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Delusion or Despair: The Concept of Limited Admissibility in the Law of Evidence

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I. Introduction

The modern law of evidence is characterized by the principle of "assumptive admissibility."[1] Its hallmark is a strong bias toward the broad admission of all testimony, documents or other exhibits that bear upon the dispute being litigated. Assumptive admissibility depends, in theory and practice, on the idea of limited admissibility; that is, the admission of evidence for certain restricted purposes.[2] The theory of limited admissibility is given effect at trial through the practice of reading limiting instructions to the jury.

The theory, however, clashes with the practice. As presently conceived, limited admissibility "works" only because of a legal fiction which postulates that the jury follows whatever instruction the court gives. Modern evidence law, therefore, is based to a large degree on the delusion, or illusion, that juries are able to adhere to instructions that tell them what to do with certain evidence. Despair arises because it is widely recognized that juries cannot follow these directives.

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1. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 33-34 (2d ed. 1987).

2. *Id.* at 33.

A. Assumptive Admissibility

The principle of assumptive admissibility evolved slowly over the last several hundred years. At its inception in the seventeenth century, the law of evidence clearly represented a more rational process than its medieval antecedents, such as trial by compurgation or the ordeal. The law of evidence did not, however, spring fully developed from the mind of any great thinker. It developed over time. The early rules were rigid, exclusionary rules which possessed a black and white quality about them.

At common law, for example, the competency rule precluded any testimony by convicted felons or parties to the action. Evidence was either admissible or inadmissible.[3] As the absolute rules of exclusion began withering away in the nineteenth century, they were gradually replaced with rules which worked a balance between the concerns that had justified the total exclusion and those which favored putting the maximum amount of information before the trier of fact.[4] This was the genesis of the doctrine of limited admis-

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3. Ladd, *The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof*, 18 MINN. L. REV. 506, 508 (1934). Professor Ladd also observed:

> By the beginning of the nineteenth century most of the rules were established. Extreme exclusion of testimony and a wide field of privilege and incompetency of witnesses generally prevailed. The nineteenth century championed the adversary system. Rules of evidence were accepted with little question; they obtained the highest professional reverence. There were a number of statutory changes, to be sure, and courts at times re-examined existing law, but by and large existing authority in the law of evidence was sustained and many new exclusionary rules were created in this period when limitation and restriction flourished at the expense of a great loss of evidence which would materially assist in the determination of factual disputes. It was an age of rule-ism and not realism but was soon to yield to the introspective era of the next century.

Ladd, *A Modern Code of Evidence*, MODEL CODE OF EVIDENCE 329, 334 (1942) [hereinafter MODEL CODE OF EVIDENCE].

4. According to Professor Ladd:

> The spirit of [recent case law] further aligns the federal courts with the modern tendency in the field of evidence to remove barriers to the

sibility: the idea that evidence may be received for certain evidentiary purposes, but not for others.

In implementing the rule of limited admissibility, the modern law of evidence is wrestling with medieval demons. The doctrine is modern and rational in the sense that it recognizes that evidence should not be withheld from the jury simply because they may draw from it impermissible inferences. The idea, however, is implemented in ritualistic fashion. To ensure that the jury does not misuse the evidence, the judge reads an incantation known as the limiting instruction. The limiting instruction, coupled with the presumption that the jury follows all of the court's instructions, has been charitably labelled by Wigmore as an "exercise in faith."[5] This raises the question: What room is there in a modern, rational system of evidence for medieval dogma?

B. Limited Admissibility

The Federal Rules of Evidence are largely based on the idea of multiple admissibility and its corollary, limited admissibility.[6] Although the doctrine is widely accepted, the reception has not been cheerful. Criticisms of the doctrine in

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> admissibility of testimony and competency of witnesses in the desire to place before the trier of fact all relevant testimony and to permit the reasons which formerly established exclusionary rules now to be used to test credibility and to aid to evaluating testimony.

Ladd, *supra* note 3, at 507. For a less sanguine view by commentators writing at about the same time, see Morgan & McGuire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909 (1937). *See also* Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U.L. REV. 1097, 1118 (1985) ("One still senses that more evidentiary material is being turned over to the factfinder under the Federal Rules of Evidence than would have been in cases tried at common law.").

5. 1 J. WIGMORE, WIGMORE ON EVIDENCE 696 (Tillers Rev. 1983); *see infra* text accompanying note 60.

6. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5063, at 307 (1977) ("Given the nature of the concept of relevance, it is inevitable that it will raise issues of multiple-admissibility. Relevance is the relationship between an item of proof and the issues in the case; it is not an inherent quality of the evidence.").

its specific applications have been pervasive, caustic and ever increasing. The crux of the controversy focuses not so much on the doctrine itself, but on its reduction to concrete form in jury instructions covering specific evidentiary problems. The piercing cry of the critics is invariably that the jury cannot possibly understand, grasp or follow such instructions.[7] Repeated throughout the critics' literature is the observation that the jury instruction cannot silence the bell following the "reverberating clang" of the evidence.[8]

The tradition of evidence law in this country recognizes and defends the idea of multiple admissibility. It accepts the notion that an item of evidence may be used to prove many different propositions. When the rules of evidence forbid certain propositions, the jury may still receive the evidence if it is relevant for a different, but permissible, purpose. Stated in the abstract, there are few quarrels with the wisdom or efficacy of the doctrine of limited admissibility. When the abstraction is reduced to a concrete, specific application in the form of a jury instruction, however, the cry is raised that it is a bogus fiction because the jury cannot possibly perform this mental gymnastic. The criticism is not limited to those instances where it is felt that the limiting instruction was so ineffectual that the evidence should have been excluded. Rather, many critics doubt that jurors can or

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7. According to one analysis:

> [T]here are serious problems that inhere in all limiting instructions: The complexity and subtlety of most limiting instructions inevitably raise the question whether jurors are likely to understand and appreciate the instructions; even if jurors understand a limiting instruction, the instruction has the undesirable effect of increasing the complexity of the jurors' already complex task; and finally, it is at best questionable whether even conscientious, understanding jurors are capable of performing the mental gymnastics that a limiting instruction requires.

R. ALLEN & R. KUHNS, AN ANALYTIC APPROACH TO EVIDENCE 747 (1989); *see also* Steele & Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. REV. 77 (1988), *reprinted in* 38 DEF. L.J. 427 (1989).

8. *See, e.g.*, 21 C. WRIGHT & K. GRAHAM, *supra* note 6, § 5062, at 304, 308.

will follow the court's limiting instructions, thus effecting virtually all applications of the doctrine.[9]

It is not surprising that this criticism has focused on the jury's ability to follow the limiting instructions. It must also be remembered, however, that the jury is not alone in the courtroom. The jury represents but one of three critical players in the trial system; the other two are the trial judge and the attorneys. For all the lamentations over the jury's capacity to grasp the distinctions purportedly explained in the limiting instructions, there is virtually no focus on the capacity of the trial judge or the lawyers to use the evidence for its limited purpose. An additional issue, therefore, is whether some of the lines drawn between admissible and inadmissible purposes are valid or only chimerical. Because the judge and more importantly the lawyers are also obligated to adhere to the limited purpose for which the evidence was received, the doctrine of limited admissibility is as much a "lawyer control device" as it is a jury control device. Thus, it is important to consider how lawyers use evidence and evidentiary rules at trial.[10]

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9. See *infra* text accompanying note 65. Some commentators are more optimistic about the ability of juries to follow limiting instructions:

> To exclude evidence of mixed admissibility entirely in jury cases would hardly be appropriate since its exclusion might well deny the jury access to facts which are essential for reaching a reasonably accurate decision. To allow only its general admission as an alternative to exclusion would, in many cases, preclude the possibility that the trier will base its decision on facts which are rationally probative. Admittedly a compromise, limited admissibility offers an acceptable, if not completely satisfactory means of allowing the trier to consider the maximum amount of evidence with the minimum risk that it will use the evidence improperly.

1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 105[02], at 105-12 (1986) [hereinafter WEINSTEIN'S EVIDENCE].

10. See *infra* text accompanying notes 40-41. Objections at trial are infrequent occurrences. A postulate of the law of evidence is that a failure to object amounts to a "waiver." Lawyers frequently fail to object either because they do not see the evidentiary problems in time to preserve the error or because an objection would be tactically unwise. If trials were final examinations in an evidence course, the typical grade would be low, assuming the idea was to object on all possible occasions. The trial practice grade, however, might be extremely high.

Accordingly, a full appreciation of limited admissibility demands an excursion into the workings of evidence law at trial. This entails a consideration of how evidence rules actually operate during the presentation of proof before a jury. One must consider not only the text of the rules and the case law construing them, but also how lawyers "use" the rules at trial. Academic writing has excelled in giving a technical exegesis of most rules, but has largely ignored any inquiry into how the rules actually function in a trial. Simply scrutinizing appellate cases for evidentiary problems presents a stilted view of what happens at trial. One of the subsidiary goals of this Article is to promote more discussion regarding how the rules of evidence are actually used, or ignored, at trial. It is this author's belief that the failure to examine how the rules are implemented at trial represents a serious lacuna in evidence scholarship.

Part IV of this Article explores the criticism of limited admissibility that has been lodged by psychologists and social scientists who study the workings of juries. This is followed by a survey of the legal profession's own critique of the doctrine as illustrated by the subjects of prior bad act evidence, the definition of hearsay, and the use of "inadmissible" evidence as a basis for expert opinion.

Finally, part V suggests a rethinking of the concept of limited admissibility and the revision of its implementation at trial. This section offers the observation that the real value of limited admissibility is its role in bridging the gap between older exclusionary rules and an effort to devise rules of proof which will aid the trier of fact in reaching a decision.

