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Missing Evidence

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MISSING EVIDENCE

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In a system of litigation that depends on the parties to marshal witnesses, documents, and other things as evidence, there is a strong incentive for each party to collect information and to filter the information thus assembled so as to present to the tribunal only evidence that supports that party's cause. I take this to be an uncontroversial claim. More controversial, of course, is the proposition that the self-interest of the adversaries, coupled with existing tools of investigation and formal discovery, will offset the filtering effect and result in an optimal, or at least satisfactory, presentation of evidence at trial. Despite the adversarial clash, there is ample reason to believe that satisfactory results often cannot be reached without the aid of supplemental prophylactic and remedial rules, and indeed may not be reached even with such rules in place. There is, in other words, a problem of missing evidence. In this essay, I shall explore the dimensions of this problem and the responses the law has generated.

It is not my contention that relatively inquisitorial systems are free of such problems.[1] While I shall try to identify ways in which the effective response to missing evidence is constrained by the employment of adversarial methods, I do not wish to address here the issue of which general kind of procedure would *best* handle the problem of missing evidence. Rather, I intend to operate within the framework of the largely adversarial systems employed in the United States, civil and criminal, for I wish to address the issue of how we should think about responses to that problem within our processes of discovery and trial. Indeed, I do not wish to overstate the seriousness of the problem of missing evidence in an adversarial system. In particular, I

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[1] I use the term "adversarial" to refer to systems of dispute resolution that give the parties primary responsibility for marshalling and presenting evidence to a relatively passive tribunal, as contrasted with "inquisitorial" systems that rely upon a judicial officer to collect and assimilate information for the tribunal's consideration. *See generally,* Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975). The adversarial/inquisitorial debate continues. For samples of the best of the debate, compare Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) with Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987).

ought not be read as suggesting that the law has not directed serious attention to it, nor that the law's responses are wholly ineffectual. The panoply of responses is extensive, and there may be reason to suspect correctible redundancy. This essay is not so much a call for draconian action as an invitation to analytical reflection.[2] On the other hand, I will not operate at the micro-level of case parsing through the details of the many doctrines that have been developed by courts and legislatures to deal with the problem of missing evidence. Instead, I want to explore the general contours of these juridical responses.

Given the nature of my enterprise, I resist stating a specific thesis. Nevertheless, for the reader who wants an organizing or motivating principle, I offer the following two recurrent themes. First, I want to examine the relationship of traditional admissibility rules to the problem of missing evidence and to other forms of juridical response to that problem. The reason for this interest will be explained in the next section. Second, I want to investigate, as we proceed, the extent to which the regulation of proof, evidence law broadly conceived, is instrumentally related to accuracy or truth seeking, and the extent to which it is a function of other concerns not demonstrably parasitic upon the accuracy criterion. The problem of missing evidence presents a useful vehicle for examining this question. My leaning, as will be evident, is toward the former, instrumentalist conception, without wanting to deny entirely the role of the latter. I will not offer here a sustained argument to that effect, for that is not my present purpose. I intend to provide such an argument in future work.

THE PROBLEMS OF MISSING EVIDENCE

The term "missing evidence" may seem self-contradictory, at least to anyone who thinks of "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."[3] If it *is* "offered," evidence can hardly be missing. Still, my usage should not be confusing, as I mean the term "evidence" to refer to information that *could* be "presented to the senses" and, indeed, *would* be presented to the tribunal in a procedurally optimal world of costless information. It

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[2] A call to action is made in Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793 (1991). My comment on Nesson's article appears as Nance, *Hear No Evil, See No Evil: A Comment on Professor Nesson's Claims About Evidence Suppression*, 13 CARDOZO L. REV. 809 (1991).

[3] CAL. EVID. CODE § 140 (West 1974). *See also* BLACK'S LAW DICTIONARY 656 (rev. 4th ed. 1968) (evidence defined as "[a]ny species of proof, or probative matter, legally presented at the trial of an issue . . . . ") (citations omitted).

therefore includes information that should be presented as evidence in the world as it is but that may not be, at least without some judicial intervention. This last caveat is not meant, of course, to limit my scope to situations in which the missing evidence can and will be forthcoming in response to appropriate judicial intervention. Some evidence may be irretrievably lost, and that may be of considerable importance to the framing of juridical responses.[4]

This broad notion of evidence readily indicates that the problem of missing evidence is not limited to the intentional filtering of damaging evidence by a litigant. We must take a wider focus than that suggested by the preceding introductory comments. This can be done by distinguishing among various ways in which potentially relevant information can come to be missing at trial. As a very general proposition, relevant information will be presented at trial if it is perceived as favorable on balance to a party who is aware of and has reasonable access to the evidence in question. By negating the predicate of this proposition, one can readily identify the principal modes by which evidence may come to be missing.

On the one hand, it may be that information that might be very helpful to a trier of fact never comes to the attention of either party to the dispute. If neither party knows the information, neither will have reason to present it to the tribunal. Although there may be, in any given situation, no way for the evidence to come to the parties' attention, generally one cannot know that in advance. The question of judicial intervention must accordingly focus on the parties' decisions about the commitment of resources to investigation and development of evidence. In fact, there is not very much that the law has seen fit to do in terms of direct regulation of resource allocation. Rather, the law has placed primary reliance upon the motivation and capacity of the parties to develop information that may be of use. The possibility of litigation being significantly affected by "unfound" evidence is thereby presented.[5]

In contrast, evidence can be missing from the trial of a dispute even though it comes to the attention of, and becomes readily available for presentation by, one or both parties. This can happen in a

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[4] For some purposes, one must distinguish between information and the thing that embodies or provides that information, like a document or witness. The term "evidence" is used here to refer either to the information or the thing, as context requires.

[5] A party may have knowledge of the existence of evidence of potential importance to the case, but not know the exact contents thereof. In such cases, further investigation is necessary to discern the evidential content of the thing, whether it be a document the precise content of which is unknown or a witness whose precise testimony is unknown. The category of "unfound evidence" is intended to include such cases.

number of ways: (a) though the evidence is readily available to *both* parties, each simply overlooks the information, finds it insufficiently favorable to be presented to the tribunal, or finds its favorable probative value in the case outweighed by considerations extrinsic to the particular litigation; (b) though evidence is or would be perceived as sufficiently favorable to one side to warrant its introduction at trial, it is reasonably available only to the other, and the latter chooses not to present the information to the tribunal; or (c) though evidence available to a party is perceived as sufficiently favorable to warrant its presentation to the tribunal, its introduction at trial is blocked by the opponent's invocation of an exclusionary rule.[6] Once again, the law has had relatively little to say about situation (a), which I shall call, for lack of a better term, the case of "rejected" evidence.[7] Situation (b), however, has occasioned a wider variety of juridical responses. Though linguistic conventions are weak in this area, I shall call this the problem of "suppression" of evidence, and it will be recognized as involving the filtering problem identified in the introduction.[8] Finally, situation (c) involves the sanction of the principle or policy behind the exclusionary rule that is invoked.

Should the law care about missing evidence? If so, ought the extent of the concern depend upon the mode by which the evidence comes to be missing? We can start with the working proposition that the law has an interest, which can of course be overridden by other concerns, in the presentation of all reasonably available information relevant to the disputed issues of fact in a case. Fact-finding, as a component task of dispute resolution, compels the law to take such an interest.[9] This claim is itself potentially controversial, for one might

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[6] While it is possible for evidence directed toward a controverted factual issue to be perceived by *both* sides as favorable, in such a case the evidence will be presented as long as either party has access to it, and the nonpresenting party will naturally forgo any applicable objection. Thus, such evidence will come to be missing at trial only when it is unfound.

[7] It should be understood that the rejection is by the parties, rather than by the court as in case (c), and that the rejection may be inadvertent.

[8] In particular, "suppressed evidence" includes both evidence that is withheld from the tribunal and evidence that is destroyed. *Compare* Maguire & Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 226-27, 234 (1935) ("suppression" used broadly to include both destruction and withholding) *with* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1118 (1987) ("suppression" distinguished from destruction). Moreover, my definition does not assume that an act of suppression is necessarily committed with an intent to hide the information or with any other particular mental state.

[9] Legal fact-finding, like most other forms of factual inquiry, involves inductive inference. The validity of such inferences is constrained by the principle of complete evidence, namely that the premises of the inference contain all logically relevant evidence available. *See, e.g.*, A. BURKS, CHANCE, CAUSE, REASON 20 (1977); B. SKYRMS, CHOICE AND CHANCE 25 (2d ed. 1975); W. SALMON, LOGIC 91 (2d ed. 1973). Of course, legal adjudication is not *only* a fact-

say, at least in civil cases, that the law sets about, or should set about, not to draw inferences as to the truth about litigated events, but only to compare the strength of inferences argued by the plaintiff with those argued by the defendant, regardless of what the best inference would be under the condition of knowledge of all reasonably available information.[10] However, even in evaluating the relative strength of competing inferences, the tribunal has an interest in any information that will shed light upon them, though the parties have not presented the information.[11] Only when information is not reasonably available may the law rightly forgo efforts to gain access to its potential, and even then the law may have to take the absence into account in considering burdens of proof.[12]

Beyond these general claims, however, much depends upon context and countervailing concerns. One of the most important features of context is the employment of an adversarial system of litigation and the implications that has for the ways in which the law's interest in relevant information is manifested. The problems of unfound, rejected, and suppressed evidence in the adversarial context will be addressed *seriatim* in subsequent parts of this essay. Before doing so, however, it will be useful to consider briefly the last category identified above, for the exclusion of evidence as a matter of legal policy bears an interesting relationship to the general topic of missing evidence. As it happens, it was my study of admissibility that led me to a serious interest in the more general issue.

Excluded Evidence

The law, of course, has had much to say about admissibility. The exclusion of irrelevant evidence would seem to pose very little cost of the sort that is of concern to us here. At worst, there is the risk that the courts, especially trial courts, will err by excluding evidence that

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finding activity, but it is *at least* that. *See generally* JACKSON, *Questions of Fact and Questions of Law*, in FACTS IN LAW 85 (W. Twining ed. 1983).

10 Ron Allen's work on the logic of civil trials might seem to suggest this kind of response by stressing the probabilistic comparison of the parties' "well specified" versions of the events and the absence of a state interest in the exploration of the "particularities" of the case beyond what is presented by the parties, though he qualifies this with a commitment to full discovery and even the use of adverse inferences from failure to present available evidence. *See* Allen, *A Reconceptualization of Civil Trials*, 66 B.U.L. REV. 401, 425-31 (1986); *see also* Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373 (1991).

11 Note that a strongly inquisitorial system, in which nonpartisan officials managed all evidence collection, could still be run on the basis of the comparative strength of case model.

12 *See* Callen, *Adjudication and the Appearance of Statistical Evidence*, 65 TUL. L. REV. 457 (1991) (a comparative approach that ignores the completeness of evidence neglects important substantive and procedural values, and incompleteness is not always dependent upon availability).

is in fact relevant, and even this relatively minor danger is reduced if the interpretation of the relevance requirement is only that the trial judge should exclude evidence that no reasonable trier of fact could find probative, rather than requiring exclusion of evidence that the judge thinks is not probative.[13] However, when exclusion is based upon some rule that presupposes that the evidence in question is or may be relevant, there is a real danger that exclusion itself will contribute to the problem of missing evidence.[14] This danger is the source of the recurrent anxiety felt about exclusionary rules generally, and the resulting attitude is one of attempting to balance the loss of probative information against the good, however defined, that is thought to result from the exclusion.

Now the purposes of these suprarelevance exclusionary rules are many, and the goods thought to result from exclusion varied. Indeed, the heterogeneity of these purposes and goods is often considered a peculiarity of evidence law.[15] Ironically, though, and despite their immediate impact, the principal purpose of many exclusionary rules is to *increase* the flow of relevant information to the tribunal. In two previous articles, I have argued that these rules operate to educate and discipline the parties in their presentation of evidence by inducing them to expand the package of relevant information received by the tribunal.[16] Such preferential exclusionary rules are concerned not with balancing the probative value of the challenged evidence against its intrinsic probative dangers, which is the most common way of conceptualizing the matter, but rather with balancing the probative value of the challenged evidence against the distortion arising from the loss of *other* evidence the presentation of which is supposed to be encouraged by the contemplated exclusion.

For example, the *prima facie* exclusion of secondary evidence of the contents of a document[17] is justified, if at all, not by the superiority of a total evidence package having no evidence of the contents over

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[13] FED. R. EVID. 401 (defining relevance) and FED. R. EVID. 402 (excluding irrelevant evidence) are silent on the matter, but sparse primary authority favors the former interpretation. *See* United States v. Williams, 545 F.2d 47, 50 (8th Cir. 1976). Given the liberally inclusive definition of relevance commonly employed, the two standards are easily conflated. *See* 1A J. WIGMORE, EVIDENCE § 37.2, at 1023 n.6 (Tillers rev. 1983).

[14] One of the untoward consequences of exclusion is that it may be necessary to take steps to prevent a jury from inferring that the absence of the excluded evidence is due to the proponent's failure to present it. *See* Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011 (1978).

[15] The insight is traceable at least to Thayer. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 263-70 (1898).

[16] *See* Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988); Nance, *Conditional Relevance Reinterpreted*, 70 B.U.L. REV. 447 (1990).

[17] *See, e.g.*, FED. R. EVID. 1002 (requiring original to prove contents).

a total evidence package having only secondary evidence of the contents, but rather by the superiority of a total evidence package having the original document over a total evidence package having only secondary evidence of its contents. Of course, there is the possibility that, under particular circumstances, the proponent cannot reasonably be expected to present the original, which gives rise to a variety of excuses allowed as against the *prima facie* exclusion.[18] One claim that I make and defend in the earlier articles is that this excusable preference structure is common to many rules besides the so-called best evidence rule. Indeed, it characterizes most of the exclusionary rules not based upon notions of privilege.[19]

The significance of this argument to the problem of missing evidence is readily seen. These exclusionary rules serve to counteract forces leading to the absence of relevant evidence under the other three categories. That is, a party may seek out evidence that is needed to satisfy a preferential exclusionary rule and that otherwise would go unfound. Similarly, a party proponent may present evidence that is needed to satisfy a preferential exclusionary rule and that otherwise would be rejected by both parties or suppressed by the proponent. The operation of these rules thus serves as a substantial limitation upon the free play of adversarial forces at trial, in the interest of improving the accuracy of judgments by means of a more complete presentation of the relevant evidence.[20]

Most modern theory concerning the rationale of the rules of evidence goes to considerable lengths to avoid this kind of conclusion. Since the late nineteenth century, the mainstream view has accepted

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[18] *See, e.g.*, FED. R. EVID. 1004 (specifying excuses for nonproduction).

[19] Other such rules include: the rule requiring witnesses to take an oath; the rule requiring witnesses to submit to cross-examination; the hearsay rule; the lay opinion rule; and the rule for sequestering of witnesses, *see* Nance, *Best Evidence*, *supra* note 16, at 281-86; the attested document rule, *id.* at 254; the doctrine of conditional relevance, *see* Nance, *Conditional Relevance*, *supra* note 16, at 456-83; the authentication and identification rules, *id.* at 484-88 & 490-97; and, to a considerable extent, the personal knowledge rule, *id.* at 488-92. Some rules, not operating as exclusionary rules, do not have quite the same excusable preference structure but are nonetheless a product of the need to increase the flow of useful information to the tribunal beyond what would arise from the free play of adversarial forces. An example is the *inclusionary* doctrine known as the rule of verbal completeness, *see* Nance, *Best Evidence*, *supra* note 16, at 284-85.

