the recording statute gives priority.⁸³ There are a number of reasons for these provisions, but one of their consequences is the creation of written evidence.

The evidence rules themselves offer incentives for the creation of evidence by making such evidence admissible. Thus, the hearsay rule exceptions allowing the admission into evidence of business records and recorded past recollections encourage record keeping.⁸⁴ Permitting the use of documents to refresh a witness's recollection, regardless of whether those documents fit within a hearsay exception, offers a further reward, especially since in practice the refreshment may be more or less fictional.⁸⁵

From another point of view, however, exceptions to the hearsay rule merely palliate the tendency of the rule itself to discourage record keeping. The hearsay rule discourages record keeping because it allows written statements to be used against the author as an admission.⁸⁶ Yet if the author tries to use the written statement himself, it will be dismissed as self-serving hearsay unless it can be squeezed into an exception. The message, familiar to lawyers and no doubt to many clients, is that one should avoid writing things down unless it is clear that they will be helpful, and tell one's employees to do the same.⁸⁷ Likewise, the rules provide a motive to adopt a "document retention policy" that reduces, as much as possible, the number

82. FED. R. CIV. P. 8(c)(1); RESTATEMENT (SECOND) OF CONTRACTS §§ 110, 131–39 (1981). Other provisions of contract law encourage disclosure, though more for the purpose of informing contracting parties than to create evidence for future use. *See, e.g.*, Alex M. Johnson, Jr., *An Economic Analysis of the Duty To Disclose Information: Lessons Learned from the Caveat Emptor Doctrine*, 45 SAN DIEGO L. REV. 79, 104–11 (2008) (discussing when Contract law should require a contracting party to disclose information).

83. RICHARD R. POWELL, POWELL ON REAL PROPERTY § 82.02[3] (Michael Allan Wolf ed., 2008). The *Uniform Commercial Code's* treatment of security interests comparably depends on written security agreements and on a filing system. U.C.C. §§ 9-203(b)(3), -310, -317(a)(2) (2000). However, the evidence fostered by the filing system (the financing statement) often does not meet by itself the requirements for a valid security agreement. *Gibson County Farm Bureau Coop. Ass'n v. Greer*, 643 N.E.2d 313, 320 (Ind. 1994).

84. FED. R. EVID. 803(5)–(6). Federal Rule of Civil Procedure 27, which provides for depositions to perpetuate testimony in the absence of a pending action, is another method of creating evidence that can sometimes be admitted under Federal Rule of Evidence 804(b)(1), the former testimony exception to the hearsay rule. It is cumbersome and rarely used, except in Texas. Lonny Scheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 226–36 (2007).

85. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 9 (6th ed. 2006).

86. FED. R. EVID. 801(d)(2).

87. *See, e.g.*, Andrew K. Lee, *Keep or Toss?: Document Retention Policies in the Digital Era*, 55 LA. B.J. 240, 247 (2007–2008) (advocating a "preventative medicine" component in document-retention policies).

of unfavorable documents in one's files while not exposing one to spoliation sanctions.⁸⁸

Civil-law systems show how it is possible to offer greater incentives for the creation of written evidence. Even under such a system that, unlike ours, does not systematically exclude hearsay evidence,⁸⁹ there are incentives to make one's records as favorable as possible. Those incentives, however, are weaker in such a system, especially if, like most civil-law systems, the system provides for less intensive discovery in civil actions and more extensive privileges than ours.⁹⁰ The expectation in such a legal system would be contrary to that in the United States: one can use one's helpful documents as evidence without facing the hearsay rule barrier, while often preventing an opponent's access to one's harmful documents.

Another area in which U.S. law provides, at best, equivocal incentives for the creation of evidence concerns informal interviews with potential witnesses. True, there is law restricting the ability of lawyers⁹¹ and courts⁹² to prevent such interviews, and the vicarious admission rule allows the use of many employee statements against their employers,⁹³ but employers are free

88. See *id.* at 242–43 (discussing the need for companies to adopt a document-retention policy before litigation arises); Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1355–57 (2006) (same); Amalia R. Miller & Catherine E. Tucker, *Electronic Discovery and the Adoption of Information Technology* 23–24 (Jan. 18, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1421244> (presenting evidence that hospitals are less likely to use electronic records in states facilitating evidentiary use of such records). For a vivid example, see Sara D. Guardino et al., *Remedies for Document Destruction: Tales from the Tobacco Wars*, 12 VA. J. SOC. POL'Y & L. 1, 25–42 (2004).

89. Jeremy A. Blumenthal, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective*, 13 PACE INT'L L. REV. 93, 98–100 (2001); Mirjan Damaška, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425, 445–46 (1992).

90. See, e.g., CHASE ET AL., *supra* note 12, at 222–27 (discussing discovery in the German civil-procedure system); MURRAY & STÜRNER, *supra* note 12, at 277–78 (same); Beardsley, *supra* note 80, at 475–77 (discussing discovery in the French civil-procedure system). Such systems' limitations on discovery may not, however, apply in criminal proceedings. See, e.g., Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 564–65 (1997) (discussing the investigative stage in French criminal cases).

91. MODEL RULES OF PROF'L CONDUCT R. 3.4(f) (2009) (stating that a lawyer may not request that someone other than a client or a client's employee not give relevant information to another party).

92. *Williams v. Rene*, 72 F.3d 1096, 1102–04 (3d Cir. 1995) (allowing an interview with the opposing party's testifying expert); *Int'l Bus. Machs. Corp. v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975) (striking down restrictions on witness interviews). Compare the principles from these cases with the French system, under which lawyers do not speak with potential witnesses. JOHN LEUBSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* 45, 86–87 (2001); see also John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 833–35 (1985) (describing the similar German practice). In the French system, however, the parties, rather than the lawyers, gather evidence, and in any event, witness statements are of little use, especially when not made in response to questioning by a judge. Beardsley, *supra* note 80, at 474, 476–80.

93. FED. R. EVID. 801(d)(2)(D) (stipulating that an employee's statement used against the employer is not hearsay if the statement concerns a matter within the scope of employment).

to seek to block access to their employees by instructing them not to speak to opposing counsel and invoking, successfully in some instances, the rule forbidding opposing counsel to speak with a represented party.⁹⁴ Noncooperation clauses in employment contracts⁹⁵ and settlement agreements⁹⁶ provide a further obstruction. Attempts to speak with an opposing party's expert witnesses likewise encounter legal obstacles based on civil procedure, professional responsibility, and expert retainer agreements.⁹⁷ A party can avoid these obstacles by taking a deposition of the potential witness,⁹⁸ but this is an expensive procedure and the presence of opposing counsel may inhibit the witness.

Three conclusions emerge from this survey of existing incentives for the creation of evidence. First, law in the United States has done little to create such incentives, and has done so without systematic thought. Indeed, law sometimes discourages proper record-keeping. Second, judges, rule-makers, and legislators should consider creating more incentives to produce evidence. There is much to be said for fostering the creation of good evidence *ex ante* rather than parsing *ex post* what the parties have come up with in the hope of improving the trial process by straining out the more questionable bits of evidence. The recent National Academy of Sciences/National Research Council on forensic evidence shows how much could be accomplished in this way, as does the movement to require the

94. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (stating that a lawyer shall not speak to a represented party about the subject of the representation without consent of the other party's lawyer). For a discussion of the varying views of how this rule applies to corporate employees, see Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 831-42 (2009).

95. See, e.g., *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 920 (D. Nev. 2006) (upholding the validity of an employment confidentiality agreement); *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 444-46 (S.D.N.Y. 1995) (providing that a court may infer information contrary to the employer where a noncooperation clause precludes the availability of information without cause).

96. See generally Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481 (2008) (discussing ethics rules relating to lawyers' contact with non-clients and arguing that lawyers who negotiate noncooperation agreements in settlements violate Rule 3.4(f) of the Model Rules of Professional Conduct); Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1 (2002) (exploring the use of noncooperation agreements and concluding that courts should not enforce or order noncooperation agreements).

97. *Erickson v. Newmar Corp.*, 87 F.3d 298, 302 (9th Cir. 1996) ("[A]n attorney who engages in prohibited communications violates the attorney's ethical duty to obey the obligations of the tribunal."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 cmt. d, Reporter's Note (2000); Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465, 472-74 (1999) ("At the extreme, unauthorized contact with an adverse party's expert may be considered witness tampering . . ."). By contrast, English judges may now direct experts retained by the parties to confer with each other, with or without the presence of lawyers. ADRIAN ZUCKERMAN, CIVIL PROCEDURE 620-22 (2003).

