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MAKING THE LAW OF FACTUAL DETERMINATIONS MATTER MORE

Randolph N. Jonakait *

I. INTRODUCTION

Evidence law should matter less. Evidence law is only a segment of a much larger field, the law of factual determinations. Scholars, lawyers and judges concentrate too much on evidence law and ignore many important questions concerning the best way to determine facts. Because we need the most accurate determination of facts, we need evidence scholars less and fact-determination scholars more.

II. THE IMPORTANCE OF ACCURATE FACTUAL DETERMINATIONS

Accurate factual determinations are crucial to the law. Without them the substantive law cannot be enforced. Contract law may excuse the nonperformance of a contract when a certain condition prevents the agreement's fulfillment. If, however, we wrongly determine whether that condition occurred, the substantive law does not control the outcome. The law can debate what liability a manufacturer should bear when its goods cause harm, but unless we accurately ascertain the source of plaintiff's injury, the debate will not matter. The retributive and rehabilitative aspects of the criminal law must fail when we incorrectly determine whether the accused was a robber. Unless litigation's primary purpose is to determine facts accurately, it is only a ritualized way of deciding disputes, and substantive law has little true meaning.¹

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1. See Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 243 (1966):

Truth finding must be a central purpose whatever the tribunal. Unless we are to assume that the substantive law is perverse or irrelevant to the public welfare, then its enforcement is properly the primary aim of litigation; and the substantive law can be best enforced if litigation results in accurate determinations of facts made material by the applicable rule of law. Unless reasonably accurate fact finding is assumed, there does not appear to be any sound basis for our judicial system.

Cf. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1358 (1985):

Successful projection of a legal rule depends on a court's ability to cast a verdict not as a statement about the evidence presented at trial, but as a statement about a past act—a statement about what happened. . . . The judicial process must somehow accomplish an inductive leap from the evidence presented to a statement about a past

Few who study law, however, give much thought to whether the accuracy of our factual determination system can be improved. The concern is largely beneath all but evidence scholars. While evidence law does proclaim a concern for accurate verdicts,² evidence law is so narrow that its improvement can only have a limited effect on improving factual determinations.

III. THE LIMITED NATURE OF THE BASIC EVIDENTIARY DISPUTE

Those involved in an evidence dispute basically argue over whether the trier of fact can properly assess information that a party seeks to present.³ The debate's proper resolution does seem to affect accurate fact determinations. If the jury is presented evidence that will be misused, verdict accuracy will suffer. If we prevent the jury from hearing information that can be properly weighed, the likelihood of that accuracy will also suffer. The correct evidentiary decision, then, seems important for producing accurate factual determinations. In fact, however, the "correct" ruling, while giving the illusion of a better outcome, often fails to improve accuracy.

event. Only then can the public accept the verdict and the judicial sanction as exemplifying the legal rule and affirming its behavioral message.

2. See FED. R. EVID. 102: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

3. Based on a belief that the adversarial process through cross-examination, the presentation of conflicting or contradictory data and argument can expose the flaws in the proffered information and that the jury can correctly assess such material, modern evidence law generally favors the admission of greater amounts of information. The probability of an accurate verdict is likely to increase as the jury can consider more of the relevant data. This logic has propelled the demise of incompetency rules, the expansion of hearsay exceptions, the admission of a broader range of expert opinions and other changes. David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 956 (1990). "[C]ourts and codifiers have come to believe that truth is likely to emerge when more, rather than less, evidence is heard by the trier of fact. This has led to a decided bias toward admissibility rather than exclusion and the abrogation of many per se exclusionary rules." *Id.*

The usual argument against admitting some sorts of data is that the jurors are likely to be unfairly prejudiced or confused by it. See FED. R. EVID. 403. Since such evidence will tend to make the fact finder decide on something other than the legally probative information, a factual decision truly enforcing the substantive evidence is less likely to result when the prejudicial or unweighable evidence is admitted. Thus, other crime evidence may be relevant, but its unfair prejudice potential can lead to worse factfinding if it is admitted. Jurors may not be able to understand and assess novel and other scientific evidence, and its admission may make verdicts less accurate. Hearsay, because it cannot be effectively challenged, will not be correctly evaluated. See FED. R. EVID. 801. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.*

Assume, for example, that a witness presents information X and that, in reality, information X is not completely reliable. The usual debate in evidence law would be whether the evidentiary devices granted the opponent are capable of revealing that untrustworthiness to the jury. If, as a result of the granted impeachment tools, the jury discounts information X, the evidence system—from its perspective—has worked properly. The information was discounted, and the verdict, accordingly, was sounder than if the opponent had not been granted those devices.