[20] One might object that excluding proffered evidence E_2 in favor of preferred evidence E_1 could not create greater completeness of the evidence unless the proponent were allowed to introduce E_2 *provided* E_1 is also introduced. In point of fact, that is the structure of most preferential exclusionary rules, with the partial and somewhat complex exception of the hearsay rule. *See* Nance, *Best Evidence*, *supra* note 16, at 270-78 (E_2 is excluded upon the introduction of E_1 primarily when and because the former is necessarily redundant or erroneously at variance with the latter) and at 281-84 (providing further illustrations, including the oath requirement, the cross-examination requirement, and the hearsay rule).

the accuracy goal, but has focused on lay jurors and their alleged emotionalism and ignorance.[21] Some recent work has played down the accuracy criterion and looked for other explanations of evidentiary rules.[22] Hybrids of these positions have also developed, deemphasizing accuracy in general but retaining the focus on control of the decision-maker in order to explain admissibility rules.[23] To be sure, the differences among the foregoing views are sometimes, perhaps often, matters of emphasis, and each contains an element of truth, but the differences are important nonetheless. What follows may shed some further light on the controversy.

UNFOUND EVIDENCE

In principle, the parties' collective commitment to case investigation can diverge from the optimal. On the one hand, the accurate resolution of the case has value to third parties, most notably the members of the tribunal itself, that may not be reflected in the parties' investigative trade-offs.[24] This could lead to underinvestigated cases.

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21 *See, e.g.*, Thayer, *supra* note 15, at 266 (in excluding information "as being dangerous in [its] effect on the jury, and likely to be misused or overestimated by that body," the law of evidence is stamped "as the child of the jury system."). *See also* Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223 (1966) (arguing that conventional view is breaking down).

22 *See, e.g.*, Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985) (claiming many rules of evidence are attributable to a policy, explicit or implicit, of generating verdicts acceptable to the public, whether accurate or not) and Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978) (positing justice as the goal of dispute resolution but denigrating truth-finding partly because justice is erroneously conceived in terms of the *perceptions* of litigants).

23 For example, Stephan Landsman, in his defense of the adversary system, recognizes litigant autonomy as a goal but acknowledges the existence of admissibility rules designed to protect the "neutrality and passivity" of the decision-maker by shielding it from "misleading" or prejudicial evidence; when it comes to controlling the litigants in their adversarial zeal, Landsman writes only of rules of "ethics" that constrain the behavior of counsel. *See* S. LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 5 (1984). The focus of admissibility rules is thereby directed away from control of the litigants and toward control of the decision-maker. However, admitting hearsay or secondary evidence of the contents of a document or unauthenticated tangible evidence poses no threat to the neutrality or passivity of the trier of fact, unless one adopts an oddly expansive notion of neutrality such that one is not neutral if one is misled by the evidence, making most errors the result of bias. Landsman also argues that having a strict evidentiary code serves to constrain judges and increase the autonomy of the parties in their conduct of the litigation. *Id.* This is true as a virtue of rule-based exclusionary sanctions over discretionary exclusionary sanctions, but not as a virtue of exclusionary sanctions over the *absence* of exclusionary sanctions.

24 The public has such an interest in view of both its substantive policies and its provision of the tribunal to settle the dispute, and the decision-maker, whether judge or jury, has such an interest in view of the responsibility of sitting in judgment on fellow citizens. *See* Nance, *Best Evidence*, *supra* note 16, at 230-31. Mixing the jargon of economists and philosophers, positive externalities associated with increased accuracy are likely to be due to preferences entitled to

More likely, the desire of the parties' attorneys to thoroughly—and profitably—prepare the case, and the parties' inability to effectively monitor their attorneys' conduct of the litigation, may lead to excessive investigation. It is difficult to solve the former problem within the framework of an adversarial system employing passive judicial officers. The converse problem of overinvestigation would seem to be somewhat more tractable within the prevailing structure. One can, for example, imagine judicial supervision of parties' investigation costs to keep them from getting out of line with the importance of the controversy. However, given the parties' interest in keeping costs within the range of the value of the controversy to them and the long-run interest of attorneys in maintaining satisfied clients, the marginal benefits of such expenditure control would probably not be worth the interference with litigant and lawyer autonomy, or at least so the law assumes. Moreover, it is not implausible that the mechanisms leading to underinvestigation and those leading to overinvestigation offset one another to a considerable extent, except perhaps in those unusual cases in which the broad social or political importance of the case is substantially greater, by any conceivable measure, than its personal significance to the litigants.[25]

One factor might suggest otherwise. A litigant cannot investigate without the resources to do so, and one may suppose that some cases are underinvestigated because one or both parties simply do not have the means to support an optimal acquisition of information. Putting aside altruistic sources of support, both public and private, this argument presupposes either that the gains from successful litigation do not have transferrable economic value, or that there is an imperfection in the "market for litigation" such that others will not underwrite the litigation of a party lacking adequate resources.

We are all familiar with the principal mechanisms for such support in civil litigation: the contingent fee contract between plaintiffs and their lawyers and the duty to defend incident to a contract of liability insurance.[26] The former allows law firms to front the necessary expenses of litigation for the relatively poor plaintiff in the expec-

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respect. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 233-38 (rev. ed. 1978) (distinguishing personal from external preferences).

25 One thinks of cases like Brown v. Board of Education, 347 U.S. 483 (1954) (holding racial segregation in public schools unconstitutional). As the *Brown* litigation demonstrates, nonparty resources are sometimes quite effectively brought to bear. *See generally* R. KLUGER, SIMPLE JUSTICE (1977).

26 Moreover, a significant part of civil litigation ends up being a battle between insurance companies, with first-party insurers subrogated to the claims of the injured person.

tation of compensation out of the eventual recovery.[27] On the defense side, given that the very poor are usually judgment proof, and given the prevalence of liability insurance with respect to the not so poor, the problem of the impecunious litigant is even less severe.[28] There may be a significant number of cases where these support mechanisms do not function adequately, but it can be doubted whether they are a frequent enough occurrence to warrant the kind of institutional changes that would be necessary to deal with them at the systemic level. Private and public altruism, in the forms of *pro bono* work and taxpayer-supported legal assistance to the poor, help remove doubts on this score.[29] To be sure, there are numerous claims, *ex delicto* or *ex contractu*, that cannot practically be pursued because the costs of litigation exceed the value in controversy, but this is not a problem related specifically to investigation costs. Though there are good reasons to make efforts to reduce litigation costs and thereby make such claims practically viable, the law should not generally act so as to require investigative expenditures, whether from private or public sources, that are out of line with the severity of the substantive claim.[30] If there is a major problem of underinvestigation on the civil side, it is probably due to ignorance of the existing litigation support

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27 *See* R. POSNER, ECONOMIC ANALYSIS OF LAW § 21.9 (3d ed. 1986) (contingent fees and class actions). By citing Judge Posner, I do not mean to suggest any broad, normative efficiency criterion. The discussion here draws only on the descriptive ("positive") elements of the economic analysis of law.

28 Of course, both plaintiffs' lawyers and insurance companies charge a price for their assistance, which raises the difficult question of whether justice should have a price, or to put the matter more accurately, who should bear the inevitable reality that justice is not a free good. But whether or not the surcharging of deserving plaintiffs (or deserving defendants, for that matter) for the costs of effectuating justice seems ultimately fair, it will have less effect upon the optimality of information provided to the tribunal than upon the decision to litigate in the first place or the decision to settle. *See id.* at 537-40 (addressing possible change in general American rule to adopt a prevailing party entitlement to recover attorney's fees from opponent).

29 Because of such efforts, there is a recognition, even among those sharply critical of the status quo, that the problem now is more the provision of legal services to the middle class. *See, e.g.*, M. FRANKEL, PARTISAN JUSTICE 119-29 (1980) (suggesting public provision of legal services to all, on the model of public education, public parks, postal services, and the like). It is disconcerting, to say the least, that Judge Frankel shows no real appreciation for what serious study of such public services reveals. For example, the postal service has long been the deserving target of critical commentary. Among recent work, see generally, J. BOVARD, SLOWER IS BETTER (1991). Similarly, consumer sovereignty and privatization are rapidly being recognized as the key ideas of reform for our troubled public schools. *See, e.g.*, J. CHUBB & T. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990).

30 To the extent that acceptance of such a view creates incentives to intentional wrongdoing, even when not subject to criminal prosecution, the availability of punitive awards will often create the expectancy necessary to induce litigation and investigation. *See* Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 649-50 (1980).

mechanisms, primarily among potential plaintiffs, leading to the failure to file practically viable claims in the first place.[31] In any event, our concern here is with the adjudicated case that is under investigated rather than the meritorious claim that is, for whatever reason, not adjudicated.

This problem may be worse in criminal cases. Many, perhaps most, defendants cannot afford an effective defense, and there is usually no direct financial return from success at trial out of which a lawyer might take a contingent fee. However, some defense lawyers have long served a similar function, lending against the future earnings, legal or illegal, of the defendant, though such loans may be very risky investments even if the defendant is exonerated. Moreover, nowadays there are the resources of the public defenders' office as well as other taxpayer-supported provision of legal assistance to the accused. Oddly, then, the problem of underinvestigation may well be more serious on the prosecution side, which generally shares the tight resource constraints of the public defenders but also bears the principal burdens of proof. In many cases, the prosecution's evidence *is* the evidence. Cases, especially run-of-the-mill cases, not infrequently arise in which the government has put inadequate efforts into the preparation of the case, given the seriousness of the consequences, preferring perhaps to rely on the jury's presuming guilt.[32] Moreover, government bureaucracies being what they are, it is not at all clear that increasing the budgets of police and prosecutors will reduce the incidence or severity of this kind of problem. The last point applies for public defenders, as well.

The Problem of Resource Imbalance

The foregoing observations do not specifically address the distinct, but related, problem of *imbalance* in the litigation resources available to parties. It is often supposed that such imbalance leads to a skewing of the evidence in favor of the wealthier party.[33] In view of the inherent constraints on the wealthier party, arising from the value of the case itself, generally this problem can be serious only where the poorer party has inadequate resources relative to the significance of

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31 This factor is surely being reduced by an increasing legal consciousness of the populace, resulting in turn from a variety of factors, including the growth of mass media generally and the advent of legal advertising in particular.

32 Examples are noted in the following discussion of the law's response to underinvestigation. *See infra* notes 47-60 and accompanying text.

33 *See* Wertheimer, *The Equalization of Legal Resources*, 17 PHIL & PUB. AFF. 303, 303-04 (1988). This, of course, is not the only evil thought to be caused by such imbalance, *see id.* at 304, but what is said here may have some bearing on the other issues.

the case, and this can happen, as noted above, only if the gains from successful litigation do not have economic value or there are defects in the market for litigation. However, there are situations where, regardless of the parties' relative wealth, the resources that one side is willing to commit to the investigation can greatly exceed what the other side is willing to commit.

Most notably, there are the "repeat players" who look at the significance of one case, and the information developed upon investigation, with an eye to similar cases simultaneously pending or likely to arise in the future.[34] Because of the repeat player's ability to spread fixed costs of litigation over many cases, this may lead to investigation outlays that would seem out of proportion to the economic value of the particular case, a rational calculation that is not necessarily matched by the other side. Class actions are a partial answer; generally speaking, they allow the aggregating of simultaneous claims. Similarly, the importance of information to similarly situated nonrepeat players over time is partially registered by law firm specialization, which attracts litigants based partly upon the accumulation of relevant information. Although it is hard to make a judgment about the net effect of these mechanisms, I doubt that they fully eliminate the disparities in available investigation resources.[35]

Formal discovery is no answer to this problem.[36] While it is true that discovery in principle renders much of the products of one party's investigation available to the other, at least in civil cases, this forms (part of) the solution to the problem of evidence suppression, more so than that of unfound evidence.[37] The problem addressed here is not that one side has information the other does not, but rather that in their respective investigations, litigants do not seek relevant information that is "random" with respect to the side it favors. Though what a litigant seeks is not necessarily what he finds, it is still

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34 *See generally* Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

35 *See* R. POSNER, *supra* note 27, at 536-37 (analyzing limitations on effectiveness of class actions). As far as law firm specialization is concerned, the mechanism obviously suffers from the problem of the willingness of the first n litigants to suffer losses in order to build the necessary information base to allow litigant $n+1$ to at least match, effectively, the resources of the opposing repeat player.

36 Indeed, one could imagine an optimal system as one in which the party in the best position to undertake a given investigation (that is, at least cost) would do so, but the resulting information would be fully disclosed to the opponent. In such an optimal system, all investigation costs would ultimately be divided between the parties in such a way as to favor the winning party to a greater extent the clearer the case is. Arguably, any case proceeding to trial, despite restrictions on frivolous complaints or defenses and the availability of summary disposition methods, is sufficiently close as to warrant an equal division of total investigation costs.

37 *But see infra* note 44.

unlikely that investigational strategies are entirely neutral in the sense of developing information which is representative of the universe of potential information. So even if all that the "wealthier" party develops were released to his opponent, it would not assure that the effect of resource imbalance would be neutralized.

Assuming this to be correct, there are strong arguments in favor of further measures to reduce the effects of the imbalance in some way, at least in civil cases.[38] The greater resource commitment results in development of potential evidence in a way that does not reflect a fair, or random, sampling of that potential. Of course, the argument is incomplete, for one cannot immediately conclude that this skewing will lead verdicts away from the truth; all one can conclude is that "wealthier" parties, as defined by the previous arguments, will tend to win more often that poorer parties, *ceteris paribus*. In order then to conclude that the skewing will reduce accuracy, one must add some proposition such as that wealthier parties are in the (legal) right on the substantive merits no more often than poorer parties, *ceteris paribus*. Perhaps this is a "social" assumption that we must make until otherwise demonstrated, or perhaps *even if* otherwise demonstrated. Extant discussions make the assumption tacitly, but recognize the difficulty of drawing implications for particular cases.[39]

The effect of measures to counteract resource differentials depends upon the details of the proposed scheme of equalization. In civil cases, one can imagine a judicially supervised investigation cost limit, equally divided between parties, which could be increased as the litigation proceeds. Presumably, the limit for each litigant would have to be determined by some measure of the seriousness of the con-

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[38] It is, of course, probable that part of the reason for the burdens of proof and procedural constraints placed upon the prosecution in criminal cases is to offset the effects of resource imbalance. Illustrative, if somewhat dated, is Justice Black's statement concerning the prohibition of double jeopardy, which operates to bar prosecutions in a way that is stronger than the corresponding effect of *res judicata* in civil cases:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957) (retrial on charge of first-degree murder precluded by reversal of conviction for lesser included offense of second-degree murder).

[39] *See, e.g.*, Wertheimer, *supra* note 33, at 304-05 ("In arguing for [equalization of legal resources in civil cases], I mean to argue not for numerical equalization, but for *whatever* regulative principle would maximize the attainment of just results, knowing full well that it will be impossible to 'micromanage' things so as to guarantee a just result in every case, and that the specification of that regulative principle will require complex empirical investigation.").

troversy, perhaps the lesser of the projected investigation costs provided by the two parties at any given time. (Because of the difficulty of identifying the alignment of interests, more complicated formulae would probably be needed for cases with more than two parties.) This would mean that the party unwilling or unable to expend as much as her opponent would be able to place a ceiling on the opponent's efforts. While this would create a superficially attractive equivalence, it would induce strategic underinvestigation by the party who perceives that she has the most to lose from further information coming to light. Such problems could be minimized by imposing a more "objective" limit, one not determined (solely) by the *parties'* perceptions of the importance of the case, but possibly related to the parties' resources. Nevertheless, the process for setting and adjusting such a limit would still be affected by notice and hearing mechanisms that would provide the opportunity for strategic as well as honest complaints by one party of inability to expand investigation. This in turn would require that the trial judge be able to waive actual equivalence in cases where that appears necessary in order to obtain information the importance of which is worth expenditure beyond a party's ceiling.[40]

Alternatively, instead of trying to constrain the expenditures of the "wealthier" party, one could try to increase the resources available to the "poorer" party. For example, one could allow a party to exceed his investigation limit on the condition that he make a matching deposit with the court in the amount of the excess, allowing the opponent to draw on that fund for investigation purposes, with anything remaining in the fund after the close of the litigation being returned to its contributor. That would preserve equivalence, since the opponent would have no incentive not to use the deposited money, but it would mean that the first party would face a distorted investigation cost function that doubled his marginal costs. Some degree of underinvestigation would continue and be especially serious when the wealthier party is in a better position, wealth aside, to make the needed investigation. This could be avoided by using taxpayers' money, rather than the opponent's, to raise the "poorer" litigant's resources. Both approaches would leave the subsidized litigant with incentives to expend the available money regardless of its contribution to the fact-finding task and would thus pose the reverse problem of

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[40] The significance of this kind of problem should not be underestimated. It would be quite common for the wealthier party to be a defendant with superior access to information that is expensive to produce. A limitation placed upon the defendant's expenditures in such a case could present serious problems of underinvestigation which the trial judge would be called upon to alleviate.

overinvestigation. The latter problem could be avoided by giving the subsidy to the "poorer" party outright, with no condition that it be spent on investigation or other litigation expenses. The litigant would then have the same incentives to conserve resources as would be true with regard to her own money. However, the availability of such subsidies would create a serious incentive to make frivolous claims, perhaps even collusive ones, pursued not for the sake of success in the litigation but only to obtain the subsidy. Besides such practical problems, public subsidy would raise serious political issues.[41]

Combinations of the two principal approaches can be imagined as well, both limiting the expenditures of the wealthier party and subsidizing the poorer party at taxpayers' or opponents' expense. In principle, the formula could be constructed so as to equalize litigation expenditures without increasing the aggregate, which might deflect criticism arising from the suspicion that the scheme is designed only to subsidize lawyers. It would, however, create the likelihood of underinvestigation by the wealthier party and otherwise suffer from the combined practical difficulties associated with each component strategy.