In essence, this Article contends that limited admissibility should be conceptualized as dealing with the problem of proof, not the issue of admissibility. Accordingly, jury instructions should be rewritten, when possible, in a way that helps the jury analyze the reliability of the evidence received. Moreover, because limited admissibility directly im-

plicates what lawyers can do with evidence during argument, it is necessary to take a different attitude and approach toward closing arguments to ensure that lawyers do not defeat the court's admission of evidence for a restricted purpose. In the process of revising jury instructions and rethinking the process of closing argument, one may decide that certain distinctions that have been drawn are not worth saving and should be abandoned. Although tentative, these suggestions are necessary if the judiciary is to treat the evidentiary rules governing admissibility seriously.

II. Relevancy, Multiple Admissibility and the Rules of Evidence

The doctrine of multiple admissibility is well entrenched in modern evidence law.[11] Wigmore described the practice as follows:

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11. Federal Rule of Evidence 105 accords with modern evidentiary theory that, as a general rule, evidence should be received if it is admissible for any purpose, notwithstanding the fact that it may be inadmissible for another. As Wigmore teaches:

> [W]hen an evidentiary fact is offered for one purpose and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity.

1 WIGMORE ON EVIDENCE, *supra* note 5, at 694. Furthermore, Weinstein's analysis of Rule 105 notes:

> [T]he rule represents a compromise between two competing interests: the desire to admit all relevant evidence and the recognition that a jury composed of twelve untrained triers of fact may not, in the absence of some control by the judge over the evidence presented, accurately assess its probative value or confine its use of the evidence to its proper legal scope. Limiting instructions have become more important since the distinct tendency of the Federal Rules of Evidence is to admit rather than exclude. . . . It is assumed that the more information available to the trier of fact, the greater will be its knowledge of the events in question and the more likely will it be that a resolution of the factual disputes will approximate the truth.

WEINSTEIN'S EVIDENCE, *supra* note 9, ¶ 105[02], at 105-11; *see also* 21 C. WRIGHT & K. GRAHAM, *supra* note 6, §§ 5062, 5063.

> In a very real sense the entire structure of the modern law of evidence rests on the specialized and limited use of evidence. The ability to extract a particular meaning from a piece of evidence is what permits courts to select the evidence that bears on legal issues, and it is that same ability, of course, that permits courts to exclude evidence that does not bear on a disputed fact of consequence. The principle that evidence may be admitted only for a particular purpose is merely a corollary of this view that evidence should focus (in a proper manner) on matters in issue.[12]

In essence, the doctrine involves the commonplace observation that multiple inferences can be drawn from any item of evidence.[13] When only some of the inferences are pertinent, the evidence should be used only for those purposes.

The concept of relevance in modern evidence codes enshrines this view.[14] In particular, the definition of "relevance" in Federal Rule of Evidence 401 is one which contemplates the use of circumstantial evidence, that is, evidence from which inferences must be drawn.[15] Moreover, it sets forth a low threshold of admissibility which is calculated to admit all evidence that may "rationally" bear upon the dispute. This definition of relevance is the very heart of

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12. 1 WIGMORE ON EVIDENCE, *supra* note 5, at 695.
13. *See infra* text accompanying notes 30-38.

> The fact that a person owns a gun may show that he had the capacity to commit armed robbery, but it may also be taken as evidence that he is (a) frightened, (b) Republican, (c) revolutionary, or (d) an off-duty police officer. Thus any time the proponent can construct a chain of inferences leading to an issue in the case, the opponent can usually construct competing inferences that lead nowhere, or to facts inadmissible but prejudicial to his client. In each case, the judge must balance the remoteness of these varying inferences in deciding whether a problem of multiple admissibility exists.

21 C. WRIGHT & K. GRAHAM, *supra* note 6, § 5063, at 307.

14. 21 C. WRIGHT & K. GRAHAM, *supra* note 6, § 5063, at 307.
15. *See infra* note 31.

the system of evidence law constructed by the Federal Rules of Evidence and has been embraced by over thirty states.[16]

In order to appreciate the workings of limited admissibility, it is necessary to first examine how the "relevance rules" function in Article IV of the Federal Rules of Evidence.

A. Article IV of the Federal Rules of Evidence and Limited Admissibility

Federal Rules of Evidence 401 through 403 are the heart of this system of evidence law. Together they implement an evidentiary scheme that places a premium on the admission of a wide range of evidence. The Federal Rules of Evidence represent an attitude which may be characterized as: "when in doubt, let it in for whatever it is worth."

Rules 401 through 403 function as the gatekeeper of admissibility. Regardless of whatever other technical objections may be lodged against the evidence, all evidence is subject to scrutiny under those rules.[17]

Rule 402 posits the virtual truism that all relevant evidence is admissible, subject to other rules, and that all irrelevant evidence is inadmissible. It is given operative effect by the definition of relevance found in Rule 401.

This definition broadly declares that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[18] Relevance, then, depends upon an assessment of two relationships: (1) the relationship between the proposition for which the evidence is offered and the ultimate issues

16. 1 G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES at xxv (1989).

17. The principal exception is Federal Rule of Evidence 609, which governs impeachment by prior conviction. The Supreme Court has held that Rule 609 is not governed by Rule 403 balancing. Green v. Bock Laundry Mach. Co., 490 U.S. ___, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989).

18. FED. R. EVID. 401.

in the case, and (2) whether the evidence has any tendency to make that proposition more or less likely. These considerations will each be discussed in turn.[19]

Relevance first requires a determination of whether the proposition the evidence is offered to prove is "of consequence" to the determination of the action. This requirement embraces those matters that were formerly covered by the common law notion of "materiality."[20]

The concern is not that each item of evidence relates directly to an ultimate issue in the case, but rather that it at least be a link in a chain leading to an ultimate issue. For example, proof that the defendant and the murder victim quarrelled shortly before the killing is relevant to prove motive. Although motive itself is not an element of the offense of murder, it in turn may be probative of the identity of the murderer or the intent to kill.[21] Both of these propositions are ultimate issues in a murder prosecution, and motive is

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19. It is this latter sense of "relevance" that is addressed in this Article.

> [R]elevance is the heart of what Thayer has called the "excluding function" of our system of evidence. We could have a rational system of proof without the opinion rule or the hearsay rule, but the rule excluding evidence that is irrelevant serves to restrict the scope of the inquiry to some finite sphere and thus to make decisions more predictable. Relevance is a relationship between the evidence offered and the fact it is supposed to prove. Notice that because the substantive law and the rules of pleading restrict the facts that are provable in the case, an item of proof may be excluded as irrelevant for two quite different reasons. First, the evidence may be perfectly satisfactory as proof of the fact to which it is directed yet be excluded because that fact is not a material fact in the case. Some lawyers and courts refer to evidence which is irrelevant in this sense as being "immaterial." Second, the evidence may be directed at a material fact but may not have any value as proof of that fact.

22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5162, at 18 (1978 & Supp. 1989) (citations omitted).

20. *Id.* § 5164, at 43.

21. A defendant's motive, if narrowly defined to exclude recognized defenses and the "specific intent" requirements of some crimes, is not relevant the substantive side of the criminal law. On the procedural side, a motive for committing a crime is relevant in proving guilt when the evidence of guilt is circumstantial, and a good motive may result in leniency by those who administer the criminal process. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.6(b), at 231 (2d ed. 1986).

circumstantial evidence of identity or intent. In short, motive, identity and intent are all consequential facts even though all three are not elements, or ultimate issues, of the offense. Thus, Rule 401 plainly contemplates the use of circumstantial evidence at trial.

The second aspect of the definition of relevancy looks to the relationship between the evidence and the proposition it is offered to prove. Here the concern is whether the evidence actually has some tendency to prove the proposition for which it is offered. The assessment is based on everyday reasoning and common-sense. This assessment is not rigidly deductive in form, nor is it something which can be divined by reading the entrails found in the case law.[22] Relevancy requires only that the judge conclude that the evidence has some tendency to make the proposition more or less probable.[23] The judge need not be convinced by the evidence or even be prepared to draw the inference himself. Indeed, the evidence may give rise to a variety of inferences for which the proffered purpose is only one, and perhaps not even the most compelling.[24] The judge may even admit it believing, or hoping, that the jury will cast the evidence aside because it is simply wrong or a falsehood. The relevancy threshold,

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22. WEINSTEIN'S EVIDENCE, *supra* note 9, ¶ 401[01], at 401-10 (1989).

23. *See* 21 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5165; WEINSTEIN'S EVIDENCE, *supra* note 9, ¶ 401[01], at 401-11 (1986).

> Somewhat akin, although perhaps not usually thought of as an aspect of discretion, is the recognition that the judge's own experience and conceptions, rather than legal precedents, furnish the basis for some determination. . . . Thayer also realized that "the law furnishes no test of relevancy" and that the judge in making his determination must be allowed flexibility in drawing on his own experience to evaluate the probabilities on which relevancy turns. Rule 401, by furnishing no standards for the determination of relevancy, implicitly recognizes that questions of relevancy cannot be resolved by mechanical resort to legal formulae.

Id.

24. Herasimchuk, *The Relevancy Revolution In Criminal Law: A Practical Tour Through The Texas Rules of Criminal Evidence*, 20 ST. MARY'S L.J. 737, 754 (1989).

then, is an exceedingly low one that is intended to admit all evidence that may shed light on, or inform the trier of fact about, the controversy.[25]

The expansive definition of relevance is somewhat tempered by Rule 403, which gives the judge discretionary power to exclude relevant evidence. It provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[26] The Rule 403 balancing test is skewed heavily in favor of admissibility. Only where the probative value of the relevant evidence is substantially outweighed by countervailing factors may it be excluded.[27] The factors themselves are organized according to various "dangers" that may affect the accuracy of the truth-determining function of the trial and certain "considerations" which relate to judicial efficiency.[28]

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25. 1 WEINSTEIN'S EVIDENCE, *supra* note 9, ¶ 401[07], at 401-09 (1986).