98. *But see* FED. R. CIV. P. 26(b)(4)(B) (limiting depositions of nontestifying retained experts).

recording of police interrogations.⁹⁹ Third, approaching evidentiary problems from this point of view inevitably leads us to view Evidence law more realistically and comprehensively as part of a system that also involves other procedural law, substantive law, and professional responsibility rules.¹⁰⁰ As scholars and reformers, we will understand vicarious admissions better if we relate their impact on party behavior to the “no contact” rule of professional responsibility¹⁰¹ and attorney-client privilege if we understand how the growth of discovery has made its invocation more frequent and more crucial.¹⁰²

B. *ENCOURAGING AND DISCOURAGING THE INTRODUCTION OF EVIDENCE*

To influence trials, evidence must not only be created, but also introduced. When evidence helps the party possessing it, the adversary system will normally ensure its introduction; and Best Evidence rules can sometimes be instituted to promote its introduction in its most useful form.¹⁰³ When a party does not possess evidence helpful to its cause, discovery procedures help it obtain that evidence. At least, they should do so, though sometimes discovery methods are not available,¹⁰⁴ not pursued, or not honored. But many incentives and disincentives for the introduction of evidence can supplement those provided by the adversary system and discovery procedures. Some of those incentives and disincentives will be discussed here.

99. See generally NAT'L RESEARCH COUNSEL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), available at http://www.nap.edu/catalog.php?record_id=12589 (addressing the current state gathering and presenting scientific criminal evidence and possible benefits of improving the overall system); Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1336 (2008) (proposing a new evidence-collection program for federal interviews).

100. William Stuntz's work on the incentives affecting the contributions to the criminal justice system of courts and legislators bears at least a distant analogy to what I have in mind. See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 74–76 (1997) (discussing “perverse effects” of judicial criminal procedure decisions on other lawmakers).

101. *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll.*, 764 N.E.2d 825, 833–36 (Mass. 2002) (discussing the relationship between the “no contact” rule and FED. R. EVID. 801(d)(2)(D)).

102. FED. R. EVID. 502 (discussing when disclosure of privileged information waives the privilege, a problem that typically arises from discovery proceedings); *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009) (rejecting immediate appeal from order rejecting privilege objection to discovery); *United States v. Zolin*, 491 U.S. 554, 572 (1989) (prescribing procedures for adjudicating claim that crime-fraud exception to privilege applies in tax investigation).

103. See *supra* Parts I, II (discussing the utilization of best evidence rules).

104. The Fifth Amendment privilege against self-incrimination, to use an obvious example, restricts discovery from criminal defendants. See, e.g., *United States v. Hubbell*, 530 U.S. 27 (2000) (rejecting the use of evidence obtained through a violation of a criminal defendant's Fifth Amendment rights).

1. Burdens of Coming Forward and Persuasion

Allocating the burden of coming forward or the burden of persuasion to the party likely to be in possession of evidence is one way to increase the likelihood that evidence will be introduced. Allocating burdens can be accomplished by placing the original burden on a particular party, employing a burden-shifting rule, or adopting a presumption.¹⁰⁵ Although courts rely on parties' access to evidence as a reason to invoke these methods, parties' different access to evidence cannot explain most of the decisions, which indeed are hard to explain under any theory at all.¹⁰⁶ Whatever grounds underlie the recognition of burdens and presumptions, one of their effects is to give a party an incentive to introduce evidence, lest the case be decided against it by default because it has not borne its burden or rebutted a presumption.

2. Blocking Evidentiary Consequences of Testimony in Order to Encourage It

Another way to encourage the introduction of evidence is to remove some of the ways that evidence could backfire against its proponent. For example, rape-shield laws encourage victims to testify by preventing a painful cross-examination about their previous sexual relationships.¹⁰⁷ Likewise, reducing the use of past criminal convictions to impeach a criminal defendant's credibility reduces the risk that the jury will hold the defendant's past crimes against him, and makes it more likely that he will testify.¹⁰⁸ Similarly, the Supreme Court crafted a rule that encourages

105. See, e.g., *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142–48 (2000) (discussing the allocation of the burden of production and a burden-shifting scheme); *Sindell v. Abbott Labs.*, 607 P.2d 924, 928–31 (Cal. 1980) (same); see STEIN, *supra* note 48, at 154. Somewhat arbitrarily, only the last of these methods, the creation of presumptions, falls within the scope of Evidence law. FED. R. EVID. 301–02.

106. See, e.g., *Schaffer v. Weast*, 546 U.S. 49, 60–61 (2005) (discussing the inconsistencies in application of allocating burdens); FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* 202–04, 420–23 (5th ed. 2001) (describing factors in the allocation of burdens and emphasizing that allocation decisions might not be obvious); see STEIN, *supra* note 48, at 133–40 (analyzing burdens of proof and presumptions as allocating the risk of error); Nance, *Evidential Completeness*, *supra* note 48, at 639–50 (1998) (proposing that judges should make presumptive factual finding against a party with greater access to important evidence that fails, after notice, to introduce it or explain its absence). As these sources indicate, courts have relied on several factors to justify placing a burden on one side or another, but these factors typically point in different directions, and courts invoke them inconsistently.

107. See, e.g., FED. R. EVID. 412 (disallowing both evidence of victim's engagement in sexual behavior and evidence of victim's sexual predisposition); *People v. Arenda*, 330 N.W.2d 814 (Mich. 1982) (holding that prohibition of cross-examination of eight-year-old rape victim was constitutional).

108. Federal Rule of Evidence 609 restricts to some extent the previous admissibility of felony convictions as impeachment. Some of its supporters hoped that this would encourage defendants to testify. 20 CONG. REC. 2377, 37078-79 (1974) (statements of Rep. Dennis and Sen. Hart). For proposals for further restriction to encourage defendants to testify, see John H.

defendants to testify at Fourth Amendment suppression hearings by barring the use of such testimony to establish the defendant's guilt at trial.¹⁰⁹ And immunity statutes enable the government—but rarely, if ever, the defendant¹¹⁰—to prevent a witness from invoking the Fifth Amendment. They thus compel or encourage the immunized witness to testify. The evidence is introduced, however, at a cost—the immunity statutes make it impossible to use that testimony or its fruits against the witness in a future prosecution.¹¹¹

One problem with encouraging evidence by reducing the ways in which it could backfire is that although it secures the introduction of testimony, it does so by sacrificing evidence that would otherwise be admissible and, perhaps, valuable. One response to this sacrifice is that the evidence gained through this approach may be worth the cost. Sometimes it can be argued that the lost testimony—for example, the complaining witness's sexual history, or the criminal defendant's past convictions—was of small or no value in any event.¹¹² Another tactic is to reduce the cost by finding ways to evade the evidentiary prohibition that provides the incentive by admitting the evidence anyway.¹¹³ Unless defendants or witnesses and their lawyers remain unaware of the fact that the prohibition will be evaded and the evidence introduced anyway, this will obviously reduce the incentive to testify that the rule in question affords.

Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL. LEGAL STUD. 477, 492–97 (2008); and Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [?!] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 689–91 (1991).

109. *Simmons v. United States*, 390 U.S. 377, 389–94 (1968); see also *Mitchell v. United States*, 526 U.S. 314, 321 (1999) (finding that defendant's guilty-plea colloquy does not waive her privilege not to testify at sentencing hearing).

110. See, e.g., *United States v. Serrano*, 406 F.3d 1208, 1217 (10th Cir. 2005) (stating that the Justice Department has the sole power to apply for immunity); *United States v. Castro*, 129 F.3d 226, 232 (1st Cir. 1997) (same).

111. See, e.g., 18 U.S.C. §§ 6001–6005 (2006) (codifying the immunity of witnesses); *United States v. Hubbell*, 530 U.S. 27, 38 (2000) (stating that immunity for compelled testimony must insure that the testimony does not lead to criminal penalties on the witness); *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (same).

112. As to sexual history, see *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993) (Posner, J.); *McLean v. United States*, 377 A.2d 74, 77–79 (D.C. 1977); and Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOY. L.A. L. REV. 757, 760–61 (1992). As to criminal convictions, see Friedman, *supra* note 108, at 688.

113. For rape-shield laws, see Leubsdorf, *supra* note 1, at 1219–20. For criminal convictions, see Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 303–07 (2008). For holdings that a defendant can appeal the court's decision allowing prior-conviction impeachment only by first taking the stand and being impeached, see *Ohler v. United States*, 529 U.S. 753, 757–60 (2000); and *Luce v. United States*, 469 U.S. 38, 43 (1984). For the rule preventing the defendant's testimony at a Fourth Amendment suppression hearing from being used to prove his guilt, see *Commonwealth v. Rivera*, 682 N.E.2d 636, 640–41 (Mass. 1997) (allowing use of suppression hearing testimony to impeach defendant who testified inconsistently at trial).