Nonsystemic Responses

In the absence of systemic change altering the methods of funding or the adversarial character of civil and criminal litigation, the law has generated more modest responses to underinvestigation in particular contexts. The preferential exclusionary rules mentioned earlier constitute one line of response. For example, the hearsay rule provides incentives for the proponent of an out-of-court declaration to find and present the declarant to testify, and the creation of this incentive is not an accidental by-product of the exclusionary rule.[42] Similarly, the rules of authentication and identification, especially as applied in criminal cases, induce greater expenditure on the creation of information concerning the history of tangible evidence.[43] The list of examples can, of course, be multiplied.[44]

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[41] Judge Frankel may be right in suggesting that public financing of the administration of justice, including the expenses of representation by attorneys, is more justifiable than that of most other goods routinely subsidized by the state. *See* M. FRANKEL, *supra* note 29, at 124-25. It hardly seems likely, however, that increasing litigation expenditures, and thereby subsidizing, or being perceived as subsidizing, lawyers, will be taken as a high priority for public spending policy, either at the state or federal level, notwithstanding empirical evidence that our society is not really overly litigious. *See* Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

[42] *See* Nance, *Best Evidence*, *supra* note 16, at 281-83.

[43] *See* Nance, *Conditional Relevance*, *supra* note 16, at 484-88.

[44] Exclusion as a sanction for noncompliance with a discovery order sometimes bears a

Although it will often be true that such rules merely encourage a party to present evidence already within its possession or control, sometimes the effect is to increase the commitment of resources to the acquisition or development of specific evidence. Whether or not investigation is encouraged turns on the conditions upon which the application of exclusionary rules is excused. For example, if the additional information, such as the details of a chain of custody, is not readily available to be presented at trial, and if the exclusionary rule is nonetheless applied, then the rule is aimed at modifying the investigative behavior of the proponent. Generally, the exclusionary rules are not excused simply by the proponent's not having the preferred evidence at immediate disposal at time of trial, so it is safe to say that these rules are intended, in an interpretive sense, to have some impact on the commitment of resources to investigation.[45] If so, it is plausible that such prophylactic rules will increase proponents' expenditures, at least with regard to the kinds of matter in question.[46]

When no such exclusionary rule can be brought to bear, tribunals are often forced to decide whether, notwithstanding the apparent inadequacy of the investigation, the applicable burden of proof has been met. For example, in *People v. Park*,[47] the defendant appealed an unlawful possession conviction that was based principally upon a deputy sheriff's testimony, and the defendant's alleged oral confession, that the possessed substance was marijuana. The Supreme Court of Illinois held that the sheriff's testimony, premised on his supposed familiarity with marijuana's "feel, smell, texture, and looks" did not qualify as expert opinion.[48] The court further held that without the sheriff's testimony there was insufficient evidence to support the conviction, a holding pointedly supported by taking judicial notice of highly reliable and readily available tests for the presence of canna-

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relation, though rather different, to the problem of unfound evidence. To the extent that discovery of what one's opponent intends to use at trial allows one to make further investigations toward impeachment or rebuttal that would not otherwise have been made, such discovery and associated sanctions operate *in favor* of the party whose investigation the law wants to assist. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400 (1988) (preclusion of testimony by defense witness whose identity was not disclosed to prosecution before trial).

[45] *See, e.g.*, FED. R. EVID. 804(a) (conditions under which a declarant is considered unavailable for purposes of hearsay exceptions conditioned upon unavailability); FED. R. EVID. 1004 (excuses for not presenting the original of a document otherwise within the prohibition of the original document rule); and Nance, *Conditional Relevance*, *supra* note 16, at 492-97 (proponent's burden under authentication and identification rules).

[46] Of course, the party's total investigation efforts may not increase as a result, since the party may simply shift its allocations of given resources.

[47] 72 Ill. 2d 203, 380 N.E.2d 795 (1978).

[48] *Id.* at 207-08, 380 N.E.2d at 797.

bis.[49] Given the modern liberality in qualifying experts and the prevailing deference to trial court determinations on such matters,[50] the weakness of the sheriff's testimony seems less important than the problem of missing evidence, in this case scientific evidence. Such a view is generally confirmed by subsequent interpretations of *Park* in the lower Illinois courts.[51] The rule is one of necessity in the presentation of evidence.[52]

Of course, any ruling that the aggregate evidence is insufficient, to the extent it can be anticipated, puts pressure on the burdened party to present stronger proofs. But when particular evidence can be identified as missing, yet reasonably available, then it may be considered unreasonable to go forward to judgment in the face of *any* doubt that could be removed by presentation of that evidence. In a criminal case like *Park*, such doubt may constitute the "reasonable doubt" that warrants dismissal or acquittal, and this is so even if the same degree of doubt would not so warrant if the missing evidence were *not* reasonably available. In some cases, that is, the failure to present the missing evidence seems to be decisive only when there is reason to think its absence could have been reasonably avoided.[53] It is often difficult to discern in such cases whether the significance of the missing evidence is to render the admitted evidence insufficient under a given measure of the burden of proof, or rather to constitute a separate part of the burden applicable even when the admitted evidence,

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[49] *Id.* at 212-14, 380 N.E.2d at 799-801.

[50] *See* E. CLEARY, MCCORMICK ON EVIDENCE § 13 (3d ed. 1984) [hereinafter MCCORMICK ON EVIDENCE].

[51] *See, e.g.*, People v. Ayala, 96 Ill. App. 3d 880, 883, 422 N.E.2d 127, 129 (1981) (*Park* requires proof of results of chemical tests to support conviction, notwithstanding admission of less conclusive expert testimony); People v. Jackson, 134 Ill. App. 3d 785, 787, 481 N.E.2d 1222, 1224 (1985) (not requiring tests of "every capsule or every gram of a substance"); People v. Little, 140 Ill. App. 3d 682, 684, 489 N.E.2d 322, 323-25 (1986) (dissenting opinion on question of how much should be required of prosecution). *Cf.* People v. Ortiz, 197 Ill. App. 3d 250, 554 N.E.2d 416 (1990) (absence of available expert testimony not determinative where parties stipulated to admissibility of test report but not to the expertise of the reporter).

[52] Lawyers routinely contrast *admissibility* of evidence with *weight* or *sufficiency* of evidence, *weight* being a concept directed to the evaluation of the evidence by the trier of fact, and *sufficiency* being a concept directed to the judiciary's supervision of fact finding. *See, e.g.*, FED. R. EVID. 104(e). Logicians, who rarely need speak of admissibility, routinely distinguish between *necessity* and *sufficiency* of propositions or evidence. The two distinctions are, of course, related: What we are concerned with here is the question of whether certain evidence that would be admissible is necessary in order for the total package of evidence presented to be sufficient to satisfy the applicable burden of proof.

[53] *E.g., compare* People v. Park, 72 Ill. 2d 203, 380 N.E.2d 795 (1978) *with* United States v. Bermudez, 526 F.2d 89, 98 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976) (conviction sustained upon DEA agent testimony identifying, as cocaine, substance never available for testing) *and* People v. Jones, 75 Ill. App. 3d 214, 393 N.E.2d 1132 (1979) (chemical test not required if adequate circumstantial evidence exists; substance not available for testing).

after appropriate discounting, is sufficient to meet the usual standard. This ambiguity is partly a consequence of the inherent flexibility of the reasonable doubt standard itself.[54] Particularly in criminal cases, the latter idea is more clearly invoked when the issue is addressed not as an ordinary question of the sufficiency of the evidence but as a question of whether conviction on an unnecessarily impoverished record violates the guarantee of due process of law.[55]

The issue arises in civil cases as well, as illustrated by the controversy over the sufficiency of so-called "naked statistical evidence" of liability. Hostility toward reliance upon such evidence is probably, if partially, a product of the belief that such evidence is almost never the only available evidence on the issue.[56] This means that even if we accept a fixed mathematical probability (for example, greater than .50 Pascalian probability) as the basic interpretation of the preponderance of evidence standard in civil cases, it would not necessarily be unreasonable to nonsuit a plaintiff who has established a .51 probability that defendant is liable when the plaintiff could reasonably have presented evidence that would have either increased or decreased the probability or increased our confidence in the estimate thereof.[57] And this is so even if the evidence, *suitably discounted for the omission*, still shows a probability greater than .50 that defendant is liable. The phenomenon can also be found at work in less overtly statistical cases.[58]

This kind of pressure on parties to produce missing evidence is not always exerted against the party with the burden of persuasion.

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54 On the reasonable doubt standard and its relation to completeness of evidence, see generally Cohen, *The Role of Evidential Weight in Criminal Proof*, 66 B.U.L. REV. 635 (1986) and Kaye, *Do We Need a Calculus of Weight to Understand Proof Beyond a Reasonable Doubt?*, 66 B.U.L. REV. 657 (1986).

55 *Compare* Garcia v. District Court, 197 Colo. 38, 589 P.2d 924 (1979) (due process violation) *with* State v. Reyna, 92 Idaho 669, 448 P.2d 762 (1968) (no due process violation). *See also* United States v. Martinez, 744 F.2d 76, 79-80 (10th Cir. 1984) (government's failure to perform scientific tests that might generate exculpatory evidence did not warrant dismissal on constitutional grounds, but would go to weight and sufficiency of evidence).

56 *See* Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L.J. 101, 104-08; Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U.L. REV. 439, 454-62 (1986).

57 *Cf.* Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985) (*confidence* in estimates of probability as relevant part of the burden of persuasion).

58 *See, e.g.*, Warren v. Jeffries, 263 N.C. 531, 533, 139 S.E.2d 718, 720 (1965) (noting failure to inspect condition of car involved in accident in ruling evidence of negligence insufficient). This may be the right way to understand a civil case that has generated much discussion. *See* Smith v. Rapid Transit, Inc., 317 Mass. 469, 58 N.E.2d 754 (1945) (directing a verdict for defendant where plaintiff had failed to present evidence excluding other plausible persons as the negligent actor). *Cf. In re* R.D., 178 Ill. App. 3d 681, 533 N.E. 2d 1121 (1989) (*Park* notwithstanding, expert testimony is not required in delinquency proceeding where burden of proof is only a preponderance of the evidence.).

The point is obvious with regard to the preferential exclusionary rules, as they apply quite generally to both parties. Moreover, it is not uncommon to see the burden of production shifted to the other party because of the latter's superior access to the missing evidence. This is standard fare, for example, in the application of the doctrine of *res ipsa loquitur*.[59] In criminal cases, constitutional limitations necessitate dealing with such problems by placing the initial burden on the defendant by way of specifying affirmative defenses, a practice also common in civil law.[60]

It is my suspicion that the number of these sufficiency rulings is large, though they are often to be found within the lower echelons of local practice, developed in a manner seemingly peculiar to particular substantive fields, or conceived less as rules of law than as rules of thumb in the application of general standards.[61] With the gradual deemphasis of admissibility, and the statutory restriction on judicial promulgation of exclusionary rules,[62] these ideas may come to have an increasing prominence in the field of evidence law. This may or may not be a happy development. It would be wise for the law to be more self-conscious in its choice whether to employ admissibility or sufficiency rules in this context.[63] The use of admissibility rules is less

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[59] *See generally* 1 S. SPEISER, THE NEGLIGENCE CASE: RES IPSA LOQUITUR §§ 2:26-:28 (1972). In many jurisdictions, the inference is said to arise when additional evidence of negligence, if any, is practically accessible to the defendant but not to the plaintiff. *Id.* § 2:26, at 84. This doctrine raises two possibilities: either the concept of accessibility is intended to be a relative one, such that the evidence is not practically accessible if it is *more easily* available to the other side; or, it is intended to be independent of the ease with which one's adversary can present the evidence. Under the former interpretation of the indicated doctrine, the inference may be available in contexts of unfound, rejected, or suppressed evidence while under the latter interpretation, the inference may not be available in cases of rejected evidence.

[60] The pivotal criminal case is Patterson v. New York, 432 U.S. 197 (1977) (permitting burden of persuasion to be placed upon defendant for an issue which, if it had been made part of the prosecution's case, could not constitutionally be made the subject of a burden-shifting presumption). *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 1.8 (c), 2.13 (2d ed. 1986) (the assignment of an issue to defendant as an affirmative defense is a plausible response to the "impossible burden on the prosecution to establish the existence of facts within the special knowledge of the defendant." *Id.* at 56).

[61] Obvious exceptions are occasionally encountered as *per se* rules on the sufficiency of evidence, such as the rule requiring corroboration of confessions. *See* MCCORMICK ON EVIDENCE, *supra* note 50, § 145.

[62] *See, e.g.*, Huddleston v. United States, 485 U.S. 681 (1988) (refusing to recognize common-law strictures on admission of prior crimes evidence not codified in the Federal Rules). *See generally*, Imwinkelried, *The Meaning Of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 898 (1988).

[63] For an example of such self-consciousness in the specific context of hearsay evidence, see Swift, *Abolishing the Hearsay Rule*, 75 CALIF. L. REV. 495 (1987) (considering the use of sufficiency doctrine, *inter alia*, in handling admitted hearsay). Professor Swift's analysis is somewhat marred, for our purposes, by her assumption that abolishing the hearsay *admissibil-*

severe as a response to unfound evidence, since it leaves open the possibility that the adversely affected party can win without the excluded evidence, as well as the possibility of avoiding the exclusion by presenting the missing evidence before the proofs are closed. Perhaps, therefore, admissibility rules are more appropriate for dealing with the less egregious omissions.

A Tentative Conclusion

Neither the problem of unfound evidence nor its near cousin problem of nonrepresentativeness of found information seems serious enough to warrant the extremely difficult administrative tasks associated with the kind of systemic responses discussed above. Most importantly, in each case a trial judge would have to sort through claims and counterclaims ancillary to the merits of the dispute, concerning the resources available to the parties, litigation economies of scale, and so forth. Assuming a realistic formula for modifying available resources could be legislated,[64] the courts would be further plagued by accusations and counter-accusations concerning whether an investigation limit has been exceeded, with whatever consequences that may entail. It is likely that the judiciary would be dragged inexorably into the detailed administration of the evidence gathering process.