> In short, the test of relevancy is whether a reasonable man might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence. The 'probabilities are determined [in the usual case] in a most subjective and unscientific way . . . according to the trier's limited experience.' Precise attempts to fix probabilities in quantitative form are usually impossible because of the absence of adequate experimental data.

Id. (notes omitted).

26. FED. R. EVID. 403.

27. 22 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5214, at 263 ("Unless the judge concludes that the probative worth of the evidence is 'substantially outweighed' by one or more of the countervailing factors, there is no discretion to exclude; the evidence must be admitted."); Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 64 (1984) [hereinafter *Judicial Discretion*]; Gold, *Federal Rule of Evidence 403: Observations On The Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497 (1983).

28. In the original scheme of Rule 403, exclusions of evidence were mandatory when any of the three "dangers" were present, but discretionary when the "considerations" were involved. This framework was scrapped in favor of the present rule, which is entirely discretionary. *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 18, § 5211, at 245-46.

The "dangers" set forth in Rule 403 revolve around fears that the jury might be confused, misled, or give undue weight to certain items of evidence. Neither the courts nor the commentators have given these terms anything resembling a rigorous definition, but two main concerns emerge from the case law. One involves evidence, which unduly appeals to the emotions of the jury, such as gruesome photographs. The other involves the subject of multiple admissibility, which directly implicates the concept of limited admissibility.[29]

B. Circumstantial Evidence

Rule 401's contemplation of circumstantial evidence and the principle of multiple admissibility recognizes the reality of trial practice. The overwhelming majority of relevant evidence used in any trial is, necessarily, circumstantial evidence. Direct evidence, properly defined, is exceedingly rare.[30] Even where it does exist as to some issues, the remaining issues in the case will have to be proven circumstantially.

For instance, if an eyewitness watches A shoot B, and A is charged with murdering B, the eyewitness' testimony would be direct evidence of an act causing death. Yet the

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29. *See, e.g., Judicial Discretion, supra* note 27, at 65-66.

30. 22 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5214, at 266.

> Careful consideration of the ultimate facts in a case and the nature of testimony will reveal that there is very little evidence in the average case that can be said to be testimonial direct evidence. Much of the testimony of an eyewitness to a crime will not prove ultimate facts but rather facts from which the ultimate facts can be inferred.

Id. at 266-67.

The increasing use of expert testimony, particularly in civil cases, is partially explainable in these terms. The wide latitude accorded the use of experts by the Federal Rules of Evidence has created the opportunity to "manufacture" direct evidence for trial. The temptation exists because of the low threshold of admissibility for expert testimony generally and because experts may give an opinion even on ultimate issues. FED. R. EVID. 704(a). Like the "miracle of modern plastics," the lawyers have used the new rules to synthesize that which is in short supply in nature: direct testimonial evidence on ultimate issues.

same testimony is only circumstantial evidence of A's intent in shooting B.[31] For example, if A killed B with only one shot, a variety of inferences may be drawn from the fact of the single shot.

First, the single shot is consistent with an intent to kill, particularly if the bullet penetrated the victim's vital organs. A single shot through the heart supports a prosecutor's argument that the defendant had formed the mental purpose to take a human life. A single shot, it can be argued, means that the defendant took careful aim at a vital organ with a loaded weapon, squeezed the trigger, saw the bullet strike the victim, and knew that more bullets were not necessary.

Yet a single shot is also consistent with a defense theory of accident, such as, "The gun just went off." The defendant may offer his own testimony to the effect that he pulled the hammer of the gun back only to scare the victim, but the gun "went off" during a struggle with the victim. Depending on other facts, the defense might try to turn the prosecutor's argument on its head. If the defendant truly intended to kill the victim, why were more shots not fired?

In addition to the murder and accident scenarios, the single shot is also consistent with self-defense. Under this theory the defendant might argue, "I only shot to protect myself from the victim's assault." One shot is consistent with

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31. According to McCormick:

> Direct evidence is evidence which, if believed, resolves a matter in issue. Circumstantial evidence may also be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the proposition to which it is directed. For example, a witness' testimony that he saw A stab B with a knife is direct evidence of whether A did indeed stab B. In contrast, testimony that A fled the scene of the stabbing would be circumstantial evidence of the stabbing (but direct evidence of the flight itself). Similarly, testimony of a witness that saw A at the scene would be direct evidence of the facts asserted, but testimony that he saw someone who was disguised and masked, but had a voice and limp like A's, would be circumstantial evidence that the person seen was A.

C. MCCORMICK, MCCORMICK ON EVIDENCE § 185, at 543 (3d ed. 1984) (citations omitted).

the defense that the actor used only such force as was reasonably necessary to terminate the assault.

The point is that this single item of evidence gives rise to multiple inferences all of which are relevant and permissible under the law. The prosecutor is free to argue the inference favoring murder from the fact of the single shot, and the defense is free to argue the inferences that favor its position. Ultimately the jury will decide which of the competing inferences is more consistent with the other evidence in the case. Moreover, it may be the case that the jury draws an inference from the evidence that neither party argued for or even anticipated.

C. Admissible Evidence

Problems of admissibility arise, however, where the law has forbidden some of the inferences which arise from an item of evidence. For example, if evidence gives rise to five different inferences, three of which are forbidden by the law, the issue is whether the item should be received into evidence as it bears on the two remaining propositions. Conventional wisdom holds that so long as the evidence is admissible for even a single proper purpose, it may be admitted.[32]

This policy is explicitly set forth in Federal Rule of Evidence 105: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."[33] The following example is intended to illustrate how this rule works and the concerns it raises.

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32. 21 C. WRIGHT & K. GRAHAM, *supra* note 6, § 5062, at 303.
33. FED. R. EVID. 105.

A driver employed by the Speedy Pizza Company has a horrendous driving record, replete with prior accidents and near-misses. This same driver allegedly drives his car through a yellow light and strikes the plaintiff's car. The plaintiff brings an action against the driver and the company for ordinary negligence, and against the company alone for negligent entrustment. It is axiomatic that the prior driving record is inadmissible to show the driver's "propensity" for bad driving.[34]

The driving record is admissible, however, to support other propositions. Specifically, it may be used against the company to prove the claim of negligent entrustment.[35] This use of the evidence is confined to the rather subtle point of whether the company had notice that the defendant driver was a "lousy" driver.[36] The company may be entitled to a limiting instruction, which, in theory, educates the jury about what it can and cannot do with this evidence, upon a timely objection or a request for a limiting instruction.[37]

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34. FED. R. EVID. 404(a) precludes in civil cases the circumstantial use of the subject's character to prove conduct in conformity therewith. *See* C. MCCORMICK, *supra* note 28, § 189, at 554 ("[T]he rule against using character evidence solely to prove conduct on a particular occasion has long been applied in civil cases."). Another commentator has observed:

> The civil cases dealing with character evidence reflect an inconsistent pattern. The dominant view, embodied in the Federal Rules, is that character evidence offered to support the circumstantial use of character in civil cases is generally not worth its cost in time, distraction, prejudice, . . . and is, accordingly, completely rejected. A minority view admits certain character evidence in limited cases, such as those involving fraudulent misconduct or assault and battery.

G. LILLY, *supra* note 1, at 129 (notes omitted).

35. For a discussion of the law governing the tort of negligent entrustment, see W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS § 33, at 197 (5th ed. 1984).

36. "Character at issue" means that the existence of the character trait must be determined by the jury; it is an element of the claim. In theory, it is not used for any further inferences, such as from character to conduct. *See* G. LILLY, *supra* note 1, at 125. Rarely is character at "issue" in civil or criminal litigation. 22 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5235, at 368.

37. *See* FED. R. EVID. 103(a), 105; 21 C. WRIGHT & K. GRAHAM, *supra* note 6, at § 5065.

The instruction would inform the jury that it may use the prior driving record to determine whether the company negligently hired or kept the driver in its employ. The evidence, however, may not be used to determine whether the driver negligently caused the particular accident.[38]

It is a legal axiom that the jury, once instructed, will use the evidence for only its proper purpose.[39] Whether this is an accurate description of what occurs or only dogma is the crux of the problem.

Although the rules appear to prescribe a rather orderly and logical structure for the presentation of evidence, trial practice is not nearly as neat as this discussion suggests. In order to assess the true extent of any problems concerning multiple admissibility, it is necessary to examine how evidentiary rules are actually used at trial.

III. The Operation of Evidentiary Rules at Trial

Trials are not final examinations in evidence. One of the great difficulties in teaching trial practice and evidence is disabusing people of the idea that the rules of evidence are themselves a road map for trial.[40] Moreover, a misconcep-

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38. The example discussed in the text is based on the discussion in J. FRIEDENTHAL & M. SINGER, THE LAW OF EVIDENCE 20 (1985).

39. In *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 1709, 95 L. Ed. 2d 176, 188 (1987), a case involving the admissibility of post-arrest statements by accomplices in the joint trial of criminal defendants, the Supreme Court discussed the rationale for limiting instructions generally. The Court observed that "[t]he rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."

40. Sometimes, of course, an attorney may deliberately choose not to object because of tactical considerations. The jury is not apt to look kindly on a party seeking to win by keeping out evidence. McCormick offers the following advice:

> One who comes to the trial of cases fresh from the course in Evidence in law school tends to assume that whenever the adversary offers proof that is inadmissible, the right thing to do is to object. Experience will soon convince a sensible learner that this attitude of automatic objecting is wrong. One must remember that the rules of exclusion are numerous and far-reaching so that any case offers an infinity of oppor-

tion about evidence courses is that they will teach someone how to prove something.[41] Upon more mature, or jaded, reflection, one realizes that evidence rules are not guides to proof or persuasion, but rather "operators" which affect the quantity, quality and, above all, the form of the evidence which goes before the jury.