Daniel Seidmann and Alex Stein argue that one can secure good evidence by excluding bad evidence, thus avoiding the cost of exclusionary rules that encourage witnesses to testify.¹¹⁴ Their controversial theory of the privilege against self-incrimination maintains that the privilege encourages innocent defendants to testify because it allows them to argue that their waiver of the privilege shows they have nothing to hide.¹¹⁵ Because these defendants are innocent, their testimony will be honest and therefore desirable. Meanwhile, the privilege encourages guilty defendants to remain silent by providing an attractive alternative to perjury—which discourages the introduction of bad, perjurious evidence.¹¹⁶ Whether or not the Seidmann–Stein theory successfully explains the privilege against self-incrimination,¹¹⁷ it does suggest that it may be possible to design rules that provide incentives to introduce good evidence by excluding bad evidence.

3. Nonevidentiary Incentives to Testify

Another method used to encourage parties to introduce evidence is to offer incentives differing from the exclusion of other evidence.¹¹⁸ Prosecutors, for example, routinely induce potential witnesses to testify by threatening them with prosecution if they do not cooperate, and offering them reduced charges and sentences if they do. Buying evidence in this way has been upheld by the courts,¹¹⁹ although it would be criminal if anyone but a prosecutor did it.¹²⁰ No statute specifies when these incentives must be

114. See Daniel J. Seidmann & Alex Stein, *The Right To Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 433–34 (2000) (noting that the right to silence encourages guilty defendants to refrain from making false exculpatory statements).

115. *Id.* at 466.

116. *Id.* at 468.

117. For criticism of the theory, see, for example, Stephanos Bibas, Response, *The Right To Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421 (2003); and Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925 (2002). *Contra* Alex Stein, *The Right To Silence Helps the Innocent: A Response to Critics*, 30 CARDOZO L. REV. 1115 (2008) (refuting critics' arguments).

118. Disincentives of this sort are also possible. See Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871 (2008) (proposing a mandatory sentence reduction when prosecutors rely on the defendant's confession as a way to encourage prosecutors to seek other evidence).

119. See, e.g., *United States v. Condon*, 170 F.3d 687, 688–89 (7th Cir. 1999) (affirming earlier decision regarding legality of offers of immunity); *United States v. Singleton*, 165 F.3d 1297, 1298 (10th Cir. 1999) (holding that prosecuting attorney did not violate law by offering leniency for “truthful testimony”); *People v. Jenkins*, 997 P.2d 1044, 1120 (Cal. 2000) (declining to find that immunized accomplice testimony “is inherently unreliable”). *But cf.* *Mataya v. Kingston*, 371 F.3d 353, 359 (7th Cir. 2004) (forbidding cash payment).

120. See, e.g., 18 U.S.C. § 201(c)(2) (2006) (providing criminal sanctions for “promis[ing] anything of value” for testimony); *United States v. Blaszak*, 349 F.3d 881 (6th Cir. 2003) (affirming conviction of witness paid for true testimony in civil action); H. Richard Uviller, *No Sauce for the Gander: Valuable Consideration for Helpful Testimony from Tainted Witnesses in Criminal*

offered; rather, prosecutors offer them at their discretion. As a result, prosecutors may sometimes wind up buying, or creating, false testimony. Consequently, in evaluating these incentives, one must ask: In what proportion of cases do prosecutors detect and secure true testimony? And do incentives that are available only to the prosecution, but not the defense, promote good results?¹²¹

Rules shielding witnesses from adverse consequences that would otherwise accompany their testimony provide further incentives for testifying other than the exclusion or admission of evidence. For example, witnesses are absolutely immune from defamation suits based on their testimony,¹²² and both criminal and civil law guard them from retaliation.¹²³ Although they may be prosecuted for perjury, the falsity of their testimony must be shown by more than a single witness; conviction requires either corroborating circumstances or a second witness.¹²⁴ This “two witness rule” was formerly based on the notion that one witness’s oath against the defendant’s previous oath would not support conviction,¹²⁵ a theory that would be equally applicable to all “he says she says” criminal cases. Today, the two-witness rule is based explicitly on incentive reasoning: witnesses should be “free to testify willingly” without facing perjury prosecution based on a single adverse witness.¹²⁶

A final instance of securing evidence through an incentive that is not itself evidentiary is the Supreme Court’s ruling in *United States v. Mezzanatto*.¹²⁷ That case allowed the government to buy the right to use a defendant’s statements made during plea bargaining. The Court upheld a deal in which the government agreed to a plea bargain in exchange for the defendant’s agreement to allow the government to use the statements he made during bargaining to impeach him if he testified, which would otherwise have been forbidden.¹²⁸ In effect, the government purchased the defendant’s agreement to make his statements admissible in evidence in some circumstances—though the contract was not one that many defendants would feel free to refuse. The agreement might inhibit the

Cases, 23 CARDOZO L. REV. 771, 774 (2002) (discussing the defense’s inability to offer immunity in criminal cases).

121. See generally Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?*, 23 CARDOZO L. REV. 747 (2002) (discussing prosecutorial incentives and their effect on witnesses).

122. RESTATEMENT (SECOND) OF TORTS § 588 (1976).

123. 18 U.S.C. § 1513; 42 U.S.C. § 1985(2)–(3) (2006); *Haddle v. Garrison*, 525 U.S. 121, 122 (1998) (reversing dismissal of complaint in civil case where employee argued he was terminated in retaliation for testifying against employer).

124. *Weiler v. United States*, 323 U.S. 606, 610 (1945).

125. *United States v. Wood*, 39 U.S. 430, 437–39 (1840).

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

127. *United States v. Mezzanatto*, 513 U.S. 196 (1995).

128. FED. R. EVID. 410(4); see *United States v. Sylvester*, 583 F.3d 285, 289 (5th Cir. 2009) (extending *Mezzanatto* to allow use in prosecution’s case-in-chief).

defendant from disclosing his story during plea bargaining, thus undermining the goal of the rule excluding such disclosures from admission in evidence,¹²⁹ although it might also increase the credibility of whatever the defendant did say.¹³⁰ But the agreement's only impact on trial testimony would be to discourage defendants from telling one story during plea bargaining and another on the stand, which is not a significant loss.

4. Disincentives to Testify

These various incentives for the introduction of evidence paint only half of the picture. There are also legal disincentives to introducing evidence. Indeed, sometimes the same rule may be viewed as either an incentive or disincentive, depending on which baseline one picks for comparison. Impeaching a criminal defendant's testimony with past criminal convictions provides an example. Considering it earlier, we viewed the current rule limiting this kind of impeachment as providing an incentive for defendants to testify.¹³¹ If, however, one compares the current rule, which only *limits* impeachment, to a rule that *forbids* past-conviction impeachment, the current rule looks like a strong disincentive.¹³²

Impeaching a witness with prior criminal convictions is only one of the evidentiary practices that discourage criminal defendants or parties to civil actions from testifying. Impeaching a witness by cross-examining her about past behavior that is probative of untruthfulness has the same effect.¹³³ Admitting opinion and reputation evidence about a witness's character for untruthfulness also discourages witness testimony.¹³⁴ The same is true of Supreme Court opinions allowing the use of a defendant's unconstitutionally obtained statements for impeachment even though their use against the defendant is otherwise forbidden.¹³⁵ Indeed, impeachment of any sort has some tendency to deter criminal defendants and other parties from taking the stand. After all, who wishes to be portrayed as

129. *Mezzanatto*, 513 U.S. at 213–15 (Souter, J., dissenting).

130. Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541, 1569 (1998).

131. See *supra* notes 108–12 and accompanying text (discussing the use of past criminal convictions to impeach a criminal defendant's credibility). Some older decisions recognize a broader scope for prior-conviction impeachment than FED. R. EVID. 609. See, e.g., *Bendelow v. United States*, 418 F.2d 42 (5th Cir. 1969) (allowing the cross-examination of the defendant regarding the existence of prior convictions); *Fisher v. Gunn*, 270 S.W.2d 869 (Mo. 1954) (same); *State v. Hawthorne*, 228 A.2d 682 (N.J. 1967) (same).

132. For advocacy of such a rule, see *supra* note 108. In Pennsylvania, a defendant may not (subject to exceptions) be cross-examined about prior convictions, but the prosecution may introduce them on rebuttal. *Commonwealth v. Garcia*, 712 A.2d 746, 748–49 (Pa. 1998).

