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# SCHOLARLY AND INSTITUTIONAL CHALLENGES TO THE LAW OF EVIDENCE: FROM BENTHAM TO THE ADR MOVEMENT

*Laird C. Kirkpatrick\**

## I. INTRODUCTION

Modern evidence professors harbor occasional defensiveness about their chosen discipline, because many of the greatest evidence scholars of the past two centuries have favored the repudiation of much of the developed law in this field. Jeremy Bentham mounted a caustic attack on virtually the entire body of evidence law as it existed in nineteenth century England.<sup>1</sup> Dean Wigmore called for narrowing and simplifying of evidence principles and rejection of many rules of exclusion.<sup>2</sup> Professor Morgan advocated radical reform,<sup>3</sup> and the American Law Institute Model Code of Evidence, of which he was the principal draftsman, was such an extreme departure from existing law that it failed to be adopted by any state.<sup>4</sup> Dean McCormick favored eviscerating two of evidence law's most fundamental exclusionary doctrines by generally supporting admission of reliable hearsay<sup>5</sup> and a balancing test that would allow most privileges to be overridden in cases where there was a strong need for the privileged evidence.<sup>6</sup> He even predicted the ultimate demise of all rules of exclusion.<sup>7</sup> While scholars in other fields of law have also served as

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1. JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (J.S. Mill ed., London, Hunt & Clark 1827) [hereinafter BENTHAM, *RATIONALE*] (five volumes).

2. 1 JOHN H. WIGMORE, *EVIDENCE* § 8c (Tillers rev. 1983).

3. EDMUND MORGAN, *MODEL CODE OF EVIDENCE* 6 (1942) ("It is time . . . for radical reformation of the law of evidence.").

4. *MODEL CODE OF EVIDENCE* (1942).

5. CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 634 (1954) ("I suggest this: a hearsay statement will be received if the judge finds that the need for and the probative value of the statement render it a fair means of proof under the circumstances.").

6. *Id.* at 166-67.

7. Charles T. McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A. J. 507, 580-81 (1938) ("So we have said that the hard rules of exclusion will soften into standards of discretion to exclude. But evolution will not halt there. Manifestly, the next stage is to abandon the system of exclusion."); see also 1 WIGMORE, *supra* note 2, § 8c, at 630 ("A complete abolition of the rules in the future is at least arguable, not merely in theory but in realizable fact. . . . [It has

critics and architects of reform, there are few areas where the scholarly challenges to established principles have been so extreme and the future of foundational doctrines so uncertain as in the law of evidence.

Evidence law also faces new institutional challenges in the form of alternative models of dispute resolution that reject the need for rules of evidence in order to have fair and accurate adjudication of disputes. Alternative dispute resolution (ADR) programs have mushroomed throughout the nation during the past decade.<sup>8</sup> Advocates claim that ADR proceedings are able to provide greater speed and efficiency in the resolution of disputes as well as lower costs, in part because they are not subject to legal "technicalities" such as the rules of evidence.<sup>9</sup>

In order to better assess these scholarly and institutional challenges to the law of evidence, this Essay briefly reviews the writings of Jeremy Bentham—who is generally regarded as the most extreme critic of evidence law—to determine the extent of his rejection of exclusionary principles. It then assesses whether any rules of exclusion operate in arbitration proceedings, the primary nonjudicial form of dispute adjudication. The Essay finds that evidentiary rules of exclusion are accepted to a greater extent than is commonly realized in either the writings of Bentham or in modern arbitration hearings, although in both instances they have a far narrower sphere of operation than in court proceedings. The Essay explores the implications of current trends for teaching and scholarship in the field of evidence, and concludes that even in models of dispute resolution where the law of evidence is formally rejected its underlying principles continue to play an important role in the process of proof and persuasion.

## II. BENTHAM'S VIEWS ON EXCLUSIONARY RULES OF EVIDENCE

Although Jeremy Bentham's published and unpublished writings range across many academic disciplines,<sup>10</sup> he directed a significant

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been shown] that in the United States and today justice can be done without the orthodox rules of evidence.").

8. James Alfani, *Alternative Dispute Resolution and the Courts: An Introduction*, 69 JUDICATURE 252, 252 (1986).

9. See Susan Keilitz et al., *State Adoption of Alternative Dispute Resolution*, STATE CT. J., Spring 1988, at 4, 10.

10. See DAVID BAUMGARDT, *BENTHAM AND THE ETHICS OF TODAY* (1952) (study of Bentham's moral philosophy); HERBERT HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* (1982) (essays on Bentham's political thought and jurisprudence); L. J. HUME, *BENTHAM AND BUREAUCRACY* (1981) (Bentham's ideas on structure and function of government); DAVID LYONS, *IN THE INTEREST OF THE GOVERNED: A STUDY IN BENTHAM'S PHILOSOPHY OF UTILITY AND LAW* (1973) (Bentham's theory of utilitarianism and legal history); CHARLES OGDEN, *BENTHAM'S THEORY OF FICTIONS* (1959) (Bentham's writ-

amount of his scholarly attention toward reform of the law of evidence.<sup>11</sup> Bentham is widely viewed as the most hostile and uncompromising critic of rules of evidentiary exclusion, espousing what has been termed an "anti-nomian thesis."<sup>12</sup> Bentham made dogmatic and sweeping pronouncements in his writings that tend to support this characterization and to overshadow the subtleties and complexities of his views.<sup>13</sup>

Bentham is often thought to favor a vision of the judge as *paterfamilias*, presiding over trials in the same manner as a father would settle disputes among members of his family without evidentiary limitations:

But in the bosom of his family, the lawyer, by the force of good sense, returns to this simple method from which he is led astray at the bar by the folly of learning. . . . The father of a family, when any dispute arises among those who are dependant [sic] on him, or when he finds it necessary to pronounce on some contravention of his orders, calls the interested parties before him; he allows them to give evidence in their own favour; he insists on an answer to every question, even though it should be to their disadvantage; . . . He does not refuse any witness; he hears every one, reserving to himself to appreciate the worth of the testimony of each; . . . He permits each of them to give his narrative at once, in his own way, and with all the circumstances which may be necessary to give connexion [sic] to the whole.<sup>14</sup>

Bentham's qualifications to this analogy, however, are sometimes overlooked. He went on to say:

We must beware, however, of abusing the parallel, so as to make the domestic, the exclusive type of the legal form of procedure. There are essential differences. . . . [A] judge is not a

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ings on logic and language); BHIKHU PAREKH, *BENTHAM'S POLITICAL THOUGHT* (1973) (Bentham's theories of political philosophy); FREDERICK ROSEN, *JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY* (1983) (Bentham's political theory, centering on CONSTITUTIONAL CODE); WERNER STARK, *JEREMY BENTHAM'S ECONOMIC WRITINGS* (1952) (study of Bentham's theories of economics).

11. See BENTHAM, *RATIONALE*, *supra* note 1 (five volumes). A one-volume edited version of his writings was also published. JEREMY BENTHAM, *TREATISE ON JUDICIAL EVIDENCE* (M. Dumont ed., London, Paget 1825) [hereinafter BENTHAM, *TREATISE*]. Bentham also wrote *An Introductory View of the Rationale of Evidence*, reprinted in VI *THE WORKS OF JEREMY BENTHAM* 1 (John Bowring ed., 1843) [hereinafter Bentham, *Introductory View*].

12. WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* 66-75 (1985). The term "anti-nomian" thesis refers to Bentham's opposition to rigid and formalistic rules governing the process of proof. *Id.*

13. IV BENTHAM, *RATIONALE*, *supra* note 1, at 490 ("Evidence is the basis of justice: to exclude evidence is to exclude justice."); *id.* at 481 ("Let in the light of Evidence.").

14. BENTHAM, *TREATISE*, *supra* note 11, at 7.

father; he has a public responsibility: his judgments must be satisfactory to others as well as to himself. Judicial tribunals, therefore, must be surrounded by other securities than are necessary in the domestic tribunal.<sup>15</sup>

Bentham did not reject all rules of evidentiary exclusion.<sup>16</sup> Consistent with his general utilitarian philosophy, he believed that a balance must be struck between the direct end of justice to obtain rectitude of decision and collateral concerns justifying the exclusion of evidence in some circumstances.<sup>17</sup> Although he viewed the exclusion of evidence as an evil, it could be an evil inferior to that which would arise from admitting certain evidence.<sup>18</sup> We can find examples of significant exclusionary principles which Bentham favored in at least four major areas of evidence law: relevance, privileges, hearsay and the best evidence doctrine.

#### A. Relevance

Bentham was clearly in favor of the most fundamental exclusionary rule—the requirement of relevancy.<sup>19</sup> In addition to excluding irrelevant evidence, he would exclude evidence where it was “superfluous” or its production would involve “preponderant” expense or delay.<sup>20</sup> Bentham’s position is consistent not only with Federal Rules of Evidence 401 and 402, but also with some aspects of Federal Rules 102, 403 and 611(a).

He also favored exclusion of evidence where its production would involve “preponderant vexation” to the parties or witnesses.<sup>21</sup> Bentham was imprecise<sup>22</sup> and inconsistent<sup>23</sup> in defining this category, but his writings express concern about evidence that would unnecessarily embarrass

15. *Id.* at 7-8.

16. IV BENTHAM, RATIONALE, *supra* note 1, at 482 (“Let not in the light of evidence: not in every case, more than the light of heaven. Even evidence, even justice itself, like gold, may be bought too dear. It always is bought too dear, if bought at the expense of a preponderant injustice.”).

17. JEREMY BENTHAM, CONSTITUTIONAL CODE 463 (“[A]nd on which side shall be the claim to preference, will, in each individual instance, depend upon the circumstances of the individual case.”).

18. BENTHAM, TREATISE, *supra* note 11, at 229.

19. IV BENTHAM, RATIONALE, *supra* note 1, bk. IX, ch. V.

20. IV *id.*, bk. IX, ch. I, at 481 (“The Rule will be,—Let in the light of evidence. The exception will be,—Except where the letting in of such light is attended with preponderant collateral inconvenience, in the shape of vexation, expense, and delay.”).

21. *Id.*

22. TWINING, *supra* note 12, at 91 (“Unfortunately he did not subject the term [vexation] to rigorous scrutiny nor explore its potential implications for a utilitarian analysis of procedure. In his published writings he treated it as being almost unproblematic.”).

23. *Id.* at 92 (Bentham “does not use the term [vexation] consistently.”).

or harass parties or witnesses or cause unjustifiable damage to their reputations.<sup>24</sup> For this reason, Bentham did not oppose the exclusion of character evidence in all circumstances.<sup>25</sup> Moreover, regardless of what Bentham contemplated, a rule authorizing trial judges to reject evidence on grounds of "preponderant vexation," with no more explicit definition or qualification, would likely have a significant exclusionary effect.<sup>26</sup>

### B. Privileges

Bentham's opposition to evidentiary privileges is widely known, and his trenchant criticisms of the attorney-client and spousal testimonial privileges are frequently quoted.<sup>27</sup> It is less known that Bentham sup-

24. BENTHAM, TREATISE, *supra* note 11, at 234-35.

Even when its nature is such, that, without being notoriously superfluous, [evidence] would harass the parties and witnesses, and bring into hazard the interest