The extent to which the rules of evidence are operative in any trial will depend upon two factors. First, it will depend upon the working knowledge of evidence law possessed by the parties' lawyers. Law professors delight in the metaphysical subtleties of evidence law. "Hillmon problems,"[42]

> tunities for plausible objecting. One learns also that the jury does not look upon a trial as a lawyer's game in which objecting is one of the moves. They want to know the facts and they look upon objections as attempts to hide the facts and upon successful objections as the actual suppression of facts. If this description of the jury's attitude is sound, then certain consequences as to desirable tactics seem to follow.
>
> In the first place, no objections should be made unless [counsel has] reason to believe that the making of the objection will do [his] case more good than harm. If the objection has little chance of being sustained, at the trial or on appeal, it should usually be waived. . . . [O]bjections to leading questions or to opinion evidence frequently result in strengthening the examiner's case by requiring him to elicit his testimony in more concrete and convincing form. In general, . . . objections should be few and should be directed only to evidence which if admitted will be substantially harmful, and as to which [counsel believes he] can get a favorable ruling at the trial or on appeal. Finally, . . . the cardinal aim is that the jury be made to see that the objection is based not on a mere technical rule, but on reason and fairness.

WEINSTEIN'S EVIDENCE, *supra* note 9, ¶ 103[02], at 103-13 (1986) (quoting C. MCCORMICK, MCCORMICK ON EVIDENCE § 52, at 121-22 (1st ed. 1954)). *See also* J. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 220 (2d ed. 1987) ("Never make an objection without a good reason for it. A trial is not an evidence examination.").

41. It appears that the modern trend in teaching evidence law is moving closer to an approach that goes beyond "rules and cases" and analyzes how the rules function at trial, i.e., within the dynamic of proof. *See* Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123, 142 (1987).

42. A "Hillmon problem" involves the admissibility of an out-of-court statement evincing the declarant's then-existing state of mind to prove that the declarant later behaved in conformity with that state of mind expressed earlier in that statement. See, for example, the discussion of *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 12 S. Ct. 909, 36 L. Ed. 706 (1892), in G. LILLY, *supra* note 1, at 149-55. The "Hillmon doctrine" raises interesting difficulties involving hearsay and relevancy, especially when the declarant's expressed intent was to do

implied assertions,[43] and conditional relevancy[44] are fascinating problems intellectually. Many of these concerns, however, are either inconsequential at trial or too reified to "catch" during the ebb and flow of testimony.[45] Objections must be lodged generally in the few seconds that separate question from answer. A failure to anticipate the otherwise inadmissible evidence before trial or immediately recognize it during trial means that the evidence is "admitted" for any relevant purpose.[46]

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something with a third party and the statement is offered to prove the declarant did the act with the third party. *See, e.g.*, R. ALLEN & R. KUHNS, *supra* note 7, at 430-36.

43. Implied assertions involve the scope of the hearsay definition. Federal Rule of Evidence 801(c) defines hearsay as an oral or written "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." A "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a). Difficulties arise when the out-of-court statement is offered to prove something other than the literal truth of the matter asserted in the statement; that is, to prove the truth of an implied assertion. Some courts have held that implied assertions do not involve "hearsay" as defined in the rules. *See, e.g.*, United States v. Zenni, 492 F. Supp. 464 (E.D. Ky. 1980); 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(a)[02] (1984). Others insist that implied assertions are hearsay under the rule. *See, e.g.*, M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.7, at 714 (2d ed. 1986); R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 369 (2d ed. 1983).

44. Problems of conditional relevancy involve the respective roles of judge and jury as triers of fact. The difficulty is in identifying which "preliminary questions of fact" are to be decided by the judge. *See* G. LILLY, *supra* note 1, at 40.

45. *See infra* text accompanying notes 49-51.

46. These observations are predicated upon this author's own experience as a trial lawyer. Unfortunately, no empirical studies exist comparing the frequency with which evidentiary issues arise at trial to the frequency with which they are later brought up on appeal. Similarly, this author has found no empirical studies examining how, when, or why trial lawyers exercise their power to object at trial.

Some evidentiary issues are so obvious and so critical that competent trial counsel will immediately recognize the problem and object. The best examples, and maybe the only ones, are the admission of other act evidence against a criminal defendant and proof of similar accidents in civil cases. This observation is grounded upon the thousands of appellate cases which concern just these issues and the experience that lawyers usually do not miss an opportunity to object to this obviously troublesome evidence. *See* Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247, 255 (1987). As a general rule, trial lawyers tend to object as little as possible and only when absolutely necessary. *See* A. TANFORD, THE TRIAL PROCESS 304 (1983); *see also supra* text accompanying note 39.

Second, the operation of evidentiary rules at trial depends upon the willingness of the lawyers to object. Many things occur during trial which are objectionable. An experienced trial lawyer will only object if there is a tactical advantage to objecting as well as a legal basis for the objection.[47] This important principle of trial practice is not explicitly set forth in the Federal Rules of Evidence, but is implicit in its structure. Federal Rule of Evidence 103 requires that parties object to evidence that they want kept out of evidence. The objection must be timely and specific. A failure to object, or an inadequate objection, means that the issue cannot be raised on appeal.[48]

Rule 103 does not require that attorneys object any time there is a legal basis for doing so. An objection serves two purposes. First, it alerts the trial court that the objecting party wants action taken. In this sense it serves as the mechanism necessary to "involve" the judge in the presentation of the evidence, which is otherwise controlled by the par-

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47. One author states:

> Just because an objection can be made does not mean that you necessarily should make it. Each time that you object, you should have a reason for doing so. This decision requires you to weigh the benefits against the risk that you will [harm] your own case. It will depend on the nature of the evidence offered, the grounds you can assert, the context of the particular controversy, and whether there is an alternative way of dealing with the evidence.

A. TANFORD, *supra* note 46, at 302.

48. M. GRAHAM, *supra* note 43, § 103.1. Federal Rule of Evidence 103(a)(1) provides:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. . . .

The only exceptions to Rule 103's requirement of an objection are the plain error doctrine and when the defense counsel's failure to object in a criminal case constitutes ineffective assistance of counsel.

ties.[49] Second, if the objection is overruled, a timely and specific objection preserves the record for review by appellate courts. If the lawyer is not interested in either of these considerations, there is no duty to object.

Unfortunately, a lawyer is under no obligation to object, and the courts are under no special obligation to police the trial proceedings to ensure fidelity to the rules of evidence.[50] Whether a lawyer deliberately allows objectionable testimony to come in or never sees the problem at all, the result is the same: the evidence is in the record and a jury may use it to reach a decision. Courts sometimes rationalize this process as a "waiver" of the objection under the rules, but it is more precisely conceptualized as involving the power of attorneys to invoke the rules as they see fit.[51]

Federal Rule of Evidence 105 sets forth analogous procedures for dealing with the difficulties created by the concept of multiple admissibility. The rule permits the opponent to request that evidence be received for only a limited purpose. By requesting a limiting ruling or instruction, the objecting party forces the proponent of the evidence to disclose what the evidence is being used to prove.

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49. For a discussion of the party presentation principle, see F. JAMES & G. HAZARD, CIVIL PROCEDURE 318 (3d ed. 1985).

50. R. UNDERWOOD & W. FORTUNE, TRIAL ETHICS 327-30 (1988).

51. Wright and Graham observed:

> Read properly, Rule 103 rejects a bit of faulty analysis that can be traced to Wigmore. "A Rule of Evidence not invoked is waived," wrote the famous scholar, and courts have been repeating this fallacy ever since. At one level, this can be dismissed as simply a matter of careless usage. Courts that talk in terms of "waiver" have never examined the conduct of a party to see if it comports with the standard definitions of that concept before barring him from raising a point on appeal that was not the subject of an objection below. According to an oft-quoted definition, a "waiver is . . . an intentional relinquishment or abandonment of a known right of privilege." Yet the failure to object below precludes raising the point on appeal without any showing that the party or his attorney was aware of the grounds of objection. Indeed, a party is barred on appeal even where the attorney was enthusiastically asserting his client's rights, but simply garbled the objection.

21 C. WRIGHT & K. GRAHAM, *supra* note 6, § 5033, at 162 (notes omitted).

If the evidence is admitted for a limited purpose, the judge must, upon request, instruct the jury about the restricted use of the evidence.[52] Often the request for the ruling is coupled with an objection to exclude the use of the evidence for any purpose. The objection may be based upon the danger that the jury will draw the forbidden inference regardless of a limiting instruction.[53] The request for a limiting instruction, like an objection, must be timely and specific.[54]

Recognizing potential objections is a function of the lawyer's erudition in evidence law and alertness at trial. The multiple admissibility of evidence, however, creates special problems. When testimony is given at trial, the proponent simply asks questions and the witness responds. The proponent is not obligated to justify the admissibility of each answer or explain what it is being offered to prove. The testimonial process is not akin to some form of deductive proof

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52. WEINSTEIN'S EVIDENCE, *supra* note 9, ¶ 105[01], at 105-5 (1986) ("It is important to note that once the court decides to admit any evidence which can be used for limited purposes, it may not refuse a requested instruction.").