133. FED. R. EVID. 608(b).

134. FED. R. EVID. 608(a).

135. See, e.g., *Kansas v. Ventris*, 129 S. Ct. 1841 (2009) (Sixth Amendment exclusionary rule); *United States v. Havens*, 446 U.S. 620 (1980) (Fourth Amendment exclusionary rule); *Harris v. New York*, 401 U.S. 222 (1971) (*Miranda* Fifth Amendment exclusionary rule).

forgetful, biased, inconsistent, unobservant, crazy, drugged, or otherwise unreliable.¹³⁶

Ideally, perfect impeachment rules would only deter false testimony—the prevention of which would be all to the good. In reality, however, impeachment may deter honest testimony—flawed witnesses often tell the truth, and impeachment makes even reliable witnesses look flawed. On the other hand, limiting impeachment would prevent the jury from hearing valuable evidence, to wit, evidence bearing on reliability. In light of these competing concerns, the challenge is, as usual, to shape rules that will minimize the exclusion and discouragement of good evidence while maximizing its admission and encouragement. In seeking this ideal, we must consider not just the value of admitted testimony to the trier of fact, but also the impact that excluding or admitting evidence has on future parties deciding whether to call witnesses, and also its impact on witnesses deciding how forthcoming they will be.

Another group of evidentiary rules creates similar disincentives for introducing evidence by decreeing that a party's use of certain evidence renders admissible otherwise inadmissible evidence. A criminal defendant who offers evidence of his good character, for example, makes it possible for the prosecution to bring before the jury disreputable incidents and rumors from his past.¹³⁷ Defendants facing this possible onslaught will undoubtedly think twice before introducing character evidence, and the rule thus creates disincentives for defendants to introduce character evidence.

The law governing waivers of privilege can also discourage testimony. For instance, a witness who waives her Fifth Amendment privilege is subject to the usual scope of cross-examination, no matter how incriminating her answers could be.¹³⁸ She may find that she unintentionally waived the privilege by answering an incriminating question.¹³⁹ The only safe course is, therefore, to object early and often, which means that witnesses have a disincentive to answer even questions that might not incriminate them.

136. It has been said that the introduction of English trial procedures into colonial India reduced the quality of justice, because respectable witnesses would not undergo the shame of having to take an oath to tell the truth. RADHIKA SINGHA, *A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA* 46–49 (1998); 1 PYARELAL, *MAHATMA GANDHI: THE EARLY PHASE* 39–40 (1965).

137. See FED. R. EVID. 404(a)(1), 405(a) (discussing character evidence and methods of proving character); *Michelson v. United States*, 335 U.S. 469, 471–72 (1948) (holding that the prosecution could ask about the defendant's arrest that occurred over twenty years ago). In England, such character evidence may now be admissible even if the defendant does not offer character evidence, thus removing or reducing the disincentive present in the United States. Criminal Justice Act, 2003, pt. 11, c. 1, § 101 (U.K.).

138. *Brown v. United States*, 356 U.S. 148, 155–56 (1958).

139. *Rogers v. United States*, 340 U.S. 367, 370–71 (1951); see also *United States v. Longstreet*, 567 F.3d 911 (7th Cir. 2009) (holding that a witness could not refuse to answer cross-examination questions that are within the scope of his testimony).

Likewise, one may waive the attorney–client privilege by failing to object at the proper time,¹⁴⁰ and the scope of any waiver may be broad.¹⁴¹ The fear of losing the privilege by answering a question spurs witnesses to claim the privilege even in response to questions they would otherwise be willing to answer.

The disincentives produced by the law of character evidence and privilege waiver recur in the cases holding that one party’s introduction of certain evidence “opened the door” to the other party’s introduction of similar, yet otherwise inadmissible, evidence.¹⁴² For example, when a defendant mentioned on direct examination that he had some troubles in school, the prosecution was allowed to show that these included burning papers in his desk—no small matter, since the defendant was charged with murder by arson.¹⁴³ Such rulings cause counsel to shy away from introducing evidence that might “open the door” to harmful replies.¹⁴⁴

Broadly speaking, these doctrines, under which introduction of one kind of evidence makes it possible for the opposing party to introduce otherwise inadmissible evidence, share a common rationale: When a party tries to establish an untruth or a half-truth, the other side should be able to enlighten the trier of fact by introducing evidence of the truth.¹⁴⁵ This is simply the completeness principle that is applied both to oral testimony and

140. See, e.g., *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 459 (N.D. Cal. 1978) (holding that one party waived privilege by not making a timely objection); *Lee Nat’l Corp. v. Deramus*, 313 F. Supp. 224, 227 (D. Del. 1970) (same). On implicit waiver, see Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1628–32 (1986).

141. For examples of cases discussing when testimony waives this privilege, see *Morganroth & Morganroth v. DeLorean*, 123 F.3d 374 (6th Cir. 1997); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); *Handgards v. Johnson & Johnson*, 413 F. Supp. 926 (N.D. Cal. 1976); and *Nationwide Mut. Ins. Co. v. Fleming*, 992 A.2d 65 (Pa. 2010). Cf. *Jacobs v. Conn. Cmty. Technical Colls.*, 258 F.R.D. 192, 196–97 (D. Conn. 2009) (stating that plaintiff waived psychotherapist privilege by claiming emotional injury and providing diagnostic letter in response to discovery request). Federal Rule of Evidence 502(a), adopted by Congress in 2008, may or may not narrow the scope of waivers.

142. See, e.g., *Walder v. United States*, 347 U.S. 62, 63–65 (1954) (holding that defendant’s assertion that he never possessed narcotics opened the door to admission of the fruits of an unconstitutional search and seizure related to another drug transaction).

143. *Commonwealth v. Key*, 407 N.E.2d 327, 334 (Mass. 1980). Disclosure: the author of this Article represented the defendant on appeal.

144. Indeed, courts rejecting claims of inadequate assistance of counsel regularly cite fear of “opening the door” to justify defense counsels’ failure to explore some evidentiary or argumentative possibility. See, e.g., *Wong v. Belmontes*, 130 S. Ct. 383, 385 (2009) (stating that counsel’s strategy hinged upon not opening the door to rebuttal evidence); *Bell v. Cone*, 535 U.S. 685, 700–02 (2002) (same); *Smith v. Quarterman*, 471 F.3d 565, 574–76 (5th Cir. 2006) (same).

145. See, e.g., *United States v. Acosta*, 475 F.3d 677, 680–81 (5th Cir. 2007) (stating that misleading insinuations during cross-examination opened the door to rebuttal); *Hoyas v. State*, 456 So. 2d 1225, 1227 (Fla. Dist. Ct. App. 1984) (noting that when defendant testified that he had told his lawyer that he was innocent, the prosecution could call defendant’s lawyer and elicit the detailed confession defendant had in fact given).

when one side introduces only part of a document.¹⁴⁶ If indeed a party's evidence is misleading, there can be no harm in deterring its introduction by allowing the opponent to correct the misleading imputation with otherwise inadmissible evidence.¹⁴⁷ However, when courts extend these doctrines beyond the correction of misleading testimony by invoking vague ideas about putting testimony in context or about not letting a party pick and choose what evidence to admit, the danger of deterring the introduction of correct testimony increases.¹⁴⁸

5. Conclusion

In sum, attaching incentives and disincentives to particular kinds of evidence can be a tricky business. One must determine whether the new incentives and disincentives induce mainly desirable evidence and discourage mainly undesirable evidence, rather than the contrary. And one must ensure that the rewards offered as incentives and the burdens offered as disincentives do not involve costs that outweigh the desired benefits. As we have seen, some incentives and disincentives work by excluding otherwise admissible evidence or by admitting otherwise inadmissible evidence—either of which can be harmful if the otherwise applicable rule of admission or exclusion better vindicates substantial interests of justice.

These problems are not always insoluble. Some rules that shift the burden of persuasion to the party with greater access to the relevant evidence yield fuller presentation of that evidence and hence better results; they will fail only when the court mistakenly places a burden on a party that does not actually have access to the evidence in question. Likewise, rape-shield statutes, which encourage victims to testify by excluding sexual-history evidence, do not raise concerns that probative evidence is being lost because the statutes exclude only evidence that should never have been admissible to

146. FED. R. EVID. 106; *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988); Nance, *A Theory of Verbal Completeness*, *supra* note 48, at 826–27; Nance, *Verbal Completeness*, *supra* note 48, at 53–58. These articles explore the completeness principle in far more depth than my discussion in the text.

147. At least, there can be no harm to the truth; but when the otherwise applicable exclusion pursues goals other than avoiding irrelevance (for example, the protection of privilege) there may be harm to those other goals. *See* Nance, *Verbal Completeness*, *supra* note 48 (noting the proposition that trial courts must both “protect the rights of the parties” and attempt to ascertain the truth (quoting *United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987))); Nance, *A Theory of Verbal Completeness*, *supra* note 48, at 883 (“[T]he concept of privilege competes with truth finding in its attempt to protect confidentiality or secrecy . . .”).