This ends the evidentiary inquiry. Its analysis remains confined to the proffered information. It does not ask a key question: what if instead of presenting the untrustworthy X, a more reliable version of it could have been, but was not, presented? The correct evaluation of untrustworthy X does not lead to a better fact determination than if a better version of X had been tendered. Whether untrustworthy X can be evaluated is much debated, but we seldom ask how we might improve the evidence's inherent quality or reliability. That possibility of improvement, however, ought to be a crucial question for those concerned about accurate factfinding for surely "[m]ore accurate and complete 'facts' will lead to more accurate results no matter how that evidence is assimilated and assessed."⁴ This is a concern that cannot be thoroughly addressed by evidence law, for much of the possible improvements would have to occur outside the courtroom and outside the present domains of evidence law.

IV. MORE ACCURATE AND COMPLETE EVIDENCE

If the adversary process works, as some might contend, to compel advocates to produce the most accurate and complete information, then an expanded debate about improving the quantity and quality of evidence is not necessary. This claim recognizes that the advocate seeks not merely to introduce evidence, but to win the case. Since the jury is more likely to be persuaded by a full and reliable form of the information than by an incomplete and untrustworthy version, the advocate will naturally present the most complete, trustworthy information available, and no further prodding of the legal system is necessary to assure such a presentation. Unfortunately, while this theory may sometimes be correct, it has flaws.⁵

4. Randolph N. Jonakait, *Stories, Forensic Science, and Improved Verdicts*, 13 *CARDOZO L. REV.* 343, 351-52 (1991).

5. At least some of the time the adversarial system will not produce the most accurate or complete information because of the lawyers' mistakes and choices. The parties may have to take the risks inherent in their advocates' tactical choices and abilities, but it does not follow

Adversarial pressures, for example, cannot force the presentation of the more trustworthy or complete information when neither jury nor advocates are aware that the proffered evidence is not as reliable or comprehensive as it ought to be. That is often the situation, as eyewitness testimony illustrates.

Most often we can do nothing to make the perceptions of witnesses more reliable and complete, but in spite of the protestations of many of us when we present an unsavory character in court, we do not really take our witnesses as we find them. Attorneys and other investigators interview witnesses before the trial, and those interviews, as much psychological research demonstrates, affect what the witnesses remember and relate.⁶ The initial perceptions, perhaps, cannot be improved, but reports

that society, which has not selected the attorneys and cannot control or influence them like the parties may, should have to bear those same risks from the performances of the attorneys. If the proper application of the substantive law were only an issue for the disputants, perhaps we need not be concerned when the advocate, for whatever reason, only produces the less trustworthy information, but society also has its own stake in accurate verdicts. The community, for example, cares whether the accused is correctly found to be the murderer. At the most elementary level, the killer set free can kill again, and the innocent imprisoned wastes tax money. Even though I am not a litigant, the wrong resolution of whether a product caused harm can make me pay a higher price than I ought for future purchases or, on the other hand, increase my chances of being harmed by a dangerous commodity.

We all have a stake in the most accurate fact-determinations, and this interest is not necessarily the same as that of the parties. A system that simply defers to the parties' choices may not be the best one for society generally. Cf. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196 (1991) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 296 (Vintage ed. 1945)):

For whose benefit did the right to jury trial exist? For De Tocqueville, the answer was easy—the core interest was that of the Citizens, rather than the parties: “I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them”

6. In one set of psychological experiments, subjects were shown a film of a moving automobile. Some were then asked, “How fast was the white sports car going while traveling along the country road?” Others were asked, “How fast was the white sports car going when it passed the barn while traveling along the country road?” No barn was in the film. A week later, all the subjects were asked whether they remembered seeing a barn in the movie. Of those given the misinformation, 17% remembered the nonexistent structure, while only three percent who had been asked the neutral question said they saw it. ELIZABETH F. LOFTUS, *EYEWITNESS IDENTIFICATION* 60 (1979).

Less blatant questioning can also have an effect. One set of subjects who had viewed a film of a car accident was asked to estimate the speed of the cars when they “smashed.” The other set was asked to give the speed when they “hit.” Later, all subjects were tested on their memory of seeing broken glass in the collision. Although none was evident, nearly 33% of those whose questions included the word “smashed” reported broken glass; only 14% of the other set did. *Id.* at 77-78.

Researchers have discovered limitations on these distortions. For instance, the memory can be affected mainly about peripheral items, not central ones. *Id.* at 63. Furthermore, once a witness resists blatantly false information, resistance to other misleading suggestions also increases. *Id.* at 125. The timing of the suggestive questioning also affects the distortion. The

about them can be made in a better or worse fashion, and the person eliciting the information influences it.