Whether we should go down this potentially nonadversarial road raises issues going beyond the scope of this paper. In making such a decision, however, we should not forget about the "present or excuse" rules of admissibility or sufficiency which can be used to target particular areas where our expectations are that better evidence is reasonably available to a party, or at least to most parties similarly situated. These relatively nonsystemic responses serve to remind litigants of the need for certain evidence. Of course, though valuable as guidance for the litigant who has the resources to produce the preferred evidence, such legal responses do not directly address the problem of resource shortage. However, the resource demands imposed by many, indeed most, such preferences are usually modest, and where they become onerous it is not uncommon for the rule to be excused, either by explicit exception or, less obviously, by its not being imposed in the first place.[65] The existing flexibility in such doctrines can thus accommo-

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ity rule somehow entails rejection of "all judicial treatment of hearsay as a special category of evidence," *id.* at 495, including *sufficiency* rules for hearsay, *e.g. id.* at 506 n.29, 512.

64 It is extremely difficult to imagine the judiciary's imposing such a formula without legislative guidance.

65 The notion of conditional relevance, and the associated doctrines of authentication and identification, exemplify the latter mechanism. *See generally* Nance, *Conditional Relevance*, *supra* note 16.

date, to a limited extent, remaining resource differentials. Moreover, in the context of criminal prosecutions, exclusion of evidence or dismissal of the case may be a more effective way to divert resources to the matter of evidentiary concern than a general increase in resources made available to prosecution and (public) defense, a way to do so that does not require the judiciary to confront directly the issue of legislative control over spending.

REJECTED EVIDENCE

The problem of evidence available to both parties, but voluntarily not presented by either of them, calls for a rather different kind of analysis. At first blush, this would seem like the perfect opportunity to apply adversarial logic: If both parties can present the evidence, but neither party does, why should the law care about its content? The answer implicit in this rhetorical question might be correct if the object of rules of procedure were simply to guarantee a "fair contest" between the parties.[66] And the general reluctance of the law to override the parties' rejection seems to confirm that conception of things.

That is not the end of the matter, however. Though the law is generally content to allow the parties "collectively" to choose not to present evidence, there are exceptions. Most obviously, the well-established practice of allowing the trial judge to call and interrogate witnesses or to ask questions of witnesses called by the parties illustrates the law's willingness to intervene to provide the trier of fact with a more complete view of the available evidence than the parties, with full and mutual access thereto, would otherwise choose to present.[67] There are many truth-threatening motives that may lead to the necessity of such intervention. For example,

> This problem frequently arises in practice. A person may possess highly relevant knowledge but have such an unsavory background and be so easily impeached that neither party wants to call him as a witness; they both may fear that if the jury associates them with that witness, the jury's suspicions about the witness will spill over

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66 *See, e.g.*, S. LANDSMAN, *supra* note 23, at 1-6. Professor Landsman acknowledges that the fair contest is simply a means to the end of a resolution of the dispute "acceptable to the parties and to society." *Id.* at 2. Elsewhere, however, he clarifies that an "acceptable" resolution should not be premised upon maximal accuracy in the determination of disputed factual issues, because preoccupation with accuracy is "naive" and "futile" and could lead to "unsavory abuses" such as the use of torture. *Id.* at 36-37.

67 *See, e.g.*, FED. R. EVID. 614. To be sure, acceptance of this practice has not been easily obtained, given the adversarial preference for a neutral and passive trial court. *See generally* 9 J. WIGMORE ON EVIDENCE §§ 2483, 2484 (Chadbourn rev. 1981) (expressing impatience with common-law judicial reluctance to call and interrogate witnesses).

and impair the credibility of their other witnesses.[68]

Moreover, it is almost invariably the case that if the trial judge has the ability to call or question a witness, each of the parties has that ability as well, though they will have chosen not to exercise that capacity in the manner contemplated by the judge.[69] Thus, the judicial calling or examination of witnesses is, in practice, a response to the problem of what we have called rejected evidence.[70]

As in the case of unfound evidence, admissibility rules and rulings may also be affected by the failure to present evidence, even when the evidence in question is reasonably available to the opposition. Our preferential exclusionary rules are not generally excused by a showing that the preferred evidence, whether it be the original of a document, the testimony of a hearsay declarant, or authenticating evidence for a tangible thing, could be introduced by the opponent.[71] In view of adversarial motivations, it might not be a disaster if they were so excusable, relying on the judicial power to present evidence to deal with joint reluctance of the parties. Yet the law has not viewed this as an adequate arrangement, partly in order to avoid dealing with the question of the opponent's capacity to produce the evidence and partly out of preference for a response to missing evidence that does not threaten the passivity of the trial judge in the information-gathering function.[72] The question of the proper *form* of intervention is often a delicate one, but it is nonetheless important to recognize that some form of intervention in the operation of the adversarial contest

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68 R. CARLSON, E. IMWINKELRIED & E. KIONKA, EVIDENCE IN THE NINETIES 77 (3d ed. 1991). Similarly, unprivileged evidence may be favorable to one side, yet too embarrassing to be presented by that party, a fact that may even induce extortionate behavior by the opponent.

69 *See, e.g.*, Johnson v. United States, 333 U.S. 46 (1948). *Johnson* was a Jones Act case in which plaintiff recovered for injuries despite a failure to call crucial witness equally and readily available to both parties. A strong dissent was filed on grounds that the trial judge should have called the missing witness. *Id.* at 50 (Frankfurter, J., dissenting).

70 *See* MCCORMICK ON EVIDENCE, *supra* note 50, § 8, at 16-17 (noting typical uses of judicial power to call unsavory witnesses and neutral experts). Of course, the recognition of the authority of the trial judge to intervene is invariably coupled with warnings about its abuse. *Id.* at 15-16.

71 On occasion, the exclusion may be excused by the fact that the preferred evidence is *comparatively easier* for the opponent to present. An example is the rule that the original of a document need not be presented to prove its contents if the original is in the possession of the opponent and the opponent has notice of the intended use of secondary evidence. *See, e.g.*, FED. R. EVID. 1004(3). It should, however, be noted that this excuse does not apply when the original is readily and equally available to the parties, as when it is in the possession of a neutral third person readily accessible to both. Similarly, a party can introduce a hearsay statement made by the opponent, but not ordinarily one made by a neutral third person who is readily available to the opponent. *See, e.g.*, FED. R. EVID. 801(d)(2) (defining party admissions as nonhearsay).

72 *See generally* Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978) (emphasizing importance of judicial passivity).

may be necessary, even in the paradigmatic situation here presented, in order simply to educate the parties as to the importance of overlooked evidence or to overcome tactical disincentives to the presentation of useful evidence.[73]

Sufficiency rules serving a similar function have also been around for a long time, like the rule in certain jurisdictions requiring the prosecution to identify *and* present all known *res gestae* witnesses.[74] As in the context of unfound evidence, in many cases it is difficult to know to what extent a sufficiency ruling entails such a distinct "rule" of general applicability, applying even if the usual standard for the burden of production has been satisfied, as opposed to being merely an application of the usual standard affected by the missing evidence.[75] In other cases, it is difficult to tell whether the ruling is indeed one concerning the sufficiency of the evidence as a whole or rather one concerning admissibility of other evidence that is presented. An interesting and controversial example of the both ambiguities is a decision concerning the use at trial of physical evidence as well as expert testimony about the thing in question. It bears close examination.

In *G.E.G. v. State*,[76] the Supreme Court of Florida held that "when a defendant is charged with possession of a controlled substance, that substance, if available, must be introduced into evidence but that a defendant who fails to object to its nonintroduction may not be heard to complain of the error on appeal."[77] The rule thus allows the defendant to insist upon the presentation of tangible evidence in addition to the testimony of an expert who reports an analy-

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73 *See* Nance, *Best Evidence*, *supra* note 16, at 263-70 (the adversary argument against preferential rules depends not only upon "(i) access by the opponent to the better evidence," but also on "(ii) absence of legal or tactical obstacles to the opponent's presentation of this evidence, (iii) sufficient diligence by the opponent's counsel in obtaining and presenting the better evidence, and (iv) adequacy of a subsequent counter-presentation").

74 *See, e.g.*, People v. Tann, 326 Mich. 361, 367, 40 N.W.2d 184, 186 (1949) (reversing conviction for failure of prosecution to call eyewitness, notwithstanding claim that witness was available to defense, relying upon "duty of the prosecution to show the whole transaction as it was, regardless of whether it tends to establish guilt or innocence"). Similar rules have developed in connection with hearings on the voluntariness of confessions. *See, e.g.*, Kelly v. State, 414 So. 2d 446 (Miss. 1982); People v. Armstrong, 51 Ill. 2d 471, 476, 282 N.E.2d 712, 715 (1972).

75 *See, e.g.*, Galbraith v. Busch, 267 N.Y. 230, 234-35, 196 N.E. 36, 38-39 (1935) (plaintiff failed to meet burden in car accident case by not calling defendants, both of whom were closely related to plaintiff and who were in the best position to know the cause of the accident). The result suggests concern about collusion between plaintiff and defendants to obtain liability insurance benefits.

76 417 So. 2d 975 (Fla. 1982).

77 *Id.* at 977. The actual result in the case was to affirm the adjudication of defendant's delinquency because defendant had not made a proper objection or otherwise put the trial court on notice of the error in question. *Id.* at 978.

sis of the substance in question. Significantly, the latter evidence was presented in the case and is itself generally necessary for a conviction under Florida law.[78] Moreover, the substance itself was in fact readily available to both the prosecution and the defense and, thus, constitutes an example of rejected evidence.[79] On first reading of the opinion, it is not easy to say whether the central issue is one of the necessity of the tangible evidence in order to satisfy the burden of proof, or the necessity of the tangible evidence to support the admission of the expert testimony. The two questions collapse into one of sufficiency if indeed the testimony of the expert is itself necessary to the conviction.[80] Nevertheless, there is considerable discussion in both the majority and dissenting opinions of ideas usually associated with admissibility rules.

The majority offers, and the dissent disputes, three arguments with regard to the announced rule.[81] In an apparent reply to the prosecution's hornbook argument that the 'best evidence' rule, a rule of admissibility, applies only to writings,[82] the majority quotes Blackstone on the classic best evidence notion[83] and then continues: "In

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78 The expert testimony was provided by a chemist. *Id.* at 977. The separate opinion in the case observes:

> To prove that an object found in the possession of the accused is a controlled substance, the state must present the testimony of a qualified expert. The testimony of a non-expert, based on simple observation, will not be enough to establish whether an object is a controlled substance under [Florida law].

Id. at 979 (Boyd, J., concurring and dissenting in part). *Cf.* People v. Park, 72 Ill. 2d 203, 380 N.E.2d 795 (1978), described *supra* notes 47-55 and accompanying text.

79 "The substance was actually present during every moment of the trial and was handled, examined, and referred to by the prosecutor and the state's witnesses." *G.E.G.*, 417 So. 2d at 977 n.2. Needless to say, subsequent litigation has focused on the exact nature of the availability premise. *See, e.g.*, Morra v. State, 467 So. 2d 742 (Fla. Dist. Ct. App. 1985) (affirming conviction where substance was excluded on defense motion at trial because of possible tampering after testing by state's expert).

80 Although there is some authority to the contrary, it has been said to be the overwhelming majority view, and the better view, that the chain of custody must only be established to the expert whose testimony is based on the substance analyzed, rather than to the courtroom. *See* Imwinkelried, *The Identification of Original, Real Evidence*, 61 MIL. L. REV. 145, 155-56 (1973). As a prerequisite to admission of the expert testimony, this would seem to be right, postanalysis tampering, for example, having no effect upon the validity of the expert's results. As a prerequisite to the introduction of the substance itself, however, there may need to be a further showing of custody to trial. Moreover, postanalysis tampering could, in a given case, conceal evidence of preanalysis tampering, so a requirement of postanalysis chain of custody as a condition of admissibility of the results of analysis may be a wise prophylactic measure.

81 The court eschews reliance upon the defendant's confrontation rights, but otherwise is silent on the question of its reliance upon constitutional norms. *G.E.G.*, 417 So. 2d at 977 n.2.

82 The argument is emphasized by the dissenting and concurring opinion. *Id.* at 979 (Boyd, J., concurring and dissenting in part).

83 The quotation is as follows:

> [T]he one general rule that runs through all the doctrine of trials is this—that the best evidence the nature of the case will admit of shall always be required, if possi-

Florida the 'best evidence rule' only applies to writings, recordings, and photographs. But the fact that we are no longer fettered by the letter of Blackstone's words hardly implies that we are not free to be persuaded by their spirit."[84] The majority then offers two practical considerations favoring required introduction. First, failure to require production of the substance, if it is available and if the defense so insists, would create a risk of prosecutorial abuse, because the prosecutor's option to present or not "could deliberately or unwittingly be used to confuse defense counsel and thwart the ability to make certain objections, particularly objections to chain of custody."[85] This argument presupposes that the defense is not astute enough to object at the time the expert testimony is offered. Attorneys, like most people, being creatures of habit, it may not be unreasonable to assume that at least some would await the expected proffer of the analyzed substance.[86] Second, the prosecution's failure to introduce the substance "might put the defendant in the awkward position of introducing it himself should he wish to challenge its authenticity where there has been testimony of its existence as here."[87] A defendant may well be understandably reluctant to inject into the proceedings a substance so associated with social ills as to generate criminal sanctions for its mere possession.[88]

This was a hard case, and the wisdom of the announced rule is certainly debatable.[89] For our purposes, it is not necessary to endorse the result but only to appreciate the nature of reasoning ultimately

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> ble to be had; but, if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed.

Id. at 977 (quoting 3 W. BLACKSTONE, COMMENTARIES *368) (footnote omitted).

[84] *Id.* (footnote omitted).

[85] *Id.*

[86] "A defense attorney might wait for the proper moment for an objection, the moment when the state offers the substance into evidence, only to find that the moment never arrives because the state has exercised its discretion in favor of non-introduction." *Id.* at 977-78. The dissent replies that "the jury, if defense counsel does his job correctly, will not see the evidence nor even hear it referred to unless and until it has been ruled admissible by the court." *Id.* at 980.

[87] *Id.* at 978. This could occur, for example, if the appearance of the substance or its container suggests a problem in the chain of custody from seizure to expert analysis.

[88] This point may serve to distinguish the class of cases covered by the announced rule from cases involving tangible evidence that is not of an inherently inflammatory nature. However, it is not clear that the rule will be interpreted that narrowly. *Cf.* Fletcher v. State, 472 So. 2d 537, 539 (Fla. Dist. Ct. App. 1985) (distinguishing *G.E.G. v. State* on the different ground that the *res*, an alleged razor blade, was not recovered by police and, therefore, was never available to the prosecution).

[89] A directly contrary holding, more briefly defended, is Watson v. State, 18 Md. App. 184, 195, 306 A.2d 599, 606-07 (1973). *See also* Giannelli, *Chain of Custody and the Handling of*

instantiated, namely that fairness to parties is not enough when there is a threat to the accuracy of the proceedings. One could try to recast the opinion as one of pure fairness to the defense, and indeed the majority's opinion probably intended to convey that message as well. It hardly seems unfair, however, to hold even a criminal defendant responsible for the choices that must be made by defense counsel under the hypothetical risks described by the court, unless what is unfair about the situation is just the increased risk of inaccuracy.[90] The majority's reliance upon a general best evidence principle coheres well with its practical concerns over the administration of the chain of custody requirement, which in turn is based upon such a principle.

Finally, the most common device for the control of the parties' rejection of evidence is the employment of adverse inferences to be drawn from the failure of a party to present the missing evidence. There is a substantial though confusing body of law concerning the use of such inferences, argued by a party, possibly supported by a jury instruction, and usually said to be premised on the probability that the missing evidence would be unfavorable to a party who consciously chooses not to present it.[91] The practice, however, raises an important question: Against whom is the inference to operate, given our assumption that the missing evidence is reasonably available to both parties?[92] There are several possibilities, each of which has support in the case law.

One conventional view is that the inference is allowed against the

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Real Evidence, 20 AM. CRIM. L. REV. 527, 540-42 (1983) (criticizing rule in *G.E.G. v. State* in context of discussion of admissibility issues, with passing reference to sufficiency issues).