148. *See, e.g.*, *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900) (describing how defendant who took the stand to establish an alibi was subject to cross-examination for all his relevant actions); *People v. Harris*, 118 P.3d 545, 562–63 (Cal. 2005) (stating that the defense witness's impeachment of the prosecution witness justified cross-examination of the defense witness about context of prosecution witness's statement, including hearsay statements incriminating to defendant); Nance, *A Theory of Verbal Completeness*, *supra* note 48, at 831–34 (describing the “relevance test” as a measure of wholeness of the evidence).

begin with.¹⁴⁹ Again, allowing some forms of impeachment discourages false testimony simply by revealing its falsity, and therefore does not discourage true testimony. Nevertheless, shaping incentives and disincentives for the introduction of evidence is usually more difficult than encouraging the creation of evidence whose later introduction will remain subject to the usual evidentiary rules and the incentives of the adversary system.

C. *DISCOURAGING THE DESTRUCTION AND HIDING OF EVIDENCE*

We turn now to disincentives, like sanctions, that discourage parties from destroying and hiding evidence, a subject that has been much discussed.¹⁵⁰ Destroying, concealing, or falsifying evidence can amount to a Constitutional violation,¹⁵¹ a crime,¹⁵² a lawyer-disciplinary offense,¹⁵³ or a tort.¹⁵⁴ A civil court can impose sanctions for spoliation that include dismissing a claim, striking a defense, taking certain facts as established, and assessing attorney fees against the party or lawyer at fault.¹⁵⁵ Obviously, these are potent disincentives for those who would destroy, hide, or forge

149. See *State v. Mastropetre*, 400 A.2d 276, 278–281 (Conn. 1978) (excluding sexual history evidence under common law); see also *supra* note 112 and accompanying text (discussing the value of sexual history). Of course, that means that such statutes would be justified even without considering their effect as incentives.

150. See generally JAMIE S. GORELICK ET AL., *DESTRUCTION OF EVIDENCE* (1989 & Supp. 2009) (providing an in-depth discussion on the destruction and spoliation of evidence); MARGARET M. KOESEL ET AL., *SPOILIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION* (2d ed. 2006) (same).

151. See, e.g., *Cone v. Bell*, 129 S. Ct. 1769, 1786 (2009) (vacating and remanding a murder conviction because the state prosecutors withheld evidence at trial).

152. See, e.g., 18 U.S.C. §§ 1503, 1510–1515 (2006) (rules relating to obstruction of justice and tampering with witnesses and jurors); GORELICK ET AL., *supra* note 150, § 5.1–.14 (describing criminal laws prohibiting destruction of evidence); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (vacating document-destruction conviction because of improper jury instructions); *United States v. Quattrone*, 441 F.3d 153, 176–81 (2d Cir. 2006) (same).

153. MODEL RULES OF PROF'L CONDUCT R. 3.4, 8.4(c)–(d) (2009); ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 322–25 (6th ed. 2007) (discussing Rule 3.4(a)).

154. See, e.g., *Rosenblit v. Zimmerman*, 766 A.2d 749, 754–758 (N.J. 2001) (discussing civil remedies for spoliation of evidence); Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1919 (1997) (discussing the liability standard for evidential damage).

155. See, e.g., *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (rejection of challenge to personal jurisdiction); *Société Internationale v. Rogers*, 357 U.S. 197 (1958) (possible dismissal); *United States v. Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009) (new trial); *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804 (7th Cir. 1995) (dismissal); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81 (D.N.J. 2006) (facts deemed admitted; evidence excluded; privilege claims denied); *United States v. Philip Morris, USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004) (prohibition from calling certain witnesses; 2.75 million dollar fine); GORELICK ET AL., *supra* note 150, § 3.1–.19 (discussing discovery sanctions).

evidence, though some believe they are insufficient.¹⁵⁶ In any event, I will focus here on less familiar incentives and disincentives falling within the scope of Evidence law.

A series of rules ensures that, if a party destroys evidence helpful to its opponent, the opponent will be able to fill the gap with evidence that would otherwise be inadmissible. Intentionally preventing a witness from testifying waives the protection of both the hearsay rule¹⁵⁷ and the Confrontation Clause,¹⁵⁸ depriving the guilty party of otherwise valid objections to evidence against it. Even if it is not proven that a party intended to procure the witness's unavailability, that unavailability will nevertheless render admissible several kinds of evidence that would otherwise be rejected as hearsay.¹⁵⁹ It will also enable the Confrontation Clause to be satisfied by the defendant's previous opportunity to cross-examine the unavailable witness.¹⁶⁰ Similarly, a party who destroys a document or renders it unavailable, with or without the intention of preventing its use as evidence, enables an opponent to introduce secondary evidence of the document's contents, which would otherwise be forbidden by the Best Evidence Rule.¹⁶¹

These rules' tendency to discourage parties from hiding and destroying evidence does not fully justify them in their present form. On the one hand, the rules do not always create sufficient disincentives to prevent parties from destroying evidence. Destruction is still attractive for a party that considers the destroyed evidence more harmful than the alternatively admissible evidence. On the other hand, even aside from the incentive-justification, unavailability of the best evidence, whatever its cause, often warrants admitting second-best evidence.¹⁶² That is why reformers unconcerned with incentives have often sought to broaden the unavailability exceptions to the hearsay rule.¹⁶³

The incentive rationale helps explain why most U.S. jurisdictions have shied away from such reforms when there is no showing that the party

156. See, e.g., Charles R. Nesson, *Incentives To Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793 (1991) (discussing need for judges to enforce sanctions). But see Sanchirico, *supra* note 88, at 1375–76 (arguing that increasing sanctions is the wrong approach); Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1315–17 (2004) (discussing shortcomings of evidence tampering sanctions). For recent decisions extending the duty to preserve evidence to an earlier stage in the unfolding of a controversy, see generally *Phillip M. Adams & Associates v. Dell, Inc.*, 621 F. Supp. 2d 1173 (D. Utah 2009); and *Micron Technology, Inc. v. Rambus Inc.*, 255 F.R.D. 135 (D. Del. 2009).

157. FED. R. EVID. 804(b)(6); see also *State v. Byrd*, 967 A.2d 285, 297 (N.J. 2009) (discussing witness intimidation “pandemic” that forfeiture rule will counteract).

158. *Giles v. California*, 128 S. Ct. 2678, 2693 (2008).

159. FED. R. EVID. 804.

160. *Crawford v. Washington*, 541 U.S. 36, 53–58 (2004).

161. FED. R. EVID. 1004(1)–(2).

162. See generally *supra* Part II (discussing the Best Evidence Principle).

163. See *supra* note 56 (listing proponents of this view). For examples of such reforms, see N.J. R. EVID. 804(b)(6); R.I. R. EVID. 804(c); and see also Evidence Act, 1995, §§ 63, 65 (Austl.).

against whom evidence is offered intentionally joined or acquiesced in wrongdoing that rendered the evidence unavailable. One must show intentional involvement or acquiescence to invoke the forfeiture exceptions to the Confrontation Clause and the hearsay rule.¹⁶⁴ If we consider only the ethical grounds for holding that someone who wrongfully procures a witness's unavailability forfeits the right to invoke the hearsay rule or Confrontation Clause to exclude his victim's written statements, there is no reply to the argument that those grounds apply equally to all those who kill potential witnesses, regardless of whether silencing them was part of the killers' intention.¹⁶⁵ But if our goal is to deter parties from attempting to procure a witness's unavailability, it is at least plausible to focus the forfeiture penalty on those who act with the requisite intent. They are the ones whom the forfeiture penalty might conceivably deter.¹⁶⁶ Applying the forfeiture rules to those who unintentionally render evidence unavailable provides little if any additional deterrence¹⁶⁷ and also reduces the assumed benefits of the Confrontation Clause and hearsay rule.

Another group of deterrence rules applies when the party who hides or destroys evidence seeks to use substitutes for the unavailable evidence. Thus the hearsay exceptions for statements by an unavailable declarant do not apply when the party seeking to use such a statement procured the declarant's unavailability to prevent the declarant from attending or testifying.¹⁶⁸ Similarly, if the government deports a witness in bad faith, the Confrontation Clause prevents it from using that witness's prior testimony against a criminal defendant even if the defendant had a previous opportunity to cross-examine the witness.¹⁶⁹ Likewise, someone who destroys a document in bad faith cannot introduce secondary evidence of its contents even though, had the destruction occurred otherwise, the Best Evidence Rule would have allowed the secondary evidence to be admitted.¹⁷⁰

164. FED. R. EVID. 804(b)(6); *Giles v. California*, 128 S. Ct. 2678, 2687 (2008).

165. See *Giles*, 128 S. Ct. at 2697–99 (Breyer, J., dissenting) (discussing the forfeiture exceptions as applied to those who kill potential witnesses). Indeed, the exclusion of statements by slain victims is one of the major scandals of our evidentiary system.

166. As noted above, this only applies to those who would prefer the evidence against them to be courtroom testimony rather than written substitutes.