While the interviewer can consciously try to manipulate the report, most often, the interviewer probably has an unconscious effect on what is related.⁷ Either way, the result can be a less complete and accurate "memory" than might otherwise have been reported. That a better version of the resulting testimony could have been produced, however, will not be apparent to either the opponent or the trier of fact, and thus, the adversary system will not compel the presentation of the more trustworthy and comprehensive evidence.

Evidence law will not change this situation. If such evidence is going to be improved, the improvement has to occur before the trial begins and before evidence law plays its role. To make the presented information more accurate and complete, we must view the fact-determination system as encompassing more than evidence law. Initial interviews have not been a concern of evidence law, but they are truly part of the fact-determination system. If we could structure those interviews to increase the likelihood that eyewitness reports are as complete and reliable as possible, we would increase the likelihood that our factual determinations would be accurate.⁸

Even though that conclusion is obvious, the law rarely considers the possibility. Law schools may increasingly teach "interviewing skills," but legal scholarship concerning recollection solicitation hardly exists. We publish much more on the hearsay rule, for example, than on interviewing, even though interviewing may be more important for accurate verdicts than another consideration of the admissibility of out-of-court statements.

greater the time lapse between the perception and the suggestion, the greater the likelihood of memory alteration. *Id.* at 66. In other words, attorneys interviewing witnesses some time after the event are more likely to produce distorted memories than investigators asking questions shortly after the incident.

The mere wording of a question designed to elicit recall can affect the recollection given. For instance, one half of a group was asked how "tall" a person was and gave an average answer of 79 inches. The other half was asked how "short." The average answer was now 69 inches. *Id.* at 94-95. Once an answer is stamped upon a memory, subsequent attempts to recall the memory may not elicit the original memory, but only the response to an earlier question. *Id.* at 86.

7. For examples of child witnesses being manipulated by pretrial interviews, see Margaret S. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. (forthcoming 1992).

8. Psychological research suggests that the investigator interested in getting the most complete and accurate recollection should first solicit a free narrative and then follow up with questions to fill in the gaps. LOFTUS, *supra* note 6, at 91-92.

We ignore this area, the reply might be, not because the importance is unseen, but because its study is the domain of social scientists. This response might suffice for evidence scholars, who perhaps can ignore what happens outside their narrow ambit, but those interested in analyzing and improving our fact-determination process cannot be so limited. If the methods of soliciting information affect the quality of information produced at trial, and they do, then those methods are not outside the legal province. Fact-determination scholars need to integrate the knowledge and insights from all other fields that can aid in making our process better. Just as those concerned about antitrust or products liability law cannot ignore economics, but must utilize economic learning in their legal analysis, those concerned about factual determinations must delve into fields with insights about information generation, collection, presentation and evaluation. Such knowledge, at a minimum, will help lawyers be more self-reflective about their own conduct and enable them to generate more reliable and complete evidence.

That should, however, not be the only use of such knowledge. It should also be assessed to see if behavior outside the courtroom can be regulated to best assure the most complete and accurate presentation of information to the fact finder. To some this will appear like a wasted effort because regulation of this aspect of the fact-determination process seems impossible. At best, however, this conclusion is premature because the issue has not been meaningfully addressed, but more important, examples exist, such as pretrial identifications, demonstrating that we could improve the recall process but choose not to.

Even though such identification procedures are an important method of fact recall, evidence law is little concerned with their study and regulation.⁹ Instead, the area has been relegated to constitutional law.¹⁰ The constitutional strictures may help to improve the quality of

9. The Federal Rules of Evidence only address the subject by exempting prior identifications from the ban on hearsay. *See* FED. R. EVID. 801(d)(1)(C): "A statement is not hearsay if . . . [t]he declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person. . . ."

10. The Sixth Amendment to the United States Constitution requires that the accused have an attorney at some lineups. *United States v. Wade*, 388 U.S. 218, 224 (1967). *Wade* held that a post-indictment lineup is a critical stage of the prosecution at which the accused is entitled to the aid of counsel. *Id.* at 225. *Kirby v. Illinois*, 406 U.S. 682 (1972), held, however, that an accused did not have to be afforded counsel at a lineup held before the initiation of judicial criminal proceedings, and *United States v. Ash*, 413 U.S. 300 (1973), held that an accused was not entitled to counsel at any photographic identification.

The only constitutional requirement directly affecting the quality of an identification procedure is the due process requirement forbidding untrustworthy in-court identifications based

pretrial identification procedures,¹¹ but they are incomplete. They do not require the best possible identification methods. All sorts of identification procedures with varying quality can pass constitutional muster.