90 The decision was not explicitly based upon avoiding potential claims of ineffective assistance of defense counsel, though the first of the two rationales given could conceivably have been cast in this fashion. In that respect, however, the requirement of prejudice to defendant means not just a decision less favorable to defendant than would otherwise have occurred, but one less reliable than would otherwise have been. *See generally* C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE 795-800, 806-17 (2d ed. 1986).

91 *See generally* MCCORMICK ON EVIDENCE, *supra* note 50, § 272. By judicial decision, one state has banned the use of adverse inferences for failure to present evidence, at least in criminal cases where the missing evidence is the testimony of a witness. *See* State v. Brewer, 505 A.2d 774 (Me. 1985). It should, however, be noted that the ruling was made in a case where the missing witness seems to have been readily available to both defense and prosecution and the inference was argued against the defendant. Moreover, the court discusses the ambiguity of any inference under the particular facts and suggests constitutional concerns with regard to the privilege against self-incrimination. *Id.* at 776-77.

92 In some formulations of the missing evidence instruction, an adverse inference is not specifically authorized unless the missing evidence is not reasonably available to the party to be benefitted by the inference. *See, e.g.*, 3 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.16 (4th ed. 1987). Depending upon the interpretation to be given "reasonably available" in such formulations the inference may be legitimate only in suppression cases.

party whom, *a priori*, the missing evidence would ordinarily be assumed to favor.[93] This view continues to be informed by the idea of trying to guess which party would be favored by the missing evidence if presented, often a strikingly speculative endeavor. If one eschews this difficult task, it does not necessarily mean that one should give up the use of such inferences, for the point may be seen as assuring that the missing evidence is in fact produced.[94] If so, and one is prepared to talk about *relative* accessibility of the missing evidence, then the inference should operate against the party with superior access, that is, the party for whom it is easier to present the evidence in court.[95] If, on the other hand, one believes that discovery is sufficiently effective as to make it pointless to try to cut the matter so finely, then the inference should operate against the party with the burden of proof generally, with due acknowledgment that placing such burdens is often, to some extent, a function of access to evidence generally.[96] Hybrid solutions are possible as well, for example, placing the burden of production associated with the inference upon the party with the burden of persuasion, except when the missing evidence is the testimony of the opponent or a person identified with the opponent.

Under all but the first indicated view, it is clear that the law's response is not then simply a logical inference from the omission to the probable content of the omitted evidence, but rather a penalty imposed for the nonpresentation and inducement to present the evidence. If the evidence is not then presented, a possibility of increased error is imposed for the improved long-run incentives. Consequently, when the adverse inference is used in this manner, the effect of the inference should be specified by the court according to the degree of leverage considered appropriate, rather than left to the vagaries of a supposed inference that is not really the point of the response.

The common-law system of adjudication thus provides a surpris-

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93 *See* MCCORMICK ON EVIDENCE, *supra* note 50, § 272, at 805-06 (under this view, the inference may indeed be argued by both parties).

94 This suggestion is made in Livermore, *Absent Evidence*, 26 ARIZ. L. REV. 27 (1984). Though his argument is questionable at points, Livermore rightly concludes that the court should first determine in each case whether the missing evidence should be presented and, only if so, upon whom to place the burden of production associated with the adverse inference. *Id.* at 28-29, 34-35, 40.

95 The classic statement of the doctrine seems to employ this idea:

> [I]f a party has it *peculiarly* within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.

Graves v. United States, 150 U.S. 118, 121 (1893) (prosecution's comment on defendant's failure to produce wife for possible identification) (emphasis added). Modern cases are collected at Livermore, *supra* note 94, at 31 n.18.

96 Livermore, *supra* note 94, at 36-37.

ingly rich array of alternative responses to the problem of rejected evidence, a problem that might not seem serious enough to warrant the effort. That it is taken seriously by the law reflects, once again, the extent to which even our adversarial system is committed to accuracy of decision and the extent to which accuracy is thought to require a complete presentation of important, privileged evidence.

SUPPRESSED EVIDENCE

There are many situations in which the law considers even the suppression of evidence, as broadly defined above, to be perfectly acceptable. Accordingly, we must distinguish at the outset legitimate from illegitimate suppression. After making some brief comments about this issue, we will look at the problem the law faces in dealing with illegitimate suppression.

Legitimate and Illegitimate Suppression

Three general categories of privileged suppression are identifiable.[97] The first is the suppression of evidence incident to the maintenance of privileges against compelled disclosure, recognized primarily to protect the confidentiality of certain relationships.[98] No attempt will be made here to assess the conventional rules of privilege; their existence and justification will be taken as given.[99]

The second category consists of a set of informal privileges arising out of property and privacy rights and the economics of information storage and embracing a right to destroy information or the physical embodiment thereof, provided of course the destruction does not involve breach of a distinct legal duty unrelated to evidentiary concerns, like the murder of a witness. This privilege depends considerably upon the motives of the destroyer, as it applies, or should apply, only to someone who destroys for reasons other than obtaining a

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[97] A fourth is sufficiently uncontroversial to be dropped to a footnote. A party is privileged, even obligated, to suppress information that is of minimal significance to the litigation. This is a consequence of what I have called the "contractionary" component of the best evidence principle, that parties have the responsibility to protect the tribunal from wasteful expenditures of court resources. *See* Nance, *Best Evidence*, *supra* note 16, at 241-42, 273. Indeed, such evidence would be objectionable, if presented, under prohibitions such as FED. R. EVID. 403 (excluding evidence "if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

[98] *See* MCCORMICK ON EVIDENCE, *supra* note 50, § 72, at 171.

[99] Their function and justification remain controversial. On the most important privileges, those attaching to the attorney-client relationship, compare Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) with Allen, Grady, Polsby & Yahsko, *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359 (1990).

tactical advantage in litigation.[100] Application of such a privilege immediately generates the problem of mixed motives, especially in the context of the routine destruction plans that have proliferated in the corporate world in recent years.[101] In the context of destruction of evidence by law enforcement agencies, where the legitimate claims of property and privacy are radically diminished and the probable evidentiary significance of information looms large, the law should be particularly strict on evidence destruction, though the courts have taken an irregular and confusing path in their supervision of governmental practices.[102]

There is a third major reason to consider suppression legitimate. Arguably even more controversial than the previous two, it is difficult even to state in terms that would not be instantly subject to challenge and qualification. As a first approximation, let us say that one consequence of the use of an adversarial system is the general notion that one need not take affirmative steps to help one's opponent. What this means in terms of information disclosure includes the proposition that a litigant is privileged to withhold evidence if his opponent has not used or has ineffectively used reasonable discovery mechanisms that would, if used, have led to the discovery of the evidence. Even this core of what may be called the quintessential "adversarial privilege" is subject to serious qualification under prevailing practice. In criminal cases, the prosecution is subject to a general duty of disclosure of exculpatory evidence;[103] and more narrowly, in both criminal and

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100 *See* Solum & Marzen, *supra* note 8, at 1140-43, 1183-91. Even in substantive law, the important zones of privilege protected by property and privacy rights are subject to limitations based upon considerations of motive, as is illustrated by the law of "spite fences." *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 829(a) (landowner may not build what would otherwise be a lawful structure for sole purpose of gratifying ill will against neighbor).

101 *See* Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1185-87 (1983).

102 *See* Solum & Marzen, *supra* note 8, at 1118-25, 1145-48. Part of the confusion arises from tensions inherent in the separation of unfound evidence problems from suppression problems. If a party with unique access to evidence takes affirmative steps to destroy it or withhold it from an opponent, the law's responses to this paradigmatic suppression may be severe. If, however, the party, by its failure to invest significant further resources, merely allows information to be lost, then the law's usual reluctance to interfere with resource allocation competes with the suspicion generated by the choice of inaction. This ambivalence is illustrated by the many cases dealing with the failure of the prosecution to preserve evidence that might be favorable to the accused. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51 (1988); California v. Trombetta, 467 U.S. 479 (1984). The issue arises in civil cases when a party fails to prepare records of information that is consequently lost. *See, e.g.*, Soria v. Ozinga Bros., 704 F.2d 990, 996 (7th Cir. 1983).

103 *See generally* C. WHITEBREAD & C. SLOBOGIN, *supra* note 90, at 537-48. The duty applies notwithstanding that the evidence is readily available to the defense. *See, e.g.*, Anderson v. South Carolina, 709 F.2d 887, 888 (4th Cir. 1983). It may be doubted, however, how

civil cases, the tribunal not infrequently asserts, usually by way of an exclusionary rule, its need for fuller information from the would-be suppressor, notwithstanding any failure of the opponent's discovery efforts.[104]

Moreover, it is arguable whether the privilege extends to withholding evidence that could *not* be discovered by the opponent's reasonable use of available discovery processes.[105] If one views the opponent's formal discovery rights as intended to create and define the extent of a litigant's duty to disclose relevant information, then the indicated extension makes sense. If, more plausibly in some contexts, one views formal discovery as simply intended to help facilitate and enforce a litigant's preexisting duty in contexts where such encouragement is practicable, then there is no reason to make such an extension.[106] The privilege to suppress may be limited to situations where it can be concluded that the opponent should bear the risk of her own failures to discover the evidence in question, and for much the same reason that the law does not concern itself greatly with the possibility of missing evidence that is in the possession or control of the litigant favored by the evidence.[107] Again, hereafter we will take the resolution of these difficult matters largely as given, in order to focus on the consequences of illegitimate suppression.

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scrupulously this duty is honored in practice. *See* Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982).

104 Once again, the paradigm, but by no means only example is the original document rule, which requires the proponent of secondary evidence of the contents of a document to present the original, or excuse its absence whether or not the opponent could have obtained access to the original and subpoenaed same. *See generally* Nance, *Best Evidence*, *supra* note 16, at 263-70.

105 Given the prosecution's disclosure duties, *see supra* note 103, this issue should be presented most often with regard to evidence in the possession or control of criminal defendants. While there has been some movement toward disclosure by the defense, the requirements pertain mostly to evidence that the defense intends to present and is, therefore, aimed at avoiding surprise and allowing the prosecution to counter claims, such as alibi and insanity, rather than at making available to the prosecution information that would otherwise never come to the prosecution's attention. *See* Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567 (1967). Of course, there continue to be gaps in discovery even in civil cases. *See, e.g.*, Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 IOWA L. REV. 825, 835-45 (1966) (analyzing gaps with respect to discovery of documentary evidence).

106 *Cf.* Nance, *Best Evidence*, *supra* note 16, at 242. The idea is analogous to the relationship between the prosecution's statutory and constitutional duties of disclosure in criminal cases.

107 Judge Frankel has suggested eliminating even this limited form of privilege by requiring disclosure of all material evidence to one's adversary in civil cases. *See* Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51 (1982). Formal discovery rights could continue to be available in Frankel's proposed scheme as an adjunct to the disclosure duty, but it does not seem that even an opponent's extreme negligence in failing to exercise discovery rights would excuse one's duty to disclose.

Future references to "suppression" should be understood as limited to illegitimate suppression, unless otherwise indicated.

The Dilemma of Suppression

The problem of responding to (illegitimate) suppression, even in the paradigm case, is related to the problem of what we should infer from the act of suppression. When I say "we" here, I mean the law generally, not any particular instrumentality like the jury. Nevertheless, the matter of what is to be inferred is discussed most fully in the literature related to the making of adverse inference arguments to the trier of fact. While there has long been judicial endorsement of the idea that an act of suppression indicates a consciousness of guilt or otherwise being (legally) in the wrong, the fact of suppression, even if conclusively established, does not prove that the suppressor should, suppression aside, lose the underlying litigation.[108] This follows from the fact that even persons in the legal right may be, and often are, insecure of winning; thus, suppression may be the act of someone in the right trying to insure that the law will not miscarry.[109] Much stronger than such a "consciousness of liability" inference is the narrower inference that the suppressor (rightly) believed the evidence in question would be damaging to his case if presented to the tribunal.[110] Such a belief could well be the basis of an inference against a party who fully believed himself to be in the right.[111] But even this inference suffers from the possibility of contrary explanations, such as the possibility that the evidence in question, though not damaging to the suppressor's case, would be embarrassing or injurious to the suppressor for other reasons, or the possibility that, in the case of evidence destruction, the act was without advertence to the evidentiary significance of the information destroyed.

Analytically, then, we may distinguish the litigant who should

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[108] *See generally* 2 J. WIGMORE, EVIDENCE, §§ 277-78 (Chadbourn rev. 1979); MCCORMICK ON EVIDENCE, *supra* note 50, § 273.

[109] The classic expression of this proposition is to be found in Justice Shaw's opinion in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 317 (1850): "[A]n innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs."

[110] *See* 2 J. WIGMORE, *supra* note 108, § 285; MCCORMICK ON EVIDENCE, *supra* note 50, § 272.

[111] A further difference between the two forms of inference is that the consciousness of liability argument makes sense at trial, if at all, whether or not the evidence is ultimately presented to the tribunal or discovered by the opponent. The consciousness of adversity of evidence argument applies at trial, if at all, only if the evidence is not revealed, for if it is revealed, there is no need of an inference to its probative value by way of the suppressor's beliefs; the probative value can be weighed directly by the opponent and, if introduced, by the trier of fact.

prevail if all the material facts were known (the "theoretical winner") from the litigant who should lose under that condition (the "theoretical loser"), and ask what the law's response should be if suppression is committed by the former, or alternatively by the latter. One simple response is that no adverse consequences ought to be imposed upon a theoretical winner who suppresses evidence, since by hypothesis he ought to win the suit. There is something very unsatisfactory about this answer. There is a separate interest at stake, an interest in the proper process of adjudication. We cannot allow a party to interfere with the tribunal's capacity to make the necessary determination, even if that party believes (or knows) that it is the theoretical winner. By the same token, default on the merits does not seem an adequate response to suppression by the theoretical loser, for it would give inadequate incentive to forego suppression in cases where the unsuppressed state of the evidence is strongly against the person contemplating suppression, suppression can significantly alter the strength of the evidence, and there is a significant chance the suppression will go undetected. Again, it is necessary to recognize the separate interest at stake.

There will, however, be dispute about the precise reason for this conclusion. Some advocates of a "fairness" approach, not unlike the "fair contest" theory criticized earlier, argue that response is required because the correct result on the merits is whatever results from a fair process.[112] But if this fair process is conceived as independent of getting at the truth of the material allegations, so that the notions of theoretical winner and loser described above are irrelevant to the policies of litigation, then it is hard to discern why the suppression of evidence should have any effect upon the fairness of the adjudication. The suggestion could be made that the unfairness of suppression arises from inequality of opportunity to suppress, since there is often an asymmetry in the initial access of parties to information. This would imply, however, that in cases where there is no such inequality, it does not matter whether suppression occurs. But it *would* matter to the trier of fact, and also to those third persons who look to the judgment in the case as a statement about the disputed merits, just as it can matter when both parties reject evidence available to each. Moreover, as illustrated in our discussion of unfound evidence, there is no reason to worry about any particular form of inequality, as a matter

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[112] *See, e.g.*, Solum & Marzen, *supra* note 8, at 1160-62. Adjudication is thereby conceived as a problem of what John Rawls calls "pure procedural justice." *See* J. RAWLS, A THEORY OF JUSTICE 85-86 (1971) (arguing, to the contrary, that trials are not properly conceived in this way).

of litigation policy, unless it has untoward impacts upon the outcomes of litigation, and there is no plausible way to discuss, even in theory, whether this is so without recourse to accuracy of decision as a normative model.[113] It is precisely because the process is aimed at determining, as best as possible, who is the theoretical winner that suppression requires response.[114] This is almost, but not quite, to say that if we somehow knew, in a particular case, the truth of the material allegations despite the suppression, then the suppression would be irrelevant to the law's procedural purposes. More precisely, it would become irrelevant only if we used a process for resolving disputes that would, in all cases of suppression, yield at least as accurate results, with no greater costs to opponent or third parties, as would be the case without suppression.