167. It is, however, possible that someone with other reasons for procuring the absence of a witness would nevertheless be deterred by its evidentiary consequences.

168. FED. R. EVID. 804(a); *United States v. Yida*, 498 F.3d 945, 956 (9th Cir. 2007).

169. *United States v. Tirado-Tirado*, 563 F.3d 117, 122 (5th Cir. 2009).

170. FED. R. EVID. 1004(1). Perhaps one should add to this group of rules the traditional one barring impeachment of a witness with extrinsic evidence of her past inconsistent statement when the impeacher has let the witness leave the stand without asking her about the statement, making her relatively inaccessible. See, e.g., *Mattox v. United States*, 156 U.S. 237, 245–50 (1895) (discussing the unanimity among authorities with respect to the necessity of laying a foundation before impeaching witnesses); *Queen's Case*, (1820) 129 Eng. Rep. 976, 982–83 (H.L.) (basing the rule on fairness to the witness). Federal Rule of Evidence 613(b) has now diluted this rule, but courts still sometimes use it to prohibit the impeachment. See, e.g.,

These rules clearly seek to deter parties from destroying or hiding evidence. The evidence they exclude would normally be admissible—it is rejected only because the proponent of the evidence is responsible for the unavailability of better evidence. Indeed, the proponent's involvement precludes admission of secondary evidence only if the proponent acted in order to suppress the better evidence.

Limiting the rules' application to parties that intentionally suppress evidence not only focuses deterrence on the conduct most easily deterred, but it also minimizes the information costs of the rules because it narrows the instances in which useful evidence is precluded. If parties are not deterred and they hide or destroy evidence, these rules exclude both the better and the substitute evidence. The better evidence is excluded because the proponent has intentionally made it unavailable. The substitute evidence is excluded because the rules then prohibit the culprit from benefiting from the misconduct by using other evidence. In short, the rules impose a real cost because they exclude potentially helpful evidence. Narrowing the scope of the rules, by limiting them to parties that intentionally destroy or hide evidence, reduces this cost. Even so, these rules exact some cost in lost evidence. It remains unclear whether this cost is outweighed by the benefit of discouraging other parties from hiding or destroying evidence.

Another deterrent to destroying, hiding, or fabricating evidence results from allowing jurors to consider such activities as evidence of the wrongdoer's consciousness of guilt,¹⁷¹ or instructing jurors that they may draw an inference that the suppressed evidence would have been harmful to the suppressor.¹⁷² Permitting jurors to consider these activities and draw these inferences has long been justified on two grounds: (1) suppressing evidence does indeed have rational probative force that a trier may appropriately consider; and (2) telling the trier about the suppression deters

United States v. Schnapp, 322 F.3d 564, 571 (8th Cir. 2003) (explaining that the procedures dictated by Rule 613(b) are “not mandatory, but . . . optional at the trial judge’s discretion”); State v. Martin, 964 S.W.2d 564, 565 (Tenn. 1998) (holding that extrinsic evidence is inadmissible until specified conditions are satisfied).

171. *E.g.*, Wilson v. United States, 162 U.S. 613, 620–21 (1896); United States v. Werner, 160 F.2d 438, 441 (2d Cir. 1947) (L. Hand, J.); Tamme v. Commonwealth, 973 S.W.2d 13, 29–32 (Ky. 1998); *see also* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 305–08 (2d Cir. 1979) (hiding of documents shown for impeachment purposes).

172. *E.g.*, Stevenson v. Union Pac. R.R., 354 F.3d 739, 743 (8th Cir. 2004); Byrnie v. Town of Cromwell, 243 F.3d 93, 106 (2d Cir. 2001); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 151 (4th Cir. 1995); *see also* Graves v. United States, 150 U.S. 118, 121 (1893) (inference from failure to produce witness); Smith v. Atkinson, 771 So. 2d 429, 433 (Ala. 2000) (shifting burden of persuasion); Sweet v. Sisters of Providence, 895 P.2d 484, 491 (Alaska 1995) (same); Richard D. Friedman, *Dealing with Evidentiary Deficiency*, 18 CARDOZO L. REV. 1961, 1967–68 (1997) (discussing the possibility that the burden of production may shift away from its original allocation).

and punishes wrongdoers.¹⁷³ Unfortunately, the jury may impose excessive punishment.¹⁷⁴ In addition, the jury is unlikely to hear all the circumstances relevant to determining the appropriate stringency of the sanction and, unlike a judge, it cannot choose from an array of sanctions such as fining a lawyer or shifting litigation costs.¹⁷⁵ So again, the provision and resulting disincentives—in this instance adverse inferences against spoliators—may foster complete and accurate trials in one way, but undermine them in another.

Shaping spoliation sanctions to reconcile two goals that sometimes conflict—encouraging the preservation of evidence and deciding cases correctly through rational evidentiary rules—may be difficult, but can hardly be avoided altogether. That is because the existing procedural system actually provides many incentives for the destruction of evidence. For instance, the vicarious-admissions rules and the narrow scope of privilege not only tend to discourage people and enterprises from creating evidence that can then be freely used against them,¹⁷⁶ but also encourage them to discard or destroy potential evidence. Indeed, Chris Sanchirico points out that spoliation sanctions themselves can provide an incentive for more thorough spoliation: If one is going to destroy some evidence, one should destroy as much as is needed to prevent anyone from finding proof of the destruction.¹⁷⁷ Luckily, it does not always work that way. Otherwise, employers would be killing departing employees instead of just making them sign nondisclosure agreements. Still, in today's world, spoliation sanctions are clearly necessary. The difficult problem is finding the optimal blend of evidentiary rules deterring spoliation: “external” sanctions such as criminal and civil liability, procedural sanctions, and alternative approaches.¹⁷⁸

173. See, e.g., *Nationwide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) (Breyer, J.) (discussing the two rationales); 2 CHARLES FREDERIC CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE §§ 1070e, 1078a, 1078b (1911) (stating both rationales); John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 230 (1935) (discussing the “evidentiary significance of implied admissions”).

174. See, e.g., 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 265 (6th ed. 2006) (discussing admissions by misconduct, specifically by obstruction of justice); Robert H. Stier, Jr., *Revisiting the Missing Witness Inference—Quieting the Loud Voice from the Empty Chair*, 44 MD. L. REV. 137 (1985) (discussing the difficulty of deciding what to infer from the withholding of evidence whose contents remain unknown). *But see* Leubsdorf, *supra* note 1, at 1248–49 (noting the ease with which accusations of jury overvaluing can be leveled).

175. Dale A. Nance, *Evidentiary Foul Play: The Roles of Judge and Jury in Responding to Evidence Tampering*, INT'L COMMENT. ON EVIDENCE, May 2009, at 7–8, available at <http://www.bepress.com/ice/vol17/iss1/art5>; see also *Burrow v. Arce*, 997 S.W.2d 229, 245–46 (Tex. 1999) (finding that the judge should decide appropriateness and size of lawyer's fee-forfeiture sanction).

176. See *supra* notes 86–90 and accompanying text (discussing the incentives created by the hearsay rule and its exceptions).

177. Sanchirico, *supra* note 88, at 1335–36.

178. *Id.* at 1382–97.

Although much discussion has considered the incentives and disincentives for destroying or concealing evidence, the incentives and disincentives for distorting evidence have been less frequently considered. The common law, of course, removed some incentives to distort evidence by barring the testimony of parties to a suit and of other interested persons. Those exclusionary rules have long since been repealed.¹⁷⁹ They have been replaced by reliance on the adversary system to expose distortion—in part by exploring the incentives to distort through cross-examination and other impeachment.¹⁸⁰

Rules still exist, however, that seek to reduce witnesses' incentives to distort evidence. For example, the rule forbidding lawyers to testify in most cases in which they represent a party reduces the chance that a lawyer-witness can earn an increased fee by slanting his testimony.¹⁸¹ Likewise, jurisdictions outside the United States have sought to avoid the financial and situational incentives that entice expert witnesses to present evidence favoring the party that retained them.¹⁸² Methods for doing this include the European system of court-appointed, rather than party-retained, witnesses;¹⁸³ the new English system of encouraging parties to select a joint expert and instructing experts that their duty is to the court rather than the retaining party;¹⁸⁴ and concealing from the experts which party has designated them.¹⁸⁵ In the United States, however, the only method other than cross-examination widely used to prevent expert witnesses from providing distorted evidence is to prohibit contingent fees for expert witnesses.¹⁸⁶

179. ALLEN, *supra* note 5; Fisher, *supra* note 5, at 656–58 (discussing the downfall of common-law rules regarding witness credibility).

180. *But see* Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1 (2005) (arguing that disclosing expert witnesses' pay incentives makes the problem worse, mainly because it makes the experts feel more free to be partisan).