Evidence law's only concern here is to make sure that the advocates have the opportunity to expose the strengths and weaknesses of the identifications so that the jury might properly assess the identification. If juries reject identification evidence because it is not being done in the most accurate manner, perhaps better procedures might emerge in the future, but such improvement would only be a remote by-product of evidence law. That law is satisfied if the presented evidence is correctly evaluated even if it leads to the discounting of evidence that could have been made better.

Those working for the best possible fact-determination system, however, cannot be so contented. Better verdicts result not just by improving the process whereby the merits of an identification are exposed and weighed at trial, but also by improving the identification methods themselves.¹²

If improvements are possible, we then need to explore the devices, if any, that can best assure generation of the more accurate information.

upon unnecessarily suggestive out-of-court identification procedures. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

11. See Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1370-71 (1977) (contending that because of Supreme Court decisions, lineup procedures have improved):

Police today make better records of the lineup and follow regulations that are designed to provide a fairer identification procedure. The improvements have been instituted without regard to whether the lawyer is present, and they are likely to continue even though *Kirby* eliminates, for most cases, the possibility that a lawyer will be present.

Cf. Frank T. Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 UCLA L. REV. 339, 362-67 (1969) (contending that defense lawyers at lineups, because of their passive role and lack of expertise in how to conduct most accurate identifications, will do little to improve identification procedures); see also Randolph N. Jonakait, *Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite?*, 52 U. COLO. L. REV. 511, 515 n.15 (1981):

[R]egardless of how specifically opinions define what is unnecessarily suggestive, a police officer can never know whether he is violating a suspect's constitutional rights when he is conducting an identification procedure. That can be determined only when the indicia of reliability are examined. . . . The Court's approach leaves the officer without any firm rules as to what conduct violates the Constitution. If the officer has no way of knowing what actions are forbidden, he can hardly be deterred from those actions.

12. For various possibilities, see LOFTUS, *supra* note 6, at 144-52; Brian L. Cutler & Steven D. Penrod, *Improving the Reliability of Eyewitness Identifications: Lineup Construction and Preservation*, 73 J. APPLIED PSYCHOL. 281, 288-89 (1988); Jonakait, *supra* note 11, at 525; Gerald D. Lefcourt, *The Blank Lineup: An Aid to the Defense*, 14 CRIM. L. BULL. 428, 430 (1978).

For example, if research discloses more desirable identification procedures, we could of course consider another exclusionary rule that would forbid the presentation of identification testimony unless the better identification methods were used. This, however, should not be the only remedy analyzed. Perhaps the situation would improve with mandatory education programs for those who most often conduct identifications. Perhaps we should require that as many identifications as possible be videotaped with the thought that a good record of what occurred would encourage the better practices. And so on. If many good legal minds truly examined this situation, useful remedies and prophylactics might be proposed. Today, however, little such analysis is attempted, and the fact-determination system thereby suffers.

Identifications are, of course, just an illustration. We must comprehensively consider all possible ways to make evidence more accurate, not just ways to evaluate evidence better. The regulation of evidence generation should not just be abandoned to constitutional law.¹³ We should be attempting to make sure evidence is as accurate as possible in all situations, not just deterring a few bad practices in a few criminal cases.

Such a comprehensive examination will probably simultaneously reveal that the quality of much information cannot be improved and that large areas of possible improvement exist. For example, if videotaping identifications were found to improve identification methods, such recording might also improve interviews generally. Surely if we had a rule that all discussions with witnesses by attorneys or investigators be videotaped and the tapes available at trial to the opponent, enormous changes in interviewing practices would take place.¹⁴

13. For example, Anthony S. Perise, *Maryland v. Craig: Ignoring the Letter and Purpose of the Confrontation Clause*, B.Y.U. L. REV. 1093, 1104 (1991), suggests that the Sixth Amendment's Confrontation Clause be interpreted to require taping of interviews demonstrating nonsuggestive questioning by government authorities as a condition of admitting hearsay. *Id.* The consideration of such a possibility, however, should not end if constitutional interpretation rejects the suggestion. Rather, it should still be examined to see if its adoption would improve the fact-determination process. Berger, *supra* note 7, at nn.187-88.

14. Some jurisdictions have required procedural safeguards for the elicitation of recall from potential witnesses under hypnosis. The Supreme Court has summarized:

One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist and the subject. . . . Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked. Such guidelines do not guarantee the accuracy of the testimony, because they cannot control the subject's own motivations or any tendency to confabulate, but they do provide a means of controlling overt suggestion.

The point, of course, is not just that we can improve factual resolutions by finding schemes to produce better interviews or identifications.¹⁵

Rock v. Arkansas, 483 U.S. 44, 60 (1987) (citations omitted). See also *id.* at 58 n.16, for a listing of jurisdictions that have established some of these procedural safeguards.