If, then, the need for response is ultimately traceable to this uncertainty as to who is the theoretical winner, the details of response are affected severely by a different source of uncertainty. Obviously, one of the most difficult aspects of solving a suppression problem is knowing when it happens. The putative suppressor may deny ever having access to the information in question, or even deny the information ever existed, or assert facts which if true would make the suppression legitimate. The resulting uncertainty has considerable importance to the framing of appropriate responses to instances of suspected suppression. In cases where it can be known with sufficient certainty that suppression has occurred, as where the suppressor has refused a discovery request on an invalid claim of privilege, the primary problem is in fashioning a remedy that responds to both the needs of the present case and to the more general concern about controlling the conduct of litigations. In cases of merely suspected sup-

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[113] Solum & Marzen suggest that the sense of equality involved is not equality of opportunity to destroy evidence, but rather the equality of opportunity to "discover, introduce, question, and impeach" evidence. Solum & Marzen, *supra* note 8, at 1162. But it is not explained why this is the more appropriate sense of equality, nor can it be explained without reference to accuracy of decision as the normative model.

[114] In an effort to support the "fair process" theory, Solum & Marzen articulate the difference between a "correspondence" theory of truth and a "discourse" theory of truth, the former being associated with the accuracy of decision model and the latter being associated with the fair process approach, but they rightly acknowledge that the discourse theory suffers from a category mistake in that it conflates the meaning of truth with the methods for arriving at truth. *Id.* at 1162-65. What appears to account for these authors' flirtation with the discourse theory, despite this acknowledgment, is either their lack of recognition of the viability of the narrower form of inference, by way of a consciousness of the damaging character of the evidence, or their mistaken assumption that the narrower inference cannot be associated with a correspondence theory of truth. The weakness of the broader consciousness of liability inference is then wrongly viewed as embarrassing to the correspondence theory. There is, however, no congruence between this difference in theory of inference from suppression and the indicated difference in theories of truth.

pression, this problem is compounded by uncertainty about the situation the law confronts, and the consequent risk of imposing sanctions upon a party who has not in truth illegitimately concealed anything.[115]

The focus on a proper process of adjudication, and even the excesses to which such a focus can be taken, serve to remind us of an important limitation of the law's traditional focus on inferences that are to be drawn from suppression. Even in situations where no inference may rightly be drawn, there may be an injury that necessitates legal response. The most important example of this is the situation of negligent destruction of evidence.[116] Although no inference from any awareness by the destroyer is warranted, some form of remedy may be necessary.[117]

What evidence can be offered to show that there is a serious problem of suppression? It clearly presupposes an imperfect flow of information between opponents through the system of discovery, and there exists both analytical and empirical work suggesting such imperfections.[118] I will add nothing here to that literature, but I note the indirect evidence of the law's response. The variety of legal doctrines brought to bear on this problem, and the number of cases in which those doctrines are successfully invoked, suggest that the law is registering a serious problem.[119] This is not to say, necessarily, that such law constitutes the tip of an iceberg threatening to overwhelm the system or undermine its legitimacy. They may simply reflect a recurrent problem that demands attention, albeit more systematic attention

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115 *See* Shavell, *Optimal Sanctions and the Incentive to Provide Evidence to Legal Tribunals*, 9 INT'L REV. L. & ECON. 3 (1989).

116 Significantly, this problem generally does not happen in the case of withholding of evidence; once the matter is brought to the attention of the suppressor, continued withholding will be advertent. Of course, until the failure to disclose is brought to the suppressor's attention, it is possible to speak of negligent withholding, but it may also be true that until brought to the suppressor's attention by an appropriate discovery request, the withholding is legitimate. *See supra* notes 103-07 and accompanying text.

117 *Cf.* Solum & Marzen, *supra* note 8, at 1165 ("On the fair process account, destruction of evidence subverts the search for truth, irrespective of the motive that prompts the destruction"). This may be the valid point that misleads these authors into considering seriously the discourse theory of truth. *See supra* note 114.

118 *See generally* W. LASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968); Kaplow & Shavell, *Legal Advice About Information to Present in Litigation*, 102 HARV. L. REV. 567 (1989); Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787; Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979). This conference has added a new contribution to this literature, *see* Nesson, *supra* note 2, and Nance, *supra* note 2.

119 For an extensive compilation of statutes and cases, covering only the more limited context of suppression by destruction of tangible evidence, see J. GORELICK, S. MARZEN & L. SOLUM, DESTRUCTION OF EVIDENCE (1989).

than it has been given up to now. On the other hand, neither is it to say that existing responses are adequate to the task of controlling evidence suppression.

Juridical Responses to Suppression

The problem of responding to illegitimate suppression of evidence by a party can arise in a wide variety of procedural contexts. Accordingly, the law's response has taken many different forms. I shall briefly assay the most common types of response. For purposes of exposition, they are numbered and discussed in order of what may loosely be considered the severity of the response. I make no claims crucially dependent upon the ordering, and in particular cases the actual severity of the response, at least as perceived by the parties, may be different.

All the following responses are just that: responses, arising out of the belief, or at least suspicion, that evidence has been or is being suppressed. One might devote some attention to the problem of *anticipating* the suppression of evidence. Occasionally, a party may take the initiative in obtaining judicial assistance to prevent her opponent from destroying evidence.[120] For the most part, however, the suppression has already occurred, or is continuing in nature, before a party discovers or suspects it. I will, therefore, focus on the latter situations. By the same token, the discovery of suppression may not occur until after the trial of the cause. That will necessitate consideration of the possibility of reopening the case for further proceedings.[121] I am not here concerned with the principles or doctrines of finality covering the decision whether or not to reopen the case, but rather with the question that must be answered thereafter. If the case is reopened, the question remains what to do with the suppression, whether simply to retry the case with the missing evidence now presented, if available, or to take some further action against the suppressor along the lines described below. Likewise, if the case is not to be reopened, it must be decided whether to take any of the actions described below that are available under such circumstances.

1. *Informal Judicial Persuasion and Condemnation.* Informal pressure is often effective, as settlement practices illustrate. Judicial persuasion, in the form of invitations, exhortations, or threats, can be employed to induce the suppressor to present the evidence in question or make it available to the opponent. Threat, in this context, means

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120 *Id.* at 76.

121 *See, e.g.*, FED. R. CRIM. P. 60(b) and FED. R. CRIM. P. 33. The matter is discussed briefly in Nesson, *supra* note 2, at 798, and Nance, *supra* note 2, at 813.

no more than the indication that harsher responses are in the offing. Depending on the threatened sanction, this response can be more severe than its place in the list would suggest. Even if the evidence is no longer available to the suppressor, judicial condemnation of the conduct of the suppressor, possibly in front of the jury if there is one, is itself a sanction that can be employed.[122]

2. *Drawing an Adverse Inference.* The suppressor's opponent may be allowed to present evidence of the suppression and to invite the trier of fact to infer something therefrom, usually that the suppressed evidence would, if presented, be favorable to the opponent.[123] The argument can be supported by a formal instruction informing the jury, if there is one, that such an inference is allowed; indeed, this may be necessary to avoid the possible assumption by jurors that unpresented evidence cannot be considered in any way.[124] The court can add weight to an adverse inference by creating a presumption, that is, by instructing the trier of fact to accept the invitation to draw an inference adverse to the suppressor unless the suppressor offers a satisfactory explanation of his actions consistent with his position at trial.[125]

3. *Exclusion of Suppressor's Evidence.* The trial court may ex-

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122 *Cf.* Williams v. United States, 381 F.2d 20, 21 (9th Cir. 1967), where the court sustained the admission of heroin against a claim of inadequate chain of custody, but chastised the officers charged with custody for being inexcusably lax in preserving the evidential integrity of the substance.

123 The ambiguities of inference involved here have already been discussed briefly. *See supra* notes 108-11 and accompanying text. These ambiguities of inference do not, of course, mean that an act of suppression is *irrelevant* to the underlying merits. In any given case, the possibility of exculpatory explanations may be probabilistically outweighed by the inculpatory explanations. Evidence of suppression is quite generally considered relevant and admitted, notwithstanding the obvious prejudicial potential. *See* J. GORELICK, S. MARZEN & L. SOLUM, *supra* note 119, §§ 2.4, 2.24; Oesterle, *supra* note 101, at 1232-39.

124 Compare the following two standard jury instructions:

> If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.

3 E. DEVITT & C. BLACKMAR, *supra* note 92, § 72.16, and

> The law does not require any party to call as witnesses all persons who have been present at any time or place involved in the case, or who may appear to have knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Id., § 73.11.

125 *See* J. GORELICK, S. MARZEN & L. SOLUM, *supra* note 119, § 2.1; *cf.* 9 J. WIGMORE, *supra* note 67, § 2524 ("[T]hat a rule of presumption can be predicted is doubtful."). While this strategy may seem possible only in the context of jury trials, where formal instructions are given to the jury, in principle it can be used in bench trials as well by the trial court simply informing the suppressor of its intention to accept the opponent's invitation to draw an adverse inference, absent satisfactory explanation by the suppressor of his acts of suppression.

clude evidence offered by the suppressor conditioned upon his presenting the suppressed evidence.[126] If one is looking simply for leverage, there is no necessity that the excluded evidence bear any particular relation to the suppressed evidence. In fact, however, excluded evidence is generally connected to the suppressed evidence in such a way that the probative value of the former may be significantly affected by the latter.[127]

4. *Making an Adverse Sufficiency Ruling.* A ruling can be made against a suppressor who bears the burden of production on an issue to which the suppressed evidence would likely relate.[128] This is more severe than an adverse inference in that it can remove a case from the deliberation of the trier of fact. As discussed in connection with unfound and rejected evidence, the ruling can be either a consequence of, or an adjunct to, the usual standard of proof applied to the kind of case involved.

5. *Conclusive Presumption or Issue Preclusion.* A presumption adverse to the suppressor can be made conclusive, leaving the suppressor no way to contend with his opponent over the issue thereby precluded.[129] This has the effect of rendering any other evidence offered by the suppressor on that issue irrelevant, unless of course it is relevant to some other issue in the case left open by the judicial sanction. The preclusion can be narrow, covering only the specific matter to which the missing evidence might most likely relate, or it can be broad, covering the entire claim or defense to which the evidence would relate, or even covering the entire lawsuit by dismissal or default judgment.[130]

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126 This, once again, is a principal function of many classic exclusionary rules. *See supra* note 16 and accompanying text. Explicit authority, more general in scope but more limited by procedural context, is now granted by discovery sanction rules. *See, e.g.*, FED. R. CIV. P. 37(b)(2)(B).

127 *See, e.g.*, State v. Langlet, 283 N.W.2d 330, 331 (Iowa 1979) ("A spoliator of evidence cannot be deprived of his legal rights by the exclusion of other and totally independant evidence offered by him."). An exception may be exclusions under FED. R. CIV. P. 37(b)(2)(B), whereby all the suppressor's potential evidence on a particular issue may be precluded, regardless of the relationship between the suppressed evidence and the excluded evidence. *See, e.g.*, Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978).

128 The underexamined use of sufficiency rules and rulings has already been noted in connection with unfound and rejected evidence. *See supra* notes 47-60, 74-90 and accompanying text. There is, of course, even greater justification for employing such responses when the missing evidence is actually suppressed.

129 *See, e.g.*, FED. R. CIV. P. 37(b)(2)(A). *See, e.g.*, Berger, *The "No-Source" Presumption: The Harshest Remedy*, 36 AM. U.L. REV. 603 (1987) (criticizing the use of conclusive presumptions against news reporters who refuse to reveal confidential sources in libel actions).

130 *See, e.g.*, FED. R. CIV. P. 37(b)(2)(C). *See generally* J. GORELICK, S. MARZEN & L. SOLUM, *supra* note 119, § 3.16 at 120-26 (destruction of tangible evidence); Berger, *supra* note 129, at 625-27 (withholding of evidence).

6. *Sanctions for Contempt of Court.* A trial judge may impose sanctions for contempt of court, to some extent as an incident of the principal proceeding. In "civil" contempt, fines are payable to the opponent as compensation, and temporary confinement can be employed to coerce a party into revealing suppressed information.[131] Fines, payable to the state, and imprisonment for "criminal" contempt are possible as well.[132] These sanctions presuppose, of course, that the suppressor's acts come within the jurisdiction of the court's contempt power.[133]

7. *Separate Civil Action for Damages.* A separate civil action can be allowed the suppressor's opponent, awarding monetary compensation for the injury done to her in not having her case decided on the best reasonably available evidence, or in suffering the risk thereof.[134] This response is relatively serious in view of the substantial additional resources that must be committed to a separate legal proceeding and the substantial civil liability that may be imposed pursuant to such a proceeding.

8. *Separate Criminal Proceeding.* Fines and imprisonment can also result from an entirely separate proceeding instituted by the government under criminal prohibitions relating to the obstruction of justice.[135]

This list is not, of course, exhaustive. One occasionally encounters hybrids or responses of limited applicability, as for example the staying of proceedings until evidence is produced by a party.[136] This response, which obviously can be employed effectively only against plaintiffs, is both a direct sanction in that plaintiff's recovery, if any, is delayed, and it is a threat of future sanction in that plaintiff may eventually be subject to a bar of the suit for want of diligent prosecution.[137] Of even narrower applicability, the actions of the suppressor may constitute a waiver of the right to object to certain other

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131 *See, e.g.*, FED. R. CIV. P. 37(b)(2)(D) and 37(b) (last paragraph). A contempt proceeding is civil in character if its purpose is to coerce compliance with a court order or to provide compensation to a party for losses resulting from violation of such an order. United States v. Mine Workers of America, 330 U.S. 258, 303-04 (1946).

132 *See* J. GORELICK, S. MARZEN & L. SOLUM, *supra* note 119, § 5.12 (destruction of evidence); Oesterle, *supra* note 101, at 1204-07 (same). For an important example in the context of evidence withholding, see Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958) (imprisonment for failure to reveal news source).

133 J. GORELICK, S. MARZEN & L. SOLUM, *supra* note 119, at 197 (limitation of contempt to "in-court" defiance of judicial authority).

134 *See generally id.* §§ 4.1-.23 (spoliation tort).

135 *See id.* §§ 5.2-.10 and Oesterle, *supra* note 101, at 1191-1204 (federal and state obstruction of justice statutes).

136 *See, e.g.*, FED. R. CIV. P. 37(b)(2)(C).

137 *See, e.g.*, Link v. Wabash R.R., 370 U.S. 626, 630 (1962).

evidence presented by the opponent, particularly if there is an evidentiary rule, such as the original document rule, the hearsay rule, or the criminal defendant's constitutional right to confront witnesses, that would otherwise require the opponent to present the suppressed evidence instead of the proffered evidence.[138] While this "waiver" must be recognized as, in truth, a form of sanction,[139] it is obviously available in only a small percentage of suppression cases. Moreover, the significance of the suppression is simply in excusing the opponent's failure to comply with the otherwise applicable exclusionary rule, and only in unusual cases will that be a function of the way that the suppressed evidence comes to be unavailable, provided of course the opponent does not participate in making it unavailable.[140]

In some situations it is possible for the attorney representing the suppressing party to be disciplined for his or her role in abetting, encouraging, or instigating the suppression.[141] As an adjunct to the sanctions imposed upon parties, this is entirely reasonable in prescribing an appropriate sharing of responsibility for suppression between lawyer and client. But insofar as the professional duties are independent of the duties placed upon litigants, so that sanctions are imposed upon the lawyer when none would be imposed upon the client, it presents the problem of seriously pitting the lawyer against the client, or more precisely, pitting the lawyer's responsibility against the lawyer's strong interest in a satisfied client.[142] Given the economics of practice, this tension cannot help but be resolved, in the vast majority

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138 *See, e.g.*, United States v. Mastrengelo, 693 F.2d 269 (2d Cir. 1982) (addressing defendant's involvement in murder of witness and consequent admissibility of witness's grand jury testimony as against hearsay and confrontation objections); State v. Gettings, 244 Kan. 236, 769 P.2d 25 (1989) (same).