181. MODEL RULE PROF'L CONDUCT R. 3.7 (2009). The Rule's main purpose, however, is to avoid the jury confusion that may result from a lawyer's appearing in two different capacities. Arnold B. Enker, *The Rationale of the Rule that Forbids a Lawyer To Be Advocate and Witness in the Same Case*, 1977 AM. B. FOUND. RES. J. 455.

182. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113.

183. *See, e.g.*, Langbein, *supra* note 92 at 835–41. Implementing recommendations going back to Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901), Federal Rule of Evidence 706 now permits court-appointed experts, but it is rarely used.

184. ADRIAN A.S. ZUCKERMAN, CIVIL PROCEDURE ch. 20 (2003) (“[T]he rules seek to promote party co-operation in the employment of experts . . .”).

185. Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174 (2010).

186. *See, e.g.*, *Person v. Ass'n of the Bar of N.Y.*, 554 F.2d 534, 538–39 (2d Cir. 1977) (discussing how the New York legislature passed Disciplinary Rule 7-109C to prevent false testimony which “might result if expert witnesses were paid on a contingent basis”); Swafford v. Harris, 967 S.W.2d 319, 321–22 (Tenn. 1998) (discussing the policy reasons behind prohibiting contingency fees for expert witnesses).

In the case of witnesses who are not experts, the law goes a bit further in its efforts to prevent distorted evidence. It forbids not only contingent fees, but also any fee in excess of the witness fees provided by law, except that a witness can be compensated for expenses and for the value of her time.¹⁸⁷ Because the fees provided by law in many jurisdictions are miserably small,¹⁸⁸ there is little danger that they will encourage potential witnesses to slant their testimony in order to be paid. Rather, the danger is the contrary one—that even truthful witnesses will shun the stand because testifying could reduce their ordinary income. Rethinking witness fees might, therefore, be one of the more effective steps one could take to improve the quality of trials. That witness-payment arrangements find virtually no place in current Evidence scholarship despite their potential impact on the quality of justice vividly illustrates the gaps in that scholarship that the *ex ante* perspective I have sketched here might contribute to filling.

IV. QUESTIONING THE INCENTIVES APPROACH

Although analyzing our Evidence law in terms of incentives and disincentives opens up new perspectives, it also inspires objections. Some of these have already been mentioned along the way, notably that incentives to create and introduce evidence usually exact a price in money or in the loss of other evidence, and that it is hard to weigh the incentive's benefit against its price.¹⁸⁹ I will now briefly discuss four more objections concerning the historical warrant for incentives analysis, its questionable relation to the real world in which incentives are supposed to operate, the incompleteness of an approach limited to incentives and disincentives, and the claim that we should be less interested in incentives for litigative behavior and more interested in incentives for primary conduct outside the courthouse. Despite these objections, I conclude that it is still useful to consider the incentives and disincentives discussed here.

First, the creators of our Evidence law did not rely on anything like the analysis proposed here. As a historical matter, concern with incentives played only a small role in shaping the Anglo-American evidence system. The Best Evidence Principle (which we have seen to involve incentives reasoning¹⁹⁰) did play a part, but so did the view that evidence of dubious value should be excluded regardless of the alternatives, as did claims that

187. 18 U.S.C. § 201(d) (2006); *Hamilton v. Gen. Motors Corp.*, 490 F.2d 223, 229 (7th Cir. 1973); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117 cmt. b (2000).

188. *See, e.g.*, FLA. STAT. § 92.142 (1999) (setting the fee at \$5 per day); MASS. GEN. LAWS ch. 262, § 29 (2008) (\$6 per day); N.Y. C.P.L.R. 8001 (1981) (\$15 per day); TEX. CIV. PRAC. & REM. CODE § 22.001 (2009) (\$10 per day).

189. *See supra* Part III.B (discussing some of the incentives and disincentives for the introduction of evidence).

190. *See supra* Part II (discussing the incentives and disincentives of the Best Evidence Rule).

jurors would overvalue certain evidence.¹⁹¹ However, as is true with most areas of law, the more one investigates the Evidence law of several hundred years ago, the stranger it seems to contemporary concerns, including the concerns underlying this Article.

Our plea must hence be one in confession and avoidance. Whatever the origins of Evidence law, we must live with it or change it today. We must, therefore, try to develop contemporary views of what Evidence law does and should do. And one thing that Evidence law clearly does is to provide incentives and disincentives. Ignoring this cannot be a good way to understand or improve the law.

Second, how can Evidence law create meaningful incentives or disincentives for people who know little about it? For example, the rule requiring more than one witness for a perjury conviction supposedly encourages witnesses to speak freely without fear of baseless prosecution,¹⁹² but how many witnesses have heard of it? As with many purportedly consequentialist rules, the two-witness rule is probably based more on a belief about what *should not* happen—in this instance, conviction of one witness simply because another witness disagrees—more than on a realistic prediction of what *will* happen—in this instance, that witnesses will speak more freely.

However, many people do know about evidentiary rules affecting them, and the rules may well influence their behavior. Surely all large businesses are now aware of the consequences of keeping and destroying records and surely they act on their knowledge.¹⁹³ Likewise, a complaining witness in a rape case will learn about the relevant rape-shield law, if she does not already know about it.¹⁹⁴ That is what lawyers are for. There are, in fact, plenty of actual and potential legal rules that create real incentives affecting the evidentiary system. By the same token, there is ample room for fruitful analysis of incentives and disincentives.

Third, incentives cannot completely explain or justify all evidentiary rules. This is plainly true. Evidentiary rules are, and should be, influenced by

191. See T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 551–52 (1999) (discussing rules that limit the testimony that jurors may hear); Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1151 (1990) (discussing the development of adversary-system reasoning in Evidence law); John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1174–75 (1996) (explaining how the focus of eighteenth-century Evidence law differed from ours); *supra* notes 5–6 and accompanying text (discussing the repeal of rules that disqualified many witnesses from testifying and liberalization of the hearsay rule).

192. *Weiler v. United States*, 323 U.S. 606, 607 (1945); see *supra* text accompanying note 124 (requiring two witnesses or corroboration to support perjury conviction).

193. See *supra* notes 87–88 (discussing motives for adopting a “document retention policy”).

194. See *supra* notes 107–13 and accompanying text (discussing rape shield laws and similar provisions).

factors such as: (1) seeking accurate results, (2) saving time and expense,¹⁹⁵ (3) avoiding the injection of prejudice,¹⁹⁶ (4) preventing harm to vulnerable witnesses,¹⁹⁷ (5) protecting privacy,¹⁹⁸ (6) enabling parties to tell their stories,¹⁹⁹ and (7) leaning against more harmful results such as the imprisonment of the innocent.²⁰⁰ Yet creating appropriate incentives and disincentives is also an important feature of our evidentiary system. Indeed, creating incentives often overlaps with other concerns like protecting vulnerable witnesses and shunning injections of prejudice, both of which make witnesses more willing to testify.

Fourth, granting that we should be concerned with incentives, why should we be limited to incentives that affect the litigation process? What about rules that reach outside the courthouse to affect what happens in the real world? Is not law's ultimate concern encouraging people to deal properly with their fellows, not providing sanctions for those who fail to do so? And should not the work of Evidence scholars concerned with incentives focus more on that ultimate concern?

Some evidentiary rules are indeed intended to influence conduct in the real world. Most of these are too familiar to require much discussion here. The privilege rules are concerned with fostering access to lawyers, ministers, psychotherapists, and others—or at least, as we have just seen, they seek to protect those who seek such access from adverse consequences.²⁰¹ Other rules seek to encourage people to make repairs after accidents²⁰² and to reach settlements out of court.²⁰³ The constitutional exclusionary rules are likewise often justified as prophylactic measures to discourage

195. FED. R. EVID. 403; *see also* BROWN ET AL., *supra* note 49, § 36.

196. FED. R. EVID. 403, 610; *see also* Dawson v. Delaware, 503 U.S. 159 (1992) (finding that it was a constitutional error to admit irrelevant evidence of the defendant's membership in the Aryan Brotherhood).

197. Maryland v. Craig, 497 U.S. 836 (1990) (holding that the Confrontation Clause is satisfied when a child testifies to abuse through a one-way circuit television).

198. FED. R. EVID. 501.

199. Old Chief v. United States, 519 U.S. 172 (1997) (explaining the importance of allowing each party to present a coherent and persuasive story).

200. *See* LARRY LAUDAN, TRUTH, ERROR AND CRIMINAL JUSTICE: AN ESSAY IN LEGAL EPISTEMOLOGY chs. 1–4 (2006); STEIN, *supra* note 48.

201. MUELLER & KIRKPATRICK, *supra* note 41, ch. 5; *see supra* note 192 and accompanying text (arguing that purportedly consequentialist rules often have other foundations).