15. Experts provide another example. We argue about the appropriate areas for expert opinions; the information the expert can rely on and reveal to the jury; and the special standards, if any, for restricting expert opinions based on novel procedures. These questions have a core concern—will the jury be able to assimilate and assess the expert opinion? The debate, however, never directly confronts what ought to be a crucial question—are there direct ways to make the expert opinions better?

Assume the doctor performs a diagnostic test that is accurate 85% of the time when its results indicate the presence of cancer. If another testing method for the same malignancy has a 95% accuracy rate, an evidentiary debate might ensue with the opponent claiming that the testimony is inadmissible because the opinion based upon the 85% test is not using the type of data reasonably relied upon by experts in the field. See FED. R. EVID. 703:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The proponent would counter that the existence of a different test method only goes to the weight of the resulting opinion. However this dispute is resolved, its narrowness should be apparent. The choices at trial are between allowing the jury to hear an opinion based upon the 85% test or not hear the opinion at all. At this point, we cannot reach back in time to make sure that the more accurate test was done, but surely the best result would be to have had the jury hear the opinion based upon the more accurate method.

Here again, the adversary system's limited ability to assure the most accurate verdicts is apparent. While in theory the adversarial forces ought to bring forward the better testing, they do not necessarily do so, for adversaries often do not control the generation of the evidence. In most circumstances, the most that the adversarial forces will do is pressure the advocate into offering the most reliable evidence presented to the advocate. The adversary system will not necessarily cause the generation by others of the better evidence. This conclusion is illustrated by forensic science. Many forensic laboratories fail to use the best procedures for producing the most accurate results. See Randolph N. Jonakait, *Forensic Science: The Need for Regulation*, 4 HARV. J.L. & TECH. 109, 155-64 (1991), for a discussion of some of the routine practices in the laboratories that tend to produce less than the best results. Even so, the pressures of the adversary system have not induced the labs to use better procedures:

[The adversary] system often does not operate effectively in assessing science. An adversary process that performs properly requires lawyers who can effectively expose weaknesses in scientific evidence and a judiciary not overawed by science. These qualities are often absent because lawyers and judges usually lack high levels of scientific training and are thus unable to challenge or evaluate evidence.

Id. at 167-68.

Furthermore, even if the scientific evidence were adequately challenged, "there is little reason to believe that jurors can make adequate assessments about the quality control programs of labs when they weigh scientific evidence." *Id.* at 171. Finally, even if the jury discounts the scientific evidence, that conclusion is not communicated in a general verdict. "Since the jury's determination of scientific evidence reliability is never definitively known, it is not likely to spur better quality." *Id.* at 172.

If the accuracy of this information is to be improved, it is more likely to come from sources such as regulation of forensic laboratories than from the adversary system. See *id.* at 172-91, suggesting regulations that could improve quality in forensic science laboratories.

Instead, we need to analyze and reform more than what falls within the limited confines of evidence law.¹⁶ Important questions for producing the most accurate fact-determination system are not being meaningfully addressed.

V. THE CREATION OF EVIDENCE

Just as we need to explore the generation of a more accurate version of the evidence presented at trial, we also need to examine what information does not get presented, but ought to. In other words, what evidence should be created that now is not, and how can that be accomplished?

Interestingly, the idea that certain evidence ought to be created is seldom explored even though such creation would often help the jury to evaluate more accurately the proffered evidence. For example, even if the recording of interviews did not improve the methods by which information recollection was elicited, the recordings presented at trial ought to allow the jury to better weigh the presented testimony.¹⁷

16. Of course, we should also continue to explore evidentiary doctrines, especially those which tend to cause less than a complete presentation of information. The rules that allow hearsay to be admitted without producing the available declarant can do that. For example, in *United States v. Inadi*, 475 U.S. 387 (1986), the Supreme Court held that a prosecutor could introduce co-conspirator hearsay consistently with the Constitution without calling the declarant. The Court reasoned that the accused could always produce the declarant. *Id.* at 399-401. As a result of this scheme, less information will be presented to the jury. See Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 617 (1988):

[T]he declarant was not produced because neither side wanted to take the risks inherent in calling him. . . . Since the declarant was not under the control of either party, no one could be sure what he would say. If, on the one hand, it had been certain that the declarant would testify detrimentally to the defense, the prosecution would have called him. If, on the other, he would have testified in favor of the accused, the defense would have had him testify. Instead, neither side produced him because it was unclear to all how the witness would testify or how the jury would perceive that testimony. Although the testimony should have been useful for a factfinder trying to ascertain the truth, neither party was sure whether the testimony would be helpful *to its case*.