53. As many have observed, the tendency has been to admit the evidence regardless of this danger. McCormick points out that:

> In this frequently arising situation, subject to the limitations outlined below, the normal practice in case law and under the Federal and Revised Uniform Rules of Evidence (1974) is to admit the evidence. The interest of the adversary is to be protected, not by an objection to its admission, but by a request at the time of the offer for an instruction that the jury is to consider the evidence only for the allowable purpose. Such an instruction may not always be effective, but admission of the evidence with the limiting instruction is normally the best available reconciliation of the respective interests. It seems, however, that in situations where the danger of the jury's misuse of the evidence for the incompetent purpose is great, and its value for the legitimate purpose is slight or the point for which it is competent can readily be proved by other evidence, the judge's power to exclude the evidence altogether is clear in case law and under the Federal and Revised Uniform Rules of Evidence.

C. MCCORMICK, *supra* note 31, § 59, at 151-52; *see also* 21 C. WRIGHT & K. GRAHAM, *supra* note 6, § 5065, at 325.

54. 21 C. WRIGHT & K. GRAHAM, *supra* note 6, § 5065.

where each step in the argument must be justified by reference to a rule.

As discussed in Section II, evidence often gives rise to multiple inferences. Trial procedures do not demand that the proponent list all possible inferences that could be drawn from the evidence and then alert the court as to the ones being used. Unless opposing counsel objects or invokes Rule 105, the evidence is generally received for all relevant propositions.[55]

The danger is that opposing counsel may think the testimony is coming in for one purpose, make no objection or limiting request, and later find that the proponent is using the evidence for an entirely different purpose to which he should have objected.[56] The rules' response to this scenario is necessarily harsh; the failure to object or request a limiting instruction at the time the evidence was introduced "waives" any problems that the attorney could have anticipated.[57]

Conversely, it appears that the proponent of the evidence is under no special obligation to warn the opponent or the court that the evidence may give rise to multiple inferences, some of which may be "forbidden" or perhaps objectionable

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55. In many cases, the function of a request for a limiting instruction is to determine the purpose for which the evidence is being offered. In the usual case, it is the opposing party that wants the evidence restricted to a limited use, if admitted at all. The proponent of the evidence typically welcomes the general admission of the evidence for any purpose. In short, the opposing party uses a Rule 105 request as a device to learn what the proponent is trying to prove with the evidence. *See* 21 C. WRIGHT & K. GRAHAM, *supra* note 6, § 5065, at 323.

56. *See, e.g.*, State v. Hoffman, 106 Wis. 2d 185, 316 N.W.2d 143 (Ct. App. 1982). In Hoffman the defendant offered testimony about a telephone bill and later moved it into evidence without any qualifications or limitations. In closing argument, the prosecutor used the bill to attack the credibility of another defense witness. The court rejected the defendant's claim that the prosecutor could not use the evidence in this manner. Because the defendant had failed to request any restrictions on the use of the bill, it could be used for any relevant purpose.

57. *See supra* text accompanying note 49. Another justification for this rule is to enforce the requirement that objections be timely and specific. It is difficult to discern whether the objecting lawyer let the objection pass in "good faith" or just missed it. The law of evidence does not distinguish between these reasons for failing to object. 21 C. WRIGHT & K. GRAHAM, supra note 6, at 311.

under Rule 403. This invites the difficult question regarding the extent to which the proponent of the evidence is bound to police his own proof for fidelity to the rules of evidence.

The unhappy answer is that this question is largely, if not entirely, rhetorical.[58] Given the nature of modern evidence rules, there is much truth to the old saying that there are three ways to get anything into evidence. The Federal Rules of Evidence are broad, inscrutably ambiguous at points, and invest such wide discretion in the trial judge that colorable arguments can be made to support the admissibility of virtually any item of evidence. Moreover, the law of evidence has wisely resisted the temptation to try to assess the "true motives" of the lawyer offering the evidence.[59] In short, the rules provide a verdant field from which skillful lawyers reap tenable arguments supporting the admissibility of most evidence.

If the evidence is admitted for a limited purpose, the trial judge is obligated to give the jury a limiting instruction upon a party's request. This raises two immediate questions. First, can the jury follow such an instruction? Second, will they follow it? The assumption is that the jury will follow the instruction.[60] The assumption is not, however, buttressed by reality. Nevertheless, the law of evidence has a built-in mechanism by which it insulates itself from the implications of this contradiction.

Federal Rule of Evidence 606 serves to shield the trial system from its own institutional contradictions. The rule precludes any inquiry into the quality of the jury deliberations. Verdicts cannot be assailed based on retrospective inquiries into what the jury thought about the evidence or the

58. *See* R. UNDERWOOD & W. FORTUNE, *supra* note 50.

59. 21 C. WRIGHT & K. GRAHAM, *supra* note 6, at 311.

60. *See* Richardson v. Marsh, 481 U.S. 200, 206, 107 S. Ct. 1702, 1706, 95 L. Ed. 2d 176, 185 (1987).

law.[61] It assures that no post-trial "final examination" tests the jury's comprehension of the judge's instructions, substantive or procedural.[62] One simply posits in Panglossian fashion that they do understand them.[63]

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61. A revised rule based on prior case law, however, presents a different approach:

> Federal and Revised Uniform Rule of Evidence (1974) 606(b) take a more conservative tack based upon prior federal case law. First, these rules do not equate with, or govern, grounds for a new trial, but merely govern the competency of jurors to testify concerning the jury process. Second, in addition to jurors' thought processes, discussions, motives, beliefs and mistakes, they exclude irregular juror conduct in the jury room. Third, they do not exclude juror testimony of extraneous prejudicial influences. Fourth, they do not preclude testimony of others about their knowledge of jury misconduct.

C. MCCORMICK, MCCORMICK ON EVIDENCE § 68, at 166-67 (3d ed. 1984). Another author noted:

> The independence of the trier of fact from government control legitimates the outcomes of trials in a democratic state. Independence means that the trier's conclusions about reliability are nonaccountable, and that its general knowledge can be nonprecedential. The lay jury is the paradigm independent factfinder, but the values of independence attach to the trial judge in her role as factfinder as well.
>
> The jury's decisions are nonaccountable, meaning that in its verdict, the jury does not give an account of what sources of knowledge it relied on, or how it evaluated their credibility. The jury does not disclose which foundation facts it used, does not explain the coherence and validity of the general knowledge it applied, and does not have to justify its conclusions as against other possible choices.

Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1367 (1987).

62. *See* Tanner v. United States, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987) (no error when the trial court refused to hold an evidentiary hearing concerning the alleged use of alcohol and drugs by the jury during the trial).

63. For instance, all twelve jurors could submit affidavits averring that they disregarded the judge's limiting instruction on evidence either because they did not understand it or did not like it. But the response of the legal system in either instance is the same: the assumption is that they did follow the instructions regardless of what the jurors later say. This device, then, permits the use of limited admissibility with virtual impunity from the suspicion or the reality that the jury cannot follow limiting instructions.

IV. Criticisms of Limited Admissibility

A. Limiting Instructions

The general subject of limited admissibility has received little attention from courts or commentators. Most of the criticism has been directed at specific applications of the rule in a given context. One common thread that runs throughout this criticism, regardless of the evidentiary problem under discussion, is that limiting instructions are ineffective or useless in most instances and potentially damaging in others.[64] Courts and commentators have long understood that limiting instructions are difficult or impossible for juries to comprehend and obey. Wigmore stated:

> The practice of admitting evidence for a limited purpose is, of course, already an exercise in faith—faith that the jury will use the evidence for its proper purpose or in the proper fashion. It is a disservice to ignore the real dangers that arise when evidence is submitted to the jury for limited purposes.[65]

Justice Jackson also criticized the efficacy of limiting instructions within the context of conspiracy prosecutions: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction."[66] These observations are buttressed by various psychological research which confirms that jurors cannot follow these instructions.

Social scientists and psychologists have conducted studies on jury behavior. Most salient to this discussion are those experiments that analyze a jury's ability to disregard inadmissible evidence and those that explore their ability to

64. *See supra* note 7.
65. 1 WIGMORE ON EVIDENCE, *supra* note 5, at 696.
66. Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 723, 93 L. Ed. 790, 799 (1949) (Jackson, J., concurring) (citations omitted).

comprehend limiting instructions. Although the studies are somewhat revealing, the findings must be treated cautiously.

First, they are not extensive in terms of the issues of limited admissibility that have been scrutinized. For example, the admissibility of a criminal defendant's prior conviction for impeachment purposes has received the most attention.[67] No one, however, has examined the broader problem presented by the admission of other act evidence or the impact of the introduction of similar accidents in civil cases.

The second and more serious shortcoming is that some of this research is so contrived that there is little support for it as any kind of an accurate barometer for actual trial practice.[68] It is difficult to see how one can meaningfully compare a two-week murder trial with a scenario in which the mock jury is given ten minutes to read a four page fact pattern that represents the "trial."[69]

At any rate, the findings of these studies confirm the non-empirically based intuition of lawyers and courts. They reveal that it is difficult for jurors to disregard inadmissible evidence once they have been exposed to it.[70] Regardless of

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67. See, for example, the studies discussed in Wissler & Saks, *On the Inefficacy of Limiting Instructions*, 9 LAW & HUMAN BEHAVIOR 37, 43 (1985).

68. *See, e.g.*, Teitelbaum, Sutton-Barbere & Johnson, *Evaluating The Prejudicial Effect of Evidence: Can Judges Identify The Impact of Improper Evidence on Jurors?*, 1983 WIS. L. REV. 1147 (1983). This study has been roundly and justifiably criticized:

> A simplistic and badly-flawed empirical study purports to show that judges are incapable of assessing prejudicial effect. The study used a small and unrepresentative group of judges, lawyers, and laypersons to rank differing bits of evidence in terms of its impact on a hypothetical trial. The study supposedly shows that there is very little agreement among persons within the groups as to what is prejudicial and that laypersons and lawyers tended to evaluate the evidence in quite different ways. The latter finding is hardly surprising since the two groups were asked different questions.