139 Since the intent of the suppressor is invariably *not* to relinquish his right to object, the waiver must be considered constructive or fictional only. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5039 (1977) (discussing various forms of fictional waivers of objection to admissibility of evidence). *See generally* L. FULLER, LEGAL FICTIONS (1967).

140 *See, e.g.*, FED. R. EVID. 804(a) (conditions under which a declarant is considered unavailable for purposes of hearsay exceptions conditioned upon unavailability); FED. R. EVID. 1004 (excuses for not presenting the original of a document otherwise within the prohibition of the original document rule). Interestingly enough, the sanction consists in the excusing of exclusionary rules in such a manner as to place them in greater apparent harmony with the principle that a party need only produce the best evidence that is reasonably available.

141 *See* J. GORELICK, S. MARZEN & L. SOLUM, *supra* note 119, §§ 7.1-.13 (professional responsibility).

142 In presenting his proposal for a general duty of disclosure in civil cases, *see supra* note 103, Judge Frankel was somewhat unclear about whether this would be a duty of the client or of the attorney, a point emphasized by his friendly critic. *See* Alschuler, *The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67 (1982).

of cases, in favor of suppression.[143] One can doubt the extent to which these provisions are effective for any purpose, including professional public relations. Accordingly, it has been argued that the problem of suppression of truth by counsel is best handled "primarily through re-examination and alteration of evidentiary and procedural law, not through ethical proscriptions that would preclude counsel from asserting rights that are available to his client under law."[144]

Putting aside these nuances, each of the principal responses listed above, except number seven, is instantiated in some measure in most jurisdictions. Each, however, is subject to important qualifications that restrict its availability as a response to suppression. It has been observed recently and correctly that the law has employed these responses in a rather *ad hoc* fashion, without serious reflection on the alternatives and their supporting rationales.[145] Here I will add a brief summary of the prevailing pattern of employment of the indicated responses.

Consider civil cases first. Since the eighteenth century, the primary lines of defense against evidence suppression, beyond informal judicial persuasion, have been what may be called the *evidentiary* responses: conditional exclusion of related evidence presented by the suppressor; allowance of an adverse inference argument, with or without supporting jury instructions at the deliberative phase of the case; or, a sufficiency ruling adverse to the suppressor.[146] Since the advent of modern liberal discovery, the exclusionary response has been expanded and both issue preclusion and contempt citations have been added as sanctions for refusal to disclose information to an opponent, but for the most part such sanctions have been thought to be predicated on a specific court order requiring the disclosure, a requirement that seriously hampers their employment in cases where evidence is destroyed prior to the entry of such an order.[147] Under the idea of civil contempt, the trial court can support the opponent's efforts by ordering the payment of money to the suppressor's opponent for expenses incurred in efforts to obtain access to the suppressed evidence. By causing the suppressor to internalize his opponent's discovery

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143 *See* Kaplow & Shavell, *supra* note 118, at 570-74.

144 Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, 925.

145 Solum & Marzen, *supra* note 8, at 1191.

146 Of course, in this century most academic attention has focused on the adverse inference. *See* Maguire & Vincent, *supra* note 8; Oesterle, *supra* note 101; Solum & Marzen, *supra* note 8; J. GORELICK, S. MARZEN & L. SOLUM, *supra* note 119, §§ 1.2-1.5.

147 *See, e.g.*, FED. R. CIV. P. 37(b)(2). *See generally,* J. GORELICK, S. MARZEN & L. SOLUM, *supra* note 119, §§ 3.3-.4 (examining limitation in context of destruction of tangible evidence). For a proposal to modify the federal rules to deal with the problem by imposing an affirmative obligation to preserve evidence, see Oesterle, *supra* note 101, at 1239-45.

costs, the suppressor could be induced to produce evidence, or assist in its production, when that evidence is more easily produced by him or with his assistance. Shifting of investigation costs, as currently practiced, usually covers only the opponent's expenses of compelling, or attempting to compel, discovery, but a few decisions require the payment of expenses of independent investigation to obtain otherwise suppressed information.[148] Finally, in recent years a minority of jurisdictions have recognized a new action in tort for the "spoliation" of evidence, allowing the kind of monetary recovery described in response number seven. So far, the tort has been recognized only for the destruction of evidence; no case has explicitly recognized such a tort for wrongful withholding of evidence.[149]

Turning to criminal cases, the origins are much the same. Traditionally, the major supplements to judicial suasion have been the evidentiary responses. In the case of suppression by the defense, the use of adverse sufficiency rulings has, of course, been limited by the unavailability of preemptory judgments against the accused,[150] and the use of adverse inferences has been to some extent limited in recent decades by the privilege against self-incrimination.[151] To this picture has been added possible prosecution for obstruction of justice, made criminal by statutes in all states and under federal law, a response that has been directed at persons prosecuted, or intended to be prosecuted, for separate offenses.[152] With regard to governmental suppression, statutory and constitutional standards requiring the disclosure of exculpatory evidence have developed in recent decades, with sanctions ranging from adverse inferences, to exclusion of related evidence, to

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148 *See, e.g., In re* Air Crash Disaster Near Chicago Illinois on May 15, 1979, 90 F.R.D. 613, 621-22 (N.D. Ill. 1981) (airline liable for additional expenses incurred by plaintiff in order to prove liability as a consequence of airline's destruction of internal report). *Cf.* McFarland v. Gregory, 425 F.2d 443, 449-50 (2d. Cir. 1970) (award of increased costs for opponent's expert caused by party's inadequate response to document discovery). *See also*, J. GORELICK, S. MARZEN & L. SOLUM, *supra* note 119, § 3.16, at 119.

149 *See supra* note 134. Of course, if the withholding is known to (and demonstrable by) the opponent in time, discovery can be compelled by civil contempt, confinement or the threat of criminal contempt or other responsive measures can be taken in the principal case. *See supra* notes 131-33 and accompanying text.

150 *See* W. LAFAVE & A. SCOTT, *supra* note 51, § 1.8(g).

151 This limits responses only to the extent that the suppressed evidence is the defendant's testimony or evidence sufficiently analogous thereto to be considered within the scope of the privilege. *See* Ayer, *The Fifth Amendment and the Inference of Guilt from Silence:* Griffin v. California *After Fifteen Years*, 78 MICH. L. REV. 841 (1980). Similar limitations should be acknowledged with regard to the conditional exclusion of defense evidence. *See* Nance, *Conditional Relevance*, *supra* note 16, at 482-83.

152 Practically speaking, this response is not available with respect to suppression by civil litigants, unless the government is the adversely affected party. *See* Oesterle, *supra* note 101, at 1201-04 (discussing incentives for private litigants and prosecutorial authorities).

dismissal of the prosecution.[153]

The most obvious issue that arises from this historical pattern is whether the modern responses, including sanctions that attend refusals of discovery and the new spoliation tort, have preempted the role of the more traditional evidentiary devices for controlling suppression. The latter are invoked at trial whereas the former are generally invoked pretrial or posttrial. For example, does it make sense to impose both a contempt citation for refusal of discovery and an adverse inference at trial? Or, both an adverse inference and an award of damages in a separate tort action? Somewhat more subtle is the question of whether the conditions that are currently imposed upon the availability of various responses make sense when viewed as part of the larger problem of developing a pattern of response to suppression. The following section will try to shed some light on these issues.

Matching Responses to Goals

There are four immediate goals of responding to the suppression of evidence: (1) to recognize any probative significance attributable to the suppression itself, considered as an additional evidentiary datum; (2) to reverse the suppression and thereby make the evidence in question available to the tribunal; (3) to compensate the victims of suppression for the injury to their distinct interest in a proper adjudication of the dispute; and (4) to deter the suppressor and other potential suppressors from similar conduct in the future.[154] As will be elaborated below, the second and third goals are different forms of compensatory justice, while the fourth invokes a broader notion of corrective justice.[155] Each is a part of an overall system of protecting the rights of litigants to an appropriate adjudication of the dispute.

As already argued, suppression is a harm to both the interests of the opponent and the interests of the tribunal itself.[156] The injury to

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153 *See, e.g.*, Thorne v. Dep't of Public Safety, 774 P.2d 1326, 1331-32 (Alaska 1989) (adverse inference); People v. Sheppard, 701 P.2d 49, 54-55 (Colo. 1989) (dismissal); People v. Moore, 34 Cal. 3d 215, 666 P.2d 419, 193 Cal. Rptr. 404 (1983) (exclusion of derivative evidence). Earlier cases are collected in Comment, *The Prosecution's Duty to Preserve Evidence Before Trial*, 72 CAL. L. REV. 1019, 1035-38 (1984).

154 These goals are related, but not entirely congruent, to the "functions" of "accuracy, compensation, and punishment" articulated in Solum & Marzen, *supra* note 8, at 1166-68. The main reason for the difference is that these authors address only the issue of destruction of evidence, where reversal of suppression is ruled out by hypothesis.

155 *See, e.g.*, Nickel, *Justice in Compensation*, 18 WM. & MARY L. REV. 379 (1976). The classic discussion of corrective justice is, of course, ARISTOTLE, NICOMACHEAN ETHICS V, 1131a, 1131b, 1132b. *See generally* NOMOS XXXIII: COMPENSATORY JUSTICE (J. Chapman ed. 1991).

156 The point is well made by Judge Thompson in an unusual opinion finding a duty not to destroy evidence in civil cases, a duty arising from the due process clause: "All parties are free

the opponent is obvious enough, but it is crucial to recognize that there is a separate harm to the tribunal, for this point is easily neglected. Whether a civil or criminal case, the convening of a court for the sake of resolving the dispute places a burden of responsibility upon judges and juries as well as burdens of expense upon the public and upon the jurors and their families. The suppression of evidence constitutes an affront to these persons in their official roles. Conversely, reversal of suppression eliminates much of the harm done to the suppressor's opponent and to the tribunal. It removes the principal injury in that it makes it possible to decide the issue with the more complete set of evidence that, but for the suppression, would have been available to the tribunal. Just as specific restitution is often a superior method of correcting a substantive wrong than the award of damages, with its inevitable vagaries of estimating loss, so reversal of suppression is the preferred procedural remedy here, provided of course that it can be accomplished. Nevertheless, reversal leaves the affront to dignity and the loss of time and energy necessary to effectuate the reversal.[157]

Compensation is often a broader concept, but I use it to denote making the injured person in some sense whole, by a method *other than* reversal of the suppression, and not including any psychic compensation that a victim derives merely from the punishment of the suppressor.[158] Compensation has two distinct components. One is the ancillary compensation needed as an incident to successful reversal of suppression. As just noted, reversal does not quite fully compensate either the opponent or the tribunal. Given reversal, we may be prepared to accept the marginal uncompensated loss to the tribunal, but the opponent should certainly receive compensation for any expenses incurred in effectuating disclosure of the information in question, and possibly for the anxiety produced by enduring the risk of successful suppression. The second component arises in those situations where reversal cannot be effectuated, where the suppressed evidence never comes to light or does so too late to be of use in resolving the principal litigation. Here the harm to opponent and tribunal is serious and the achievement of compensation extremely difficult, es-

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to invoke the protection of this and other courts to protect their rights. However, this privilege carries a concomitant responsibility of fairness, both to the Court and the adverse party, in prosecuting one's suit." Barker v. Bledsoe, 85 F.R.D. 545, 547 (W.D. Okla. 1979).

157 Reversal also affects the nature of the probative value of the suppression itself, as it renders superfluous any indirect inference as to what the unpresented evidence would have shown. *See supra* note 111 and accompanying text.

158 I use the term "compensatory" or "corrective" to indicate the broader notions. *See supra* note 155 and accompanying text. *Cf.* Maguire & Vincent, *supra* note 8, at 227.

pecially if the information is never brought forth. Efforts may be taken both to approximate at trial the forgone probative value of the missing evidence and to compensate for ancillary losses suffered by the opponent.

Compensatory responses suffer from a well-known defect of such schemes generally. Even if the negative value of the compensatory response to the suppressor equals or exceeds the gains that the suppressor hoped to obtain by his acts, the discounting of the negative value by the probability of being discovered in the suppression may often leave the expected gains from suppression greater than the expected losses.[159] Thus there arises the need, in those cases where suppression is calculated, even in a rough intuitive fashion, to impose additional sanctions that will more effectively deter acts of suppression. The problem here, as elsewhere in the law, is determining the optimal level and form of additional sanctions.[160] Much as the notion of compensation used above is expressed as an adjunct of, or regrettable alternative to, the reversal of suppression, so the deterrence goal is here articulated as an adjunct of, and regrettable alternative to, the reversal of suppression or compensation for the harms thereof. That is, deterrence ought to enter the response only after the best compensatory response has been formulated, and it ought to take into account the deterrent effects of the formulated compensatory response. This tertiary priority of deterrence reflects the indefiniteness of predictions of future acts and the punitive character of deterrence beyond that inherent in compensatory responses. If deterrence presupposes

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159 *See generally* Nesson, *supra* note 2 (illustrating the calculations of "bad man" civil litigants who discount for the probability of escaping effective sanctions). In the criminal context, the clearest example is the practice in dealing with unconstitutional governmental suppression discovered after conviction: If the evidence is still available, the remedy is merely reversal for possible retrial, even if the suppression is calculated. *See, e.g.*, Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979), *cert. denied*, 414 U.S. 1013 (1980). *Cf. supra* note 153 (evidence destruction cases). Only limited deterrence can be found in the expense and inconvenience of a second prosecution. This limitation may be peculiar to the constitutional source of the sanction: In due process review, according to the Supreme Court, the focus is on assuring defendant a fair trial, not punishing the prosecution. *See* United States v. Agurs, 427 U.S. 97, 110 (1976). *Cf.* United States v. Loud Hawk, 628 F.2d 1139, 1151 (9th Cir. 1979) (en banc) (Kennedy, J., concurring), *cert. denied*, 459 U.S. 1117 (1983) (deterrence of misconduct appropriate under courts' supervisory power).

160 Without an extended excursus into the theory of punishment, one point should be noted. Of course, one cannot deter an act of suppression that has already occurred, and it would violate the suppressor's moral rights if he were treated merely as the means of deterring, by the example set, *future* acts of suppression. Thus, the punitive sanction, if it is to be justifiable, must be seen as the imposition of a sanction previously promised to those who suppress evidence, and that requires it to be imposed pursuant to a regime of sanctions announced prior to the acts being punished. *See, e.g.*, Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 LAW & PHIL. 151 (1989).

calculated deception or other mendacity, then the imposition of deterrent sanctions imputes such mental states, something we should, out of simple civility, hesitate to do.[161] I will refer to such supplemental sanctions, added for the sake of deterrence, as punitive.[162] Like compensatory and punitive sanctions in substantive law, it is important to integrate the response in order to accomplish compensatory and deterrent goals in a complementary fashion.[163]

If we look now at the inventory of responses, we can make some useful observations concerning their rationales. Informal judicial persuasion, including the threat of more severe sanctions, is principally intended to reverse a decision to suppress, though it can be used to punish the insistent suppressor and thereby deter future acts of the sort.[164] On the other hand, citation for criminal contempt and criminal prosecution for obstruction of justice are clearly punitive. Fines payable to the opponent under civil contempt, as well as damages payable to the opponent under the separate action in tort, where allowed, are obviously designed to provide compensation, though liberally computed fines and the availability of punitive damages in tort can help perfect the deterrent element of these sanctions.[165] That leaves what I have called the evidentiary responses. There is greater ambiguity in, and dispute about, the nature of these sanctions.

As noted earlier, there was a time when discovery was not so widely available, and the evidentiary responses were the primary lines of defense against suppression. The response most widely associated with this function is the allowance of an adverse inference argument or instruction.[166] Both the threat of its use and its actual use constitute an incentive for the suppressor to bring forth the information in question, first in order to avoid the argument that the missing evi-

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161 This reluctance is reflected in judicial attitudes. *See, e.g.*, Edgar v. Slaughter, 548 F.2d 770, 772-73 (8th Cir. 1977). *See generally* Nesson, *supra* note 2 (lamenting judicial reluctance).