From the perspective of the fact-determination system, rules that make it more likely that less relevant evidence will be presented to the jury make little sense.

17. For example, the information concerning how well forensic laboratories perform analyses is seldom now available because these laboratories do not take part in proficiency testing programs measuring their capabilities. The creation of this additional evidence would improve factual determinations.

Juries should also know how particular laboratories and analysts perform on proficiency testing. When jurors determine what weight to give scientific evidence, they should have as much pertinent information as possible. Jurors' conclusions about the weight to be given to a fingerprint expert's opinion may logically change when they learn that the expert made mistakes ten percent of the time on proficiency testing. Without disclosure of those proficiency testing results, a proper assessment of weight cannot be made. Better verdicts will be obtained if the results of proficiency tests are known. Furthermore, attorneys, knowing that proficiency testing results will be

Instead of comprehensively examining that topic, we have, as illustrated by *Delaware v. Fensterer*,¹⁸ largely consigned it to a constitutional nether world. At the trial there, an "expert" testified that a hair found on the supposed murder weapon had been forcibly removed from the victim.¹⁹ He believed in three techniques of determining forcible removal, but neither his notes nor his memory revealed which method he had used.²⁰ The procedure he employed was important because a defense expert maintained that one of those three methods was scientifically invalid and did not indicate forcible removal.²¹

The Delaware Supreme Court found a violation of the Sixth Amendment's Confrontation Clause.²² "The primary interest secured by the Clause is the right of cross-examination. . . . Effective cross-examination and discrediting of Agent Robillard's opinion at a minimum required that he commit himself to the basis of his opinion."²³ The court's ruling would not have created a significant problem for experts in the future; they just would have had to take more complete notes. In other words, the problem would have been solved by the relatively easy creation of additional evidence. The Supreme Court, however, reversed.²⁴ "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [forgetfulness, confusion or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness's testimony."²⁵ The Court, therefore, refused to establish a Sixth Amendment rule that would have led to the creation of more evidence.²⁶

presented to the jury, will be concerned about the quality of the laboratories they use. Disclosure of testing results to jurors will provide a powerful incentive for prosecutors and defense attorneys to choose the best laboratories and to exert pressures for improved performances.

Jonakait, *supra* note 15, at 189-90.

18. 474 U.S. 15 (1985).

19. *Fensterer v. State*, 493 A.2d 959, 963 (Del.), rev'd, 474 U.S. 15 (1985).

20. *Id.*

21. *Id.* at 964.

22. *Id.* at 963-64.

23. *Id.*

24. *Delaware v. Fensterer*, 474 U.S. 15 (1985).

25. *Id.* at 21.

26. *Id.* at 22; *see also* *Idaho v. Wright*, 110 S. Ct. 3139 (1990). In determining whether statements made by a claimed victim of child sexual abuse violated the Confrontation Clause, the Court rejected the approach previously used by the Utah Supreme Court, which apparently would have excluded the statements if they had not been recorded on tape. *Id.* at 3145.

[W]e reject the apparently dispositive weight placed by [the Utah] court on the lack of procedural safeguards at the interview. . . . Although the procedural guidelines propounded by the court below may well enhance the reliability of out-of-court statements of children regarding sexual abuse, we decline to read into the Confrontation

This decision might be correct constitutionally. It also may be sensible from the evidentiary perspective trying to make the best resolution of a specific dispute.²⁷ When the issue is whether a particular person is guilty, the jury perhaps may be more likely to resolve the factual dispute accurately when it considers more evidence rather than less. It may be more likely to reach the right result hearing the expert opinion, which can be discounted, than not having the chance to correctly weigh the opinion at all, which occurs if the testimony is excluded because of a Confrontation Clause violation.

If, however, we do not limit our vision to the trial, but take the broader look, we ask a different question. Is a fact-determination system more likely to be accurate when the experts are able to reveal the basis for their opinions or when they cannot? The answer, of course, is easy. Once we realize that we would prefer a system where the information is available, we should ask: how can we modify our present fact-determination methods to best assure that result?²⁸ That question has not been comprehensively addressed. Much more effort is spent considering a mundane topic such as authentication, because it falls within evidence law, than the important subject of what evidence ought to be created and how that might be accomplished. The fact-determination system suffers as a result.

VI. NON-EVIDENTIARY FORCES THAT AFFECT THE VERDICT

We need to examine vistas beyond that of evidence law. This view will encompass not just the processes that generate information for our trials to see how, if possible, they can be improved, but much more. For example, our system is premised on the principle that the trier of fact should determine facts based upon the available information. When the

Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant.