22 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5215, at 233 (Supp. 1989).

69. Carretta & Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 7 J. APPLIED SOCIAL PSYCH. 291, 294 (1983).

70. R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 87 (1983) [hereinafter INSIDE THE JURY] (discussing the "subtle and possibly unconscious impact of inadmissible testimony" on jurors); S. KASSINS & L. WRIGHTSMAN, THE

the instructions that are given to them, the inadmissible information appears to have an effect on the jury's decision.

The studies also indicate that jurors, like everyone else, have difficulty comprehending jury instructions. This is especially true of the garden variety patterned instructions that are widely used on both procedural and substantive issues at trial.

From these two observations concerning the difficulty jurors have disregarding inadmissible evidence and their problems in following jury instructions, one can draw a third conclusion. When the jury is told that a certain item of evidence may be used for one purpose but not for others, they have an especially difficult time.

A recent study illustrates this third observation.[71] Researchers sought to gauge the effects of limiting instructions under Federal Rule of Evidence 609 which inform the jury that it may consider a defendant's prior criminal convictions to assess his credibility, but may not use it as evidence of criminal propensity. The study concluded that the sample juries did not use the prior convictions to assess credibility because the jurors had such a low opinion of a defendant's credibility from the start.[72] Furthermore, the researchers observed that the percentage of convictions varied as a function of the existence and type of prior criminal record.[73] With respect to the efficacy of limiting instructions, the study observed:

> On the basis of the available data, we conclude that the presentation of the defendant's criminal record does not affect the defendant's credibility, but does increase the

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AMERICAN JURY ON TRIAL 211 (1988) (instructions admonishing juries not to make unwarranted inferences "are not particularly effective," since jurors will use any information that helps them make the "right" decision); Carretta & Moreland, *supra* note 63; Cope, *Can Jurors Ignore Inadmissible Evidence?*, TRIAL, Sept. 1988, at 80; Wissler & Saks, *supra* note 67.

71. Wissler & Saks, *supra* note 67.

72. *Id.* at 41.

73. *Id.* at 42.

> likelihood of conviction, and that the judge's limiting instructions do not appear to correct the error. People's decision processes do not employ the prior-conviction evidence in the way the law wishes them to use it.[74]

Despite any methodological shortcomings, the extant psychological studies provide empirical support for the intuitively obvious conclusion that limiting instructions as presently conceived do not, and cannot, effectively control the minds and thought processes of jurors. The difficulty is exacerbated when the distinctions between the permissible and impermissible uses of the evidence are exceedingly subtle or perhaps nonexistent.

B. Integration Into the Federal Rules of Evidence

Despite the abundant well placed criticisms by legal commentators and psychologists, this same scenario of limited admissibility recurs over and over in the Federal Rules of Evidence and the state codes modeled upon it. Not only is limited admissibility inherent in the general relevance provisions of Rules 401 through 403, but it is encompassed in other significant provisions of the rules.[75] Three disparate examples will serve to illustrate the point. These illustrations were selected to highlight the degree to which limited admissibility has become integrated into the Federal Rules of

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74. *Id.* at 47.

75. The concept of limited admissibility has found its way into many provisions of the rules.

> Many rules of evidence turn on the purpose for which the evidence is offered: an out-of-court declaration is hearsay only if used to prove the truth of the matter asserted; evidence of subsequent repairs cannot be used to show negligence; evidence of the defendant's character is inadmissible for the purpose of showing that he probably committed the crime. In each of these cases, however, the evidence is admissible if it is offered for some other purpose: an alleged hearsay statement to prove notice, subsequent repairs to show ownership of the repaired property, or character evidence to impeach the defendant as a witness.

21 C. WRIGHT & K. GRAHAM, *supra* note 6, § 5062, at 302 (notes omitted).

Evidence. The purpose is not to exhaustively analyze the particular evidentiary issues, but to illustrate the workings of limited admissibility within each instance.

The first example is the admissibility of "other acts, wrongs, or crimes." The second is the definition of hearsay under Federal Rule of Evidence 801. The third will examine the workings of Federal Rule of Evidence 703, which authorizes the admission of expert opinion testimony even when it is based on "inadmissible" evidence. This last example may underscore the problem more dramatically than any other. All three illustrations involve problems of proof that arise in virtually all trials, civil and criminal. All three involve rules of admissibility that hinge on the concept of limited admissibility. All three have been roundly criticized.

1. Prior Bad Acts Evidence

Many criminal defendants have records of prior convictions or have been involved in some sort of wrongdoing of which the prosecutor is aware. The general rule is that this evidence cannot be used at trial to show that the defendant has a criminal character and, therefore, a propensity for criminal behavior.[76] That is, the law precludes any inference running from the defendant's character to his conduct in conformity with his character on a particular occasion.[77]

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76. The example discussed in the text is taken from criminal law, but the admissibility of other similar accidents in civil cases raises nearly identical concerns. See Reed, *The Pushy Ox: Character Evidence In Pennsylvania Civil Actions*, 58 TEMP. L.Q. 623 (1985).

77. FED. R. EVID. 404(b); 22 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5239, at 435 ("The other crimes rule is simply a special application of the doctrine of multiple admissibility; that is, evidence that is inadmissible for one purpose is not to be excluded if it is admissible for some other purpose unless the judge, in his discretion, determines that the danger of its prejudicial use for the improper purpose outweighs its legitimate probative value.").

Problems in the administration of Rule 404 are discussed thoroughly in Imwinkelried, *The Need To Amend Federal Rule of Evidence 404(b): The Threat To The Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465 (1985).

Nevertheless, the prosecution frequently offers evidence of other crimes, wrongs or acts against a criminal defendant. The evidence is admitted not to show criminal propensity, but ostensibly to prove other things, such as motive, opportunity, intent, knowledge, or identity. Upon request, the jury is instructed that the evidence of the other act, which is typically criminal in nature, may only be used for the prescribed permissible purposes, not for the forbidden inference of propensity.

This rule has been widely criticized for the seeming ease with which prosecutors evade the general proscription barring bad character evidence.[78] The lament is often that the proffered permissible use, *e.g.*, intent, is merely a pretext for admitting the evidence in the hope that the jury will draw the forbidden inference regardless of any limiting instructions or admonishments.

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78. See the comments of Professors Wright and Graham:

> It is important to distinguish between a true problem of multiple admissibility and the administration of legal fictions. Some of the supposed rules of exclusion are not, and were not intended to be, anything other than pious ceremonials to long dead gods. An example is the rule that asserts that the prosecution cannot use evidence of the criminal defendant's bad acts to show he is the sort of person that is likely to have committed the crime. The Rule is so riddled with exceptions that only an incompetent prosecutor could fail to get the defendant's past derelictions into evidence. Indeed, many courts will admit such evidence even if the defendant offers to stipulate to the fact that the evidence is supposedly offered to prove. Why, then, did the Advisory Committee not abolish the rule? Answer: because it offers the judge a splendid opportunity to demonstrate to the jurors how fair the system is by reciting to them a supposed maxim of fairness that they are expected to honor in the breach. Were the judge to exclude the evidence, by application of the supposed rule, he would deprive the jury of the right to witness this patriotic ritual. Since the rule exists only to support the giving of the instruction, there is little need for extensive analysis of whether the evidence ought to be admitted or of alternative means of protecting the defendant.

21 C. WRIGHT & K. GRAHAM, *supra* note 6, at 308.

See also Leonard, *The Use of Character To Prove Conduct: Rationality And Catharsis In The Law Of Evidence*, 58 U. COLO. L. REV. 1 (1987); Uvillier, *Evidence Of Character To Prove Conduct: Illusion, Illogic and Injustice In The Courtroom*, 130 U. PA. L. REV. 845 (1982).

Putting to one side the question of prosecutorial bad faith, the real crux of the problem, from the standpoint of limited admissibility, is distinguishing the concept of character from the other permissible purposes. The prevailing "inclusionary approach" to other act evidence establishes that the evidence is admissible where its probative value does not depend upon an inference of conduct in conformity with a character trait.[79]

As an abstraction, the rule is beguilingly simple and straightforward. The law's failure to define the concept of "character" with precision means that this formulation of the rule is, more often than not, a rationalization for a conclusion rather than an analytic structure. Neither the Federal Rules of Evidence nor the common law have satisfactorily defined "character."[80] The case law and commentators appear content to define character as a "generalized disposition" and list certain accepted character traits, such as law abidedness and peacefulness.[81] This amorphous approach virtually assures failure. If character has no settled meaning, how does one identify the permissible use of other act evidence for proving "non-character" inferences?

The concept of limited admissibility, however, requires that this distinction be drawn. The question becomes: is there an articulable difference between the concept of character and the so-called permissible uses of this evidence which can be explained to the jury in a meaningful way?

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79. *See* Kuhns, *The Propensity to Misunderstand The Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 780 (1981).

80. *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 19, § 5233 (surveys the confusion over the definition of character).

81. Kuhns, *supra* note 79, at 794. The prevailing approach also attempts to flesh out "character" by contrasting it with "habit," which is also an elusive term. The classic statement of this approach is found in C. MCCORMICK, *supra* note 31, at § 195.

One failed effort at codifying the law of evidence defined character as follows: "Rule 304. Definition of Character. Character as used in these Rules means the aggregate of a person's traits, including those relating to care and skill and their opposites." MODEL CODE OF EVIDENCE, *supra* note 3, at 182.

This distinction is vital if the court must frame a limiting instruction that will educate the jury about what it can or cannot do with the evidence.