202. FED. R. EVID. 407. For a brilliant critique of the incentives and other grounds invoked to support this rule, with implications for other rules as well, see Dan M. Kahan, *The Economics—Micro-, Behavioral, and Political—of “Subsequent Remedial Measures” Evidence*, 111 COLUM. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1561843>.

203. FED. R. EVID. 408–10. Many states now also seek to foster apologies by excluding them from evidence. *See, e.g.*, COLO. REV. STAT. § 13-25-135 (2009) (limiting the admissibility of statements made by health-care providers and their employees); MASS. GEN. LAWS ch. 233, § 23D (2008) (excluding from evidence as admissions of liability benevolent statements, writings, or gestures pertaining to accident victims); WASH. REV. CODE § 5.66.010 (2008) (same).

unconstitutional behavior by depriving prosecutors of its fruits.²⁰⁴ Although all these rules are important, they also tend to be narrowly focused, so there is little difficulty in treating separately rules that seek to encourage or discourage conduct in the courthouse from those directed outside it. Many of them also do not get far outside the courthouse—this is true of the rules about settlements and repairs, about constitutional decisions concerning the gathering of evidence in criminal cases, and in some instances of the attorney–client privilege.

A more far-reaching challenge comes from Judge Richard Posner and Chris Sanchirico, who have sought to develop differing theories about the connection between the legal system, including both procedural and substantive law, and primary conduct in the real world. Judge Posner, for example, as part of a general theory of Evidence law and the judicial process, suggests that the marital-communications privilege may encourage spouses to commit crimes, and that the intensive use of expert testimony may divert academics from their proper scholarly roles.²⁰⁵ Sanchirico, focusing on specific bodies of evidentiary law, suggests that searching for and sanctioning evidence tampering and spoliation may sometimes be more trouble than it is worth in terms of deterring future misconduct.²⁰⁶ And both have argued that the use of prior convictions and bad-character evidence in criminal trials is properly restricted to preserve the incentive to reform of those who have erred in the past by shielding the jury from their past misdeeds—though it is also true that starting with two strikes against one could, on the contrary, increase one’s incentive to play right.²⁰⁷

It would be easy to multiply these examples of evidence rules that might affect primary conduct. The dying declaration exception to the hearsay rule²⁰⁸ might give criminals an incentive to keep victims alive, or contrariwise might spur them to finish off victims before they could talk to the police.²⁰⁹ Strong application of the *Daubert* “gatekeeper” requirements to exclude expert evidence in suits against drug manufacturers²¹⁰ might make

204. *Mapp v. Ohio*, 367 U.S. 643, 657–60 (1961); *see also supra* note 135 and accompanying text (discussing U.S. Supreme Court cases that discussed various exclusionary rules).

205. *See* Posner, *supra* note 3, at 1531, 1540.

206. *See* Sanchirico, *supra* note 156, at 1287–303 (concluding that the law of evidence tampering is troublesome and inefficient in terms of deterrence).

207. *See* Posner, *supra* note 3, at 1483–84 (discussing the effect of deterrence resulting from admitting character evidence); Sanchirico, *supra* note 13, at 1259–66 (explaining the argument for the restriction of character evidence). Indeed, allowing bad character evidence might discourage people from committing the first offense.

208. FED. R. EVID. 804(b)(2).

209. *See* Sanchirico, *supra* note 88, at 1372–82 (suggesting that sanctions against spoliation drive organizations to destroy evidence more thoroughly to prevent detection).

210. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *see also* *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 136 (1997) (upholding a trial judge’s gatekeeper role when excluding certain expert medical testimony).

manufacturers more willing to introduce new drugs, including some that might later turn out to be hazardous. The coconspirator exception to the hearsay rule²¹¹ might fracture trust among conspirators—which some see as a major goal of conspiracy law²¹²—by making each legally knowledgeable conspirator fear that the statements of other conspirators in pursuit of the conspiracy could be used as evidence against him. “Rape shield” laws²¹³ might encourage people to have sex by protecting their sexual history from disclosure.

One problem with analyses of this sort is that the connection between evidentiary rules and the primary behavior they supposedly encourage or discourage is at best tenuous.²¹⁴ Whether someone released from prison avoids further crime is surely far more affected by personal, social, and economic factors than by his knowledge (probably nonexistent) of the “grotesque structure” of the reputation-evidence rules.²¹⁵ Often, changing one’s factual assumptions can reverse the hypothesized incentive, and empirical research on the actual effects of evidence rules on primary conduct will rarely or never be possible. No doubt the legal system does affect the conduct of people and organizations, and the effect will tend to be greater when the results are more accurate.²¹⁶ But anyone trying to affect behavior in the real world would be far better advised to change the liability rules, the measure of damages, and the attorney-fee rules than to tinker with the rules of evidence.

Another problem with the primary-conduct approach to evidentiary incentives is that, if viewed as a basis for change, it would tend to break down the trans-substantive rules now in effect. The incentives created by *Daubert* and its successors, for example, might have very different power depending on whether *Daubert* is invoked against drug manufacturers, manufacturers using arguably toxic chemicals, or tire makers,²¹⁷ to say nothing of criminal

211. FED. R. EVID. 801(d)(2)(E).

212. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1369–80 (2003); Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 622 (2004).

213. FED. R. EVID. 412.

214. Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 46 B.C. L. REV. 949, 1013 (2006). For other critiques of Judge Posner’s article, see Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1419 (2001); and Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1691 (2001).

215. *Michelson v. United States*, 335 U.S. 469, 486 (1948); see also Michael Pinard, *Collateral Consequences of Criminal Conviction: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010) (describing the enormous burdens that our law and society place on released convicts).

216. See Posner, *supra* note 3, at 1483 (“More accurate factfinding increases deterrence of wrongful conduct.”). But see Lempert, *supra* note 214, at 1643–52 (disagreeing with Posner’s analysis).

217. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999); *supra* note 210 and accompanying text (describing the potential effects of applying *Daubert* in the context of drug manufacturers).

prosecutors. Even when incentives have similar force, whether they are desirable in different categories of cases would depend on other factors such as the incentives already in effect for persons in each category. Were we to seek to maximize the incentives for socially desirable primary behavior, we might therefore have to fragment some of the evidentiary rules. Also, to the extent that we shape evidence law with the goal of affecting primary conduct, there is a strong argument that state law should govern the incentives and disincentives in cases where the claim arises under state law.²¹⁸ If state law decides what measure of damages will best deter tortious conduct,²¹⁹ why should it not decide what evidentiary incentives are appropriate?²²⁰

None of this is meant to criticize scholarly exploration of the primary-conduct perspective on Evidence law, which could well continue to yield interesting insights such as those of Judge Posner and Professor Sanchirico. After all, there is no reason why the same evidentiary rule should not create incentives for different kinds of conduct. But so far it does not seem that this approach has produced persuasive rationales for existing doctrine, or persuasive grounds for new doctrine. Of course, some might say the same of the approach sketched out in this Article. At the very least I would maintain that the problems with the approach outlined here are present in spades in the primary-conduct approach.

V. CONCLUSION

This Article has described an unsuspected variety of evidentiary incentives extending well beyond those created by the adversary system and by rules implementing the Best Evidence Principle. The law can promote or discourage the creation, preservation, introduction, and destruction of evidence in many different ways. Some of these are clearly intended, and others not; some of the incentives are useful, and others perverse. The law in question is not just Evidence law in the traditional sense but includes many other types of law. Indeed, one of the main lessons of an *ex ante* study of Evidence is that traditional Evidence law covers only part of what those interested in our evidentiary system should be considering.

These effects should be taken into account as we seek to understand or to change Evidence law and other law affecting evidence. I make no claim that analyzing evidentiary incentives can provide a unitary theory of

218. Margaret A. Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*, 64 LAW & CONTEMP. PROBS. 289, 320–22 (2001).

219. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996).

220. To the extent evidentiary incentives are embodied in the Federal Rules of Evidence, they could not be invalidated under the *Erie* doctrine, *Hanna v. Plumer*, 380 U.S. 460 (1965), but those who write the Rules could nevertheless decide to defer to state Evidence law in claims governed by state law, as they did with respect to privilege in Federal Rule of Evidence 501.

Evidence law. On the contrary, that law seeks to reconcile a number of goals.²²¹ What is important is that we consider not just the impact of evidentiary principles on the particular case before a court. Rather, we must consider evidentiary principles' broader impact—the way they can reach forward to affect peoples' behavior in anticipating, conducting, litigating, and settling future disputes.

221. See *supra* notes 195–200 and accompanying text (listing factors that should influence evidentiary rules). Whether Evidence law's reconciliation of competing goals is plausible or logical is another question. See Leubsdorf, *supra* note 1 (noting that current law applies a complex structure of rules with questionable premises).