162 As already suggested, my view is that retributivist notions serve as deontological constraints upon the general goal of deterrence in the use of punitive sanctions. *See supra* note 160 and J. MURPHY & J. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 109-24 (rev. ed. 1990).

163 Occasions may arise where a punitive response must be formulated before the situation is ripe for determination of a compensatory response, but this is less likely to happen in the present context than in the substantive law. *Cf.* Hanover Ins. Co. v. Hayward, 464 A.2d 156, 158-59 (Me. 1983) (punitive damages in tort should be awarded with due recognition of previously imposed criminal punishment).

164 If made in front of a jury, it could suggest compensatory inferences or even punitive action by the jury. The ambiguity of the message from the jury's point of view is reason enough to avoid such a practice.

165 *See* Solum & Marzen, *supra* note 8, at 1100 n.67, 1183.

166 *See supra* note 146 and accompanying text.

dence is adverse and later, after the inference is raised by the opponent, to counteract the inference. Ultimately, in the event the incentive is ineffective, the allowance of the argument and any associated jury instructions serve as a utilization of new evidence created by the act of suppression itself, and as a form of compensation for the opponent, giving her the benefit of the argument and instruction, if any, in place of what the suppressed evidence would have shown. The response is compensatory precisely to the extent the inference is intended to approximate, in the trier's evaluation of the evidence, the probative value of the suppressed evidence or to provide ancillary compensation for the inconvenience of dealing with the suppression.

At some point, however, there is a subtle slide into punitive response. To the extent the doctrine is intended to go beyond what may be logically inferred from the suppression as to the merits of the claim or defense, the use of inferences and instructions generally becomes punitive.[167] This is suggested by decisions, going back to the earliest uses of the idea, that require the trier of fact to assume the worst about what the evidence would show against the suppressor.[168] Ambiguity remains because there is the possibility that the suprarational inference is intended to compensate the opponent for the incidental losses that would not be fully compensated even if the suppression were reversed. The shift to punitive response seems palpable when the presumption is made irrebuttable, as when the issue is preemptively decided in favor of the opponent.[169] The punitive character becomes fully manifest when such issue preclusion extends beyond the factual matter to which the suppressed evidence might plausibly relate to preclusion of the suppressor's entire claim or defense or, in the case of multiple causes, to default or dismissal for the entire case.[170]

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167 This is the central theme of the classic study by Maguire & Vincent, *supra* note 8. They are critical of punitive measures, but only insofar as they are disruptive to an accurate resolution of the principal case. They do not consider explicitly the long run of cases as to which a deterrent sanction may be effective in improving accuracy. Moreover, their discussion of punitiveness suggests hostility to retributive impulses, not to the deterrence of wrongdoing. *Id.*

168 *See, e.g.*, Armory v. Delamirie, 93 Eng. Rep. 664 (K.B. 1722). It is, of course, possible that under the particular circumstances of suppression, the logical inference is that the evidence *is* most conceivably damning to the suppressor.

169 *See, e.g.*, Pomeroy v. Benton, 77 Mo. 64, 86 (1882).

170 This is most likely to be encountered in connection with a statutory discovery sanction. *See supra* note 127. There has been controversy over the constitutionality of using evidentiary sanctions for what I have called punitive goals, indeed over the constitutionality of the use of evidentiary sanctions as compensation. *See, e.g.*, Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909). But the modern view is that no serious constitutional barrier is encountered, at least not in cases of deliberate suppression. Solum & Marzen, *supra* note 8, at 1177-82 (also arguing that compensation should be constitutional in negligent destruction cases). Nevertheless, the warning provided by these constitutional doubts reinforces the propriety of seeing punitive responses as disfavored.

Much the same can be said with regard to the exclusion of the suppressor's proffers and the use of adverse rulings on the sufficiency of the evidence. Conditional exclusion operates, in the first instance, as pressure to reverse the decision, whether knowingly or inadvertently made, to suppress other evidence. In the event that the suppressor does not present the missing evidence, exclusion follows from the pressure exerted and operates as a form of compensation to the opponent. Insofar as the exclusion covers evidence the probative value of which is substantially affected by the content of the suppressed evidence, exclusion remains essentially compensatory in nature. However, as the evidential connection between suppressed evidence and proffered evidence grows weaker, the punitive character of exclusion becomes dominant.[171] We have already noted, in connection with unfound and rejected evidence, how rulings on sufficiency can reflect either the failure of the burdened party to present evidence that can satisfy the persuasion requirement or a penalty for failure to remove unnecessary doubt in the result.[172]

An important question that emerges from this account is whether evidentiary responses *should* be employed in ways not aimed at facilitating accuracy in the particular case. Should the law take steps that risk undermining accuracy in a particular case in order to pursue the other goals of juridical response? This question poses greatest difficulties for what we have called the punitive dimension of these responses, where we increase the risk that a theoretical winner will be declared the loser simply in order to deter similarly situated parties from improper litigation practices. But a similar question can obviously be raised concerning the use of evidentiary responses for compensation ancillary to reversal of suppression or any other form of evidentiary compensation not aimed at restoring the probable accuracy of the result.[173]

As a first-order answer to these questions, such uses of evidentiary sanctions should be avoided to the extent that appropriate substitutes are available. There is no reason to sacrifice accuracy if that is not necessary to effectuate compensatory and deterrent goals. Thus,

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171 This rarely if ever occurs under the conventional exclusionary rules, but it can be encountered in connection with discovery sanctions. *See supra* note 127 and accompanying text.

172 *See supra* notes 52-58, 74-90 and accompanying text.

173 I suspect that sensitivity to this issue accounts for some of the commentary critical of the use of adverse inferences, as the cases criticized often involve the weaker "consciousness of liability" inference that can be invoked even where the suppression is unsuccessful and the evidence in question is ultimately presented to the trier of fact. *See, e.g.*, 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5178 (1978); MCCORMICK ON EVIDENCE, *supra* note 50, § 273.

monetary sanctions may be better responses to suppression in many cases, which in turn argues in favor of the extension of such forms of response, by endorsing both compensatory and deterrent monetary discovery sanctions and, where these are nonetheless inapplicable or inadequate, the spoliation tort. Moreover, there is no reason in principle that the latter should not be extended to improper withholding of evidence, either from the opponent in discovery or, possibly, from the tribunal at trial.[174] The problem of sacrificing accuracy can also be avoided, at least to some extent, if the suppression is serious enough to warrant a summary dismissal or default judgment, for this can be clearly articulated as a response to the suppression and not a determination on the underlying merits, and the trier of fact is not required to struggle with a determination on the basis of artificially skewed evidence or standards for its evaluation.[175]

But much lies in the second order, in the careful consideration of alternatives in context, and it must be borne in mind that evidentiary sanctions have certain advantages over their monetary counterparts. The most important is that they generally do not require an explicit finding that evidence has been suppressed, with all the opprobrium that entails. There may, for example, be genuine controversy over whether it is merely unfound or whether it was legitimately destroyed, and evidentiary sanctions allow the court to put pressure on a party while preserving recognition of the possibility of innocent, or relatively innocent, explanations for the absence of the evidence.[176] More subtly, because of their traditional association with judicial control over the courtroom, evidentiary sanctions may be (correctly or incorrectly) perceived as posing less a threat to the valued passivity of the judiciary. Finally, since evidence of the suppression will generally be admissible, it may often be difficult in practice to separate the evaluation of the probative significance of that evidence from the determina-

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174 As already noted, if the withholding is known to the opponent in time, discovery can usually be compelled by civil contempt confinement. *See supra* note 149 and accompanying text. This has the obvious merit of avoiding the waste of resources involved in generating an entirely separate litigation. But in civil cases where these measures are ineffective, and those where the suppressed evidence is discovered too late to be used by the opponent in the principal case, something like the spoliation tort is needed.

175 This is not so easy to do in the context of issue preclusion that does not resolve an entire cause of action or defense. A trier of fact can be given a surreal exercise if, for example, it is told to assume negligence, when the evidence indicates to the contrary, and then to determine what damages proximately resulted from the counter-factually assumed negligence.

176 A conspicuous exception is the exclusion of a party's evidence explicitly as a sanction for violation of a discovery order. *See supra* note 126. This form of response consequently has relatively little to commend it.

tion of ancillary compensatory or punitive responses by the trier of fact.

If, for whatever reasons, it is necessary or desirable to make recourse to evidentiary sanctions, there are advantages and disadvantages associated with each form. When used in jury trials, the classic adverse inference relieves the trial judge of the responsibility of deciding what to make of the claim of suppression, but only by placing the burden on participants more poorly suited to bear it. Questions about litigation tactics and the plausibility of excuses for nonpresentation of evidence are probably better handled by the trial judge, whose experience and training provides an expertise relative to such questions that is not shared by the jury. Moreover, judgment about the deterrent measures necessary to deal with the long run of similar cases involves a law-making skill and perspective that is better exercised by the judiciary.[177] Preferential exclusionary rulings avoid this problem at the cost of occasionally excluding relevant evidence and thereby presenting the trier of fact with an artificially distorted evidentiary package. Sufficiency rulings avoid this difficulty but generally come too late in the proceedings to allow the suppressor opportunity to produce withheld evidence.[178]

A good case can be made for the elimination of the use of evidentiary sanctions against a criminal defendant for punitive or even ancillary compensatory purposes. In particular, unnecessary increases in the risk of erroneous conviction ought not be easily countenanced merely for the sake of long-run deterrence.[179] One manifestation of this is the invocation of the due process and compulsory process clauses to override ordinary exclusionary rules that, in the long-run interest of the production of evidence, would otherwise operate against the criminal defendant.[180] The message that may be drawn from this body of law is that in the case of evidence offered by a crimi-

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[177] These points are to be distinguished, of course, from any claim that judges are better fact finders on the substantive merits of the case. *See* Nance, *Best Evidence*, *supra* note 16, at 291.

[178] Even in cases of evidence destruction, where the suppression is rendered irreversible, an adverse sufficiency ruling is unlikely to contribute to adequate general deterrence unless its punitive character is made clear by the trial judge's ruling, as will be the case in summary dismissals or defaults.

[179] It bears repeating that this would not mean that evidence of suppression by the defense would necessarily be inadmissible, as it could still be used to show the probable content of suppressed evidence or to suggest the indefinite inference as to the weakness of the defendant's case. *See supra* notes 108-11, 123 and accompanying text. Limiting instructions may be required. *Cf.* Oesterle, *supra* note 101, at 1238 (claiming that adverse inference instructions originated as attempts to *limit* the use of evidence of suppression).

[180] *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 294-98 (1973) (overriding state's restrictive hearsay rule); *see generally* E. IMWINKELRIED, EXCULPATORY EVIDENCE (1990) (surveying criminal cases).

nal defendant, our evidentiary requirements must be applied on a case-by-case basis. In other words, prophylaxis must be pursued by means other than the threat of erroneous conviction.[181] The obvious candidates are contempt proceedings and separate prosecutions for obstruction of justice.

Conversely, good reasons explain the dominance of evidentiary sanctions that currently attends the discovery of suppression by the government in criminal cases.[182] The law and literature of the exclusionary rule analogously applied to violations of search and seizure restrictions indicate the difficulties of moving to monetary sanctions or incarceration as responses to governmental misconduct.[183] To be sure, there are certain differences that weaken the analogy. Most importantly, the wrong of suppressing potentially exculpatory evidence is very different from the wrong of securing inculpatory evidence in an improper manner. Even a jury that wants to be tough on crime is more likely to acknowledge the former illegality in a verdict.[184] It is not so implausible, therefore, to consider modes of response, such as governmental liability, that can achieve compensatory goals without unnecessarily imposing or risking acquittal of the guilty.[185] Nevertheless, given the probable background of potential complainants, it is

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181 Whether this sort of reasoning should be extended to civil litigants is an interesting question that requires further thought. *Cf.* Imwinkelried, *The Case for Recognizing a New Constitutional Entitlement: The Right to Present Favorable Evidence in Civil Cases*, 1990 UTAH L. REV. 1 (criticizing the prevailing dichotomy between criminal and civil cases, but without reference to the distinction drawn in the text).

182 *See supra* note 153 and accompanying text.

183 *See* C. WHITEBREAD & C. SLOBOGIN, *supra* note 90, at 44-67 (concluding that exclusionary rule serves important functions not adequately served by available substitutes). The basic conclusion is mirrored in the following comment about government destruction of evidence:

> [T]ort actions may be unlikely ever to serve as a significant deterrent to prosecutorial abuse. Juries are not usually sympathetic to guilty criminal defendants, even when evidence was destroyed by law enforcement officials. When the defendant has been found innocent, the proof of damage caused by the destruction of evidence may be difficult.

J. GORELICK, S. MARZEN & L. SOLUM, *supra* note 119, at 247.

184 One other difference may be noted, though it is more ambiguous. Wrongdoing in the search and seizure context is more likely to be *police* wrongdoing; suppression is more likely to be *prosecutorial*. Not only may this difference by expected to support the point made in the text, since a trier of fact may have less sympathy for prosecutors than for police, but it also points to the greater potential use of sanctions under the special law of professional responsibility. *Cf. supra* notes 141-44 and accompanying text. On the other hand, the potential complainants here—defense attorneys—are in a rather poor position to be aggressive in pursuing the matter.

185 *See, e.g.*, Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986) (recognizing common-law tort action against government for destruction of evidence following dismissal of earlier criminal charges against plaintiff).

unlikely that civil or criminal liabilities can wholly displace evidentiary sanctions in the present context.

In the end, the right mix of responses to achieve the proper measure of reversal, compensation, and deterrence is a delicate matter. Much depends upon context, including the ever significant distinction between civil and criminal cases. Conscious reflection on the advantages and disadvantages of the various alternatives may be expected to improve the quality of juridical response.

CONCLUSION

Despite the existence of substantial discovery mechanisms, especially in civil cases, and despite the prosecution's duties of disclosure in criminal cases, the problem of suppression of evidence seems more serious than either the problem of unfound evidence or that of rejected evidence. No doubt, this judgment is affected by the tinge of fraud that often attends suppression. Moreover, addressing problems of unfound evidence involves interference with the parties' allocation of resources, and the law is understandably reluctant to interfere with litigants' resource autonomy by getting into the business of potentially detailed supervision of such allocations. In contrast, addressing suppression has relatively little economic impact: If the evidence in question is already available to the litigant, requiring in some way its revelation to the opponent or its presentation to the tribunal, or imposing sanctions for refusal to do so, usually involves a comparatively minimal expenditure and potential oversight burden. Rejected evidence presents similarly minor resource allocation issues, but since the evidence involved is, by hypothesis, available to both parties, there is ordinarily little reason to suspect that its nonpresentation reflects anything other than its weak probativity. It is not difficult, therefore, to see why the law has had more to say about suppression than about either unfound or rejected evidence.

On the other hand, the categories of response to the three different problems have much in common. Most important is their character as reinforcing the duty of the parties, when not exempted by proprietary or adversarial privilege, to present the best available package of evidence on the disputed facts of the case. The traditional exclusionary rules, which make up what most people think of as the law of evidence, are placed in a better interpretive framework when seen as constituent parts of a larger fabric of procedural law possessed of this dominant theme. The end in view is accuracy of judgment, in the service of just dispute resolution, even when the means chosen operate prophylactically, that is, even when the rules impair the accuracy of a

particular result in order to create and maintain incentives that improve accuracy in the long run of cases. Serious questions may well be raised about such a trade-off, especially when there exist alternative means of achieving the needed deterrence. The same criticism can be made, even more strongly, with regard to the use of evidentiary sanctions to provide what I have called ancillary compensation, where the trade-off is not between current accuracy and long-run accuracy, but rather between current accuracy and the avoidance of litigating separate claims for compensation. Nevertheless, the importance of getting at the truth, elusive as it may be, remains central to the procedures controlling the proof process.