In short, it may be that the difficulties caused by the use of other act evidence is in part explained by the law's ambivalence over the notion of "character." Indeed, the conceptual confusion may mask, or foster, other reasons for permitting the introduction of this evidence which the courts cannot or will not articulate.[82]

2. The Definition of Hearsay

The doctrine of multiple admissibility is also given play in the definition of hearsay. An out-of-court statement may be offered by the proponent to prove the truth of the matter asserted in the statement. If it is, the statement is hearsay as defined in Federal Rule of Evidence 801(c), which provides: " '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."[83] When offered to prove the truth of the matter asserted, the hearsay must comport with one of the nearly forty exceptions to the rule of exclusion.[84]

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82. One study has been interpreted as concluding that limited admissibility may "reflect an ambivalence" concerning the desired impact of evidentiary rules which would otherwise operate to wholly exclude or admit the evidence. *See* S. KASSINS & L. WRIGHTSMAN, *supra* note 70, at 153 (construing the results of a study by Wallace Loh). In such instances, there is a desire to give this information to the jury, but a reluctance, not an inability, to explain exactly why the evidence is being admitted. "As a compromise between decision-making accuracy and the values of procedural fairness, the rules of evidence thus strike a balance between wholesale acceptance and rejection of [evidence of prior criminal convictions as impeachment evidence]."

83. FED. R. EVID. 801(c).

84. This assumes that the opponent has made a timely objection on the ground of hearsay. If there is no such objection, then it is not necessary to lay such a foundation. *See supra* text accompanying notes 40-49. The Federal Rules of Evidence recognize thirty-seven "exceptions," if one counts the Rule 801(d) "exemptions" as exceptions. *See also* United States v. Inadi, 475 U.S. 387, 399 n.12, 106 S. Ct. 1121, 1128 n.12, 89 L. Ed. 2d 390, 401 n.12 (1986).

The proponent may, however, offer the statement for something other than the truth of what it asserts. The most common non-hearsay purposes are to establish the effect of the statement on a listener, to show the declarant's knowledge, or to prove a verbal act, or verbal part of an act.[85] Regardless of what the out-of-court statement is offered to prove, the jury hears, or sees, the statement. The only difference is the use to which the evidence may be put.

If the statement is offered for a non-hearsay purpose, the judge, upon request, instructs the jury about the limited use that the evidence may be given at trial. The limiting instruction looks efficient and expedient in the abstract, but when one considers what is actually being asked of the jury, the difficulties emerge quickly.

It is simple to put this matter in perspective. All lawyers, judges, and law students have struggled, or will struggle, at some point with the distinction between offering a statement for some non-hearsay purpose as opposed to offering it for the truth of the matter asserted. Without the benefit of a legal education, the jury is literally told that the out-of-court statement was received for the non-hearsay purpose and that the statement is not to be used for the truth of the matter asserted. Without hornbooks, nutshells, computer assisted legal instruction, or even "testimonial triangles," not to mention days or weeks to ponder the distinction, a jury might find that the judge's one or two sentence "explanation" really does little to flesh out the concept.[86]

The point is that these reified distinctions demand considerable treatment within the formal evidence course of the law school curriculum. Yet we "educate" the jury about

85. C. MCCORMICK, *supra* note 31, § 249; Lilly, *supra* note 1, § 6.2.

86. The distinctions discussed in the text have received massive attention from the commentators. Law school evidence texts devote considerable attention to refinements of the definition. *See, e.g.*, R. LEMPERT & S. SALTZBURG, *supra* note 43, at 347 (devoting thirty-four pages of text and problems to the definition of hearsay); R. ALLEN & R. KUHNS, *supra* note 7, at 293 (devoting fifty-six pages to the concept of hearsay).

precisely these concepts through a limiting instruction. If McCormick had difficulty explaining the concept clearly, one suspects that the distinction probably eludes most juries as well.[87]

3. Expert Opinion Predicated Upon Inadmissible Evidence

A final example of the problems presented by limited admissibility involves Federal Rule of Evidence 703. This rule allows an expert to base an opinion on facts or data that are "otherwise inadmissible" provided they are of a type reasonably relied upon by experts in the particular field.

If the rule authorized only the admission of the opinion itself, as opposed to the underlying basis, there would be little problem with it. Rule 703, however, permits the underlying basis of the opinion to be disclosed to the trier of fact even when the evidence constituting at least part of the basis is "otherwise inadmissible."[88] Thus, the rule works to put before the jury evidence that does not otherwise pass muster under the Federal Rules of Evidence. Upon timely request, the judge will instruct the jury that the evidence was received solely for the purpose of demonstrating the basis for the expert's opinion and that it should not be used for any other purpose.

Rule 703 operates most frequently as a kind of hearsay exception. Through the mechanism of a cooperative expert witness willing to testify that the facts or data are of a type reasonably relied upon by experts in the field, courts have permitted the use of a plethora of out-of-court statements

87. Park, *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestion to Law Teachers*, 65 MINN. L. REV. 423 (1981) (explaining McCormick's confusion of the declarant-oriented and assertion-oriented definitions of hearsay).

88. *See* Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C.L. REV. 1 (1988); M. GRAHAM, *supra* note 42, § 703.1.

that otherwise fail to qualify under any of the hearsay exceptions. For instance, a medical expert may testify about the earlier diagnoses and findings of other doctors, which do not fit within any recognized hearsay exception.[89] Similarly, a fireman has been allowed to testify about the utterance of an unknown bystander, even when the statements failed to qualify as a present sense impression or an excited utterance.[90]

Assuming that a party has made a timely objection or request, the judge will instruct the jury that the out-of-court statements cannot be used for the truth of the matter asserted. Critics have pointed out that jurors cannot distinguish analytically between the statement's use as a basis for the expert opinion and its use to prove the truth of what is asserted in the statement.[91] The accuracy of this observation is beyond question. Courts that have referred to Rule 703 as a "hearsay exception" are probably closer to the truth of the matter than any subtle academic distinction between the two uses of the evidence.[92]

These observations have serious repercussions for the law of evidence as implemented in the trial court. Suppose the proponent of an expert witness wants the witness to refer to some otherwise inadmissible item of hearsay while explaining the basis of his opinion. The opponent may consider objecting, but dismiss the idea as a waste of time. Rule 703, as interpreted by the courts, requires only that the proponent establish that the evidence is of a type reasonably relied upon by other experts in the field in rendering opinions.

89. O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084 (2d Cir. 1978) (The court allowed the plaintiff's medical expert to testify about what other non-testifying medical experts said about the plaintiff's injury, based on the reports of the non-testifying medical experts and plaintiff's rendition about what her other doctors had told her about the injury.).

90. Bagnowski v. Preway, Inc., 138 Wis. 2d 241, 251, 405 N.W.2d 746, 751 (Ct. App. 1987).

91. R. ALLEN & R. KUHNS, *supra* note 6, at 764; Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986).

92. *See Bagnowski*, 405 N.W.2d at 751.

Usually the objection can be brushed aside by the simple expedient of asking the witness: "Is this the kind of evidence that you and other experts rely upon in rendering opinions?"[93] Moreover, the objection may serve only to force the opponent into laying a more persuasive foundation for the evidence. At best the opponent gains whatever advantage there is in a limiting instruction that tells the jury not to use this statement for the truth of the matter asserted, but only as it forms a basis for the expert's opinion.[94]

Faced with these prospects, the opponent may well choose to forego the objection or limiting request and decide instead to discredit the evidence or opinion through impeachment. The failure to object, however, means that the statement has been admitted for all relevant purposes, including the truth of the matter asserted.[95]

In summary, Rule 703 may fail to function effectively, or at all, at the trial level. The prevailing laissez faire attitude toward expert testimony is one by which trial lawyers face this evidence as best they can on cross-examination and attempt to counter it with their own "friendly" expert. The appellate cases and legal commentary dealing with this issue may only dimly reflect a much larger problem that exists at the trial court level, when objecting to evidence is the exception and not the rule.

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93. *See* Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 480 (1986).

94. *See* R. ALLEN & R. KUHNS, *supra* note 7.

95. The only clear way of winning a Rule 703 objection is to convince the trial judge that experts do not reasonably rely upon the inadmissible facts or data in rendering opinions. Because the testifying expert will normally insist that he or she does rely on the particular basis and that it is reasonable for the expert to do so, opposing counsel must persuade the judge through other evidence or testimony that this is wrong. *In re* "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223, 1244 (E.D.N.Y. 1985) (Despite assertions to the contrary by plaintiffs' expert witnesses, the court held that medical experts would not rely upon "hearsay checklists" representing the medical history of a patient in rendering medical opinions.); Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir. 1988) (approaching the same problem from the perspective of sufficiency of the evidence, not admissible).

V. Should the Law of Evidence Constitute an Exercise in Faith?

The law of evidence should not be trapped between the delusion that juries follow limiting instructions and the despair that they either cannot or will not follow them. There is a need to rethink what we are trying to accomplish with limited admissibility and with evidentiary rules generally.

If limited admissibility is conceived narrowly as a device used to "control" the jury's thought processes, two roads are available. One is to continue along the present course, turn our backs to reality and take whatever comfort we can from a practice that holds that juries follow such instructions only because we postulate that they do.

The second alternative is to verify whether juries adequately understand instructions. To accomplish this, it will be necessary to relax the rules governing the competency of jurors to testify about their thought processes during deliberations. A verdict could then be scrutinized for the jury's fidelity to the judge's instructions. If it came to light that jurors misunderstood a limiting instruction, courts could consider granting a retrial or other relief on this ground.[96]

This alternative, however, is totally unworkable. Opening up the process of jury deliberations to psychological autopsies into their quality, particularly with respect to the jury's comprehension of the instructions, would critically affect the jury system. Not only might it undermine constitutional rights, but it is also procedurally impractical. Disgruntled parties would look for any indication that the jury ignored or misapprehended the instructions. Post-verdict motions would turn into sideshows featuring a trial of the trial, this time starring the original jury as grist for the litigation mill.