Id. at 3148.

27. Confrontation Clause determinations often coincide with evidence law because modern Supreme Court interpretations have made the Confrontation Clause subordinate to evidence law. See Jonakait, *supra* note 16, at 570-74.

28. A question related to what evidence should be created is what information and materials ought to be preserved. While some legal principles such as discovery rules and spoliation doctrines do affect the preservation of evidence, this topic, also, has been too often treated as a matter of constitutional law. See *Arizona v. Youngblood*, 488 U.S. 51 (1988), where the Supreme Court held that the accused's due process rights were not violated when the government destroyed potentially useful material unless the accused could show that the failure to preserve was done in bad faith. Once again, while such a result may be correct from the constitutional and evidentiary perspectives, it should not end consideration of the subject from the viewpoint of the fact-determination process.

verdict is shaped by other sources, the system is not working as well as it ought to.

Evidence law, almost as a matter of definition, does not study these non-evidentiary pressures. Anecdotes, at least, however, abound suggesting that such influences affect factual determinations. Those wishing to improve the fact-determination system must be concerned about these possibilities.

For example, stories about the skills and stratagems of trial attorneys thrive with the implication that results would have been different with someone else trying the cases.²⁹ Such yarns are good for lawyers' egos and may induce us to work harder at our craft, but they should concern those who want the most accurate fact-determination system.

Our goal is to have outcomes reflect historical reality, which, having already occurred, does not change. Ideally, then, if we could try the same case over and over again, the results should always be the same. The more often different verdicts would be returned, the less well the system is working. Thus, when the individual attorneys affect the results, our system deviates from the desirable.³⁰ While lawyers' effects on outcomes is an important topic for the fact-determination system, legal scholars have paid it little meaningful attention.³¹

29. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 351 (Phoenix ed. 1966):

[I]t is one of the more popular assumptions about the jury that it tends to "try the lawyers," that, unlike the judge, it is susceptible to the skill and rhetoric of trial counsel and that he may well be a major determinant of the jury's decision. The very legends of the bar's heroes, of the Erskines, the Choates, the Darrows, imply that lawyers of their caliber would make a decisive difference in any case

30. Cf. *id.* at 372 n.26 (quoting PATRICK HASTINGS, *CASES IN COURT* 329 (1953)):

The view of one of England's great trial lawyers is worth noting in this context: "The late Mr. Justice Rigby Swift, a most forceful judge, was once dining at a mess dinner on circuit, when he was greeted, triumphantly by the circuit leader: 'Well, Judge,' he said, 'I had a good win before you to-day.' Rigby Swift was never one to mince his words. 'How dare you say you had a win before me? I sit in Court to see that justice is done. In my Court justice *is* done. No counsel ever wins a case before me.' The learned judge was very nearly right. I have known so many advocates, good advocates and very good advocates, bad advocates and very bad advocates, and in the result I am satisfied that at least ninety per cent of all cases win or lose themselves, and that the ultimate result would have been the same whatever counsel the parties had chosen to represent them. But of the remaining ten per cent it is not so easy to speak with any certainty."

31. The scantiness of the research might be defended because the possible reforms are not apparent if it is discovered that attorneys have too much effect on verdicts. The difficulty of good research in the area also could deter such inquiries. If, however, this topic were treated seriously by scholars, useful work might get done. For example, a large prosecutor's office where a significant number of assistant prosecutors had cases randomly assigned to them could be examined. Of course, there will be individual differences in the cases each gets, but if the system is truly random, over a period of time, the difficult and easy cases should even out so that the conviction rates obtained by each assistant could be expected to be the same if the

A related area is the effect of judges on verdicts. Certainly attorneys trying criminal cases often believe that a verdict for the prosecution becomes more or less likely depending on the identity of the presiding judge. If this is so, the fact-determination system is not working as well as we desire. This topic, too, is not one that has consumed many pages in legal journals.³²

The avoidance here, however, is a little more surprising because the conclusion that the judiciary does have an inordinate power over juries could hold important implications for evidence law.³³ Such an untoward effect raises fundamental questions about the level of discretion granted to trial judges. If individual judges consistently push verdicts in one direction or the other, it probably means that the judge's discretionary rulings consistently go in one direction or the other. If so, we ought to consider circumscribing the powers of those who preside over trials. Such a conclusion has great importance for evidence law because it would cast doubt on the modern evidentiary principle that increasingly

system is working properly. (A similar study might be done on the civil side by examining an insurance or government office with a number of attorneys defending against tort claims.)

Such a study could also follow assistants who leave the prosecutor and go into defense work. If the prosecutors were winning 70% of their cases, what happens when they defend? Do they continue to win 70% of their cases? The answer, of course, is no. If the apparently hot-shot prosecutors' winning percentages as defense attorneys approximate that of the rest of the defense bar, then this would suggest that something other than the abilities of the attorneys is the dominant cause of the verdicts.

Such study, I believe, would show that attorney performance only has a marginal effect on the outcome of the cases. Without knowing how large that margin is, however, we cannot know how much concern we should have about this non-evidentiary force. See *KALVEN & ZEISEL*, *supra* note 29, at 372 (concluding from their jury study that superior defense counsel affected outcome of criminal cases about one percent of time).

32. A feasible study that might shed light on how much judges affect verdicts could be done in a court system that randomly assigns criminal cases to judges. Over a long enough period of time the idiosyncrasies in cases that could affect the likelihood of convictions should even out among the judges, and any remaining differences in those rates might result from the judicial effect. Thus, over a 10 year stretch, we might posit that the conviction rate in cases held before two different judges sitting in the same court with random assignment of cases would be the same if the judges themselves are not somehow affecting the verdicts. If the rates were different, it could tell us that judges do affect verdicts and give an idea of how strong that power is. See *KALVEN & ZEISEL*, *supra* note 29, at 472 (concluding that judges who had been prosecutors but not defense attorneys acquitted at 13% rate, while judges who had been defense attorneys but not prosecutors acquitted at 22% rate).

33. Similar is the claim by some that they can affect the verdict through the "correct" selection of jurors. This non-evidentiary matter is especially deserving of study because, if true, some reforms are possible. For example, we could allow discovery of the information utilized by the opponent in its jury selection so the playing field might be more even during this portion of the trial. Or, to lessen the abilities of advocates to shape juries, we could lessen or eliminate peremptory challenges. Once again, however, such choices cannot be meaningfully considered until we first learn how much jury selection distorts accurate factfinding.

grants trial judges discretionary authority.³⁴

VII. INFORMATION PROCESSING BY JURORS

Those truly interested in the most accurate fact-determination system must not only examine processes before evidence law applies, such as the generation of information, and processes that may operate parallel to evidence law, such as the possible effect of attorneys and judges on verdicts, but they must also consider processes that occur after the end of normal evidence law, which for the most part occurs when the evidence taking is done. For example, those wishing to understand and improve the fact-determination system cannot ignore jury deliberations, but instead must examine how the triers process information.

That knowledge could be important for other components of the system. Thus, research indicates that jurors process trial information into stories and use these narratives to reach their verdicts.³⁵ This work ought to lead to many important questions for our system. Even evidence scholars ought to be interested because this research holds implications for the narrowly defined evidence law. Does it matter which story is presented first? How much does the order of witnesses matter? Is the effectiveness of a story diminished when it is interrupted by the other side's story? If so, does that help resolve how broad cross-examination should be or tell us anything about controlling the order of witnesses? Do jurors find it easier to construct accurate stories when witnesses give their own narratives or when sharply limited through questions? Are some forms of impeachment harder to incorporate by juries than others?

Answers to questions such as these that could improve our fact-determination system will not occur if we maintain our present focus on a limited evidence law. We must break out of the narrow confines of the evidentiary box and look at the entire process of factual determinations.

34. "[T]he drafters [of the Federal Rules of Evidence] imbued the rules with flexible standards and a bias toward admissibility. The drafters made these choices because they believed flexible standards would more effectively fulfill the Rules' core principles than a system of fixed rules with many exclusionary provisions." Leonard, *supra* note 3, at 967; *see also* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 460 (1989):

As a general matter, rules allowing room for a trial judge's sensitivity to the complexity and uniqueness of a particular case necessarily should promote truth more than rules providing for only mechanical application of a closed and complete system. Mechanical rules restrain a trial judge's access to factors that might lead to the best resolution of a particular case.

35. *See, e.g.*, Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986) (note sources collected there).

VIII. CONCLUSION

Evidence law is only a small part of the much larger fact-determination system. In comparison to its limited role, too much time is spent debating evidence law. As a result, evidentiary doctrine seems much more important than it is. We need to scramble over the ha-ha defining the antiquated boundaries of evidence law to see a broader world. We need to be scholars of the fact-determination process, not just of evidence. The accurate determination of facts is crucial to justice, and we need to explore all the possibilities that can affect that accuracy.

We must learn from other disciplines about the acquisition, retention and processing of information. We must see if this knowledge could lead to rules that would make our fact-determination process better. We must get empirical information on what actually affects verdicts besides the presented evidence. We must learn how jurors use information to determine the best ways to present data to them. We must ask questions not from an evidence perspective, but from a fact-determination priority.