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96. This suggestion is advanced in Steele & Thornburg, *supra* note 7, at 468. The authors of that article, however, recognized that this might create "other problems" and advocate prevention (i.e., clearer instructions) rather than cure. *Id.* at 468, n.170.

Challenges to a jury's understanding of limiting instructions would have to be extended logically to substantive instructions as well. Jurors would no doubt be intimidated by having to explain their understanding of the instructions. Moreover, it would be virtually impossible to attempt to accurately reconstruct the thought processes of twelve individuals over a period of time.[97] In short, it cannot be done.

The outlook for limited admissibility need not be as bleak as suggested. Because limited admissibility poses grave problems when considered as a device for controlling the jury's thoughts, the concept itself should be rethought.

First, the theory of limited admissibility should be reconsidered. It is suggested that limited admissibility may function as an extremely useful doctrinal bridge between the older models of evidentiary rules and more modern thought about evidence. The older rules were dominated by rigid exclusionary approaches that kept the evidence out entirely if it was susceptible to use for improper purposes. The modern tendency to admit a greater amount of evidence has been facilitated by the practice of limited admissibility. In this way, the concerns of the older exclusionary rules are assuaged while allowing the jury to see or hear the evidence.

Limited admissibility, then, masks the tensions bound up with the development of evidence law from a system of exclusionary rules to one moving ever closer to the Benthamic ideal of a system of "free proof."[98] It also represents our first serious flirtation with rules of proof as opposed to rules of admissibility. Unlike an exclusionary rule, which simply decides what may come in through the gate of admissibility, rules of limited admissibility purport to instruct the jury

97. One way to do this would be to tape record or videotape the deliberations. This could lead, however, to stilted jury deliberations and the inhibition of candid free-wheeling discussions concerning the law, the evidence, and even the lawyers and judges.

98. *See* W. TWINING, THEORIES OF EVIDENCE: BENTHAM & WIGMORE 28 (1985).

about what they should do with the evidence once they have it. The problem is that the judicial system seems to be doing a bad job of it.

In order to bring practice in line with the theory, limited admissibility should be approached through three avenues. First, when the distinction between the permissible and impermissible purpose arises from concerns about the trustworthiness or reliability of the evidence, the fears justifying the rule should be explained to the jury in an instruction which educates them about the dangers.[99] When it proves impossible to draft a meaningful instruction, two other courses are available: reconsider the parts played by the judge and lawyers with respect to limited admissibility, or reconsider the evidentiary rule itself.

Prime attention should be given toward developing limiting instructions that tell the jury not just what they should

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99. For example, a recurring problem is the admissibility of post-arrest statements made by accomplices which incriminate the defendant. Although such statements are generally inadmissible unless the accomplice testifies in the defendant's trial, the Supreme Court has recognized that they can be used even without the accomplice's testimony if introduced for a relevant non-hearsay purpose. Tennessee v. Street, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985). In *Street*, the Court upheld the admissibility of such a statement to rebut the defendant's claim that his own "confession" was simply a coerced copy of his accomplice's confession. The accomplice's statement, then, was not offered or "used" to prove the truth of the matters asserted, *i.e.*, that the defendant participated in the murder.

This particular limited use of the evidence creates special problems because it jeopardizes the defendant's sixth amendment right of confrontation. An instruction to the jury should educate them about the perilous reliability of post-arrest statements by accomplices which implicate a defendant. It should explore the fear, coercion, and bare selfishness which infuse these statements. Finally, the instruction should literally implore the jury to use this evidence only to assess the circumstances surrounding the rendition of the defendant's alleged statement to police; the jury should not use the accomplice's statement as a substitute for testimony by the accomplice.

For an example of a suggested instruction that fails badly on all counts, see WIS. J.I.-CR. 220B:

> Evidence has been received of a statement made out-of-court by _____. This evidence is to be considered only for the purpose of rebutting the defendant's testimony that his own confession was a coerced copy of _____'s statements. It must not be considered as proof of the facts contained in the statement.

do with the evidence, but why they should do it. Instructions must do more than articulate arcane legal concepts. They should instead be thought of as "rules of proof," which provide some guidance to the trier about how to work with the evidence that has been admitted.

One example is the use of out-of-court statements for some non-hearsay purpose. An understanding of the distinction demands a legal education at the very least. Given the problems and ambiguities that plague even the definition of hearsay, it is doubtful that a meaningful instruction can be drafted. It does not necessarily follow, however, that the hearsay concept should be jettisoned for this reason alone.

Technically, subtle distinctions such as these are still, one hopes, within the grasp of most lawyers and judges. In deciding whether to admit the evidence for a limited purpose under these circumstances, the trial judge should assume that the jury cannot and, therefore, will not use the evidence for the permissible purpose only. This "reality" should be balanced against the probative value of the evidence when conducting the balancing test.[100] In short, trial judges need to take a more honest look at the impact that this evidence will certainly have on the jury.

When the judge decides to admit such evidence knowing that a jury instruction cannot adequately explain the purported legal distinctions between what is and is not permissible, the focus of attention should shift to the lawyers. In particular, the conduct of the attorneys in presenting their arguments should be closely scrutinized. Limited admissibility is a charade if the attorney can later do whatever he or she wants to do with the evidence during the summation. This is critical because, aside from limiting instructions, the only other significant guidance given to the jury about how to use the evidence comes from the attorneys during argument.

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100. *See supra* the discussion of Rule 403 at text accompanying notes 25-27.

Closer scrutiny, therefore, should be paid to arguments, questions, or other statements by counsel bearing on evidence that has been admitted for a limited purpose. Rulings admitting evidence for limited purposes cannot be effective if later in the trial the proponent uses the evidence for the forbidden purpose.

For example, when evidence of a defendant's prior crimes is introduced either as other act evidence or for impeachment purposes, the critical point is not so much the juncture at which it is admitted, but the point where the prosecutor actually uses it—the closing argument. At the time of admission, the careful advocate will do and say nothing that might betray an intent, conscious or unconscious, to use the evidence impermissibly. The "true meaning" of the evidence for the proponent may not come to light until the closing argument, which may be the first and only opportunity to actually "use" the evidence for its intended purpose.[101] Policing closing arguments may require not only certain procedural changes, but a different attitude toward them by the court and counsel.[102] The present practice is one in which attorneys typically do not object during the closing argument unless it is virtually a life or death matter. The circle becomes all the more vicious because a failure to object to an argument constitutes a waiver even if the court made a ruling that limited the use of the evidence at the time it was admitted.

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101. See, for example, the confusion demonstrated in *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986). Lee was tried for murder with a codefendant. The prosecutor introduced testimony of incriminating post-arrest statements made by each defendant. Ostensibly, the statements were to be used only against the defendant who made the statement; they were not to be used against the respective codefendant. *Lee*, 476 U.S. at 536-37. In a vivid example of how futile limited admissibility can be under certain circumstances, the Supreme Court observed that the prosecutor had confused the contents of the two different statements in his closing argument.

102. Tanford, *Closing Argument Procedure*, 10 AM. J. TRIAL ADVOC. 47, 85-90 (1986).

Finally, in addition to more enlightened instructions and a more rigorous approach by the bench and bar to evidence admitted for a limited purpose, a third avenue is open when appropriate: modify or discard those rules which turn on distinctions that are so subtle that instructions cannot be formulated and even lawyers cannot be expected to appreciate the distinctions within the context of trial.

Probably the best example is Rule 703. The rule is useful and should be retained insofar as it recognizes the reality that expert opinion will necessarily be based on a great deal of information, especially hearsay, which is not admitted into evidence at trial in any formal sense. One should not continue to carry on the charade that this represents some sort of evidentiary purpose distinct from the "truth of the matter asserted."

Rather, the trial judge should determine whether the specific information has sufficient indicia of reliability to warrant being placed before the jury. If so, then the evidence ought to be formally "admitted."[103] When that degree of reliability in the basis is lacking, then the expert might be allowed to state the opinion, but not put before the jury the particulars of the inadmissible basis.[104] The point here is not to resolve the problems caused by Rule 703, but only to show that other approaches are open to this and similar problems.

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103. In this instance, one need no longer speak of an "inadmissible" basis within the language of Rule 703. Hearsay problems could be resolved through Federal Rule of Evidence 803(24).

104. *See* Carlson, *supra* note 91, at 586 n.29; *Federal Rules of Evidence: Fresh Review and Evaluation* 1987 A.B.A. CRIM. JUST. SEC. 72-78 (proposing an amendment to Federal Rule of Evidence 703 strictly curbing the opportunity to put before the jury any basis for an expert opinion which is not independently admissible).

VI. Conclusion

Limited admissibility is an integral part of the modern law of evidence. It provides the theoretical foundation necessary to allow juries to see and hear evidence which would have been excluded under the old common law rules of exclusion. Present practice, however, suffers from the existence of limited admissibility only because of the widely disparaged fiction that juries follow limiting instructions.

The doctrine of limited admissibility needs to be reconsidered so that it can be more fully and effectively utilized and so that the bogus fiction about jury instructions is eliminated. Limited admissibility should be properly appreciated as focusing on problems of proof and weight, not problems of admissibility.

In addition to the theoretical ramifications of reconsidering the doctrine, it needs procedural retuning as well. Jury instructions should be redrawn so that they truly educate the jury about how to use the evidence. Discarding the fiction that juries follow the sort of limiting instructions that are commonly used at present will also require a different attitude by the courts toward admitting such evidence and a modification of closing argument practice and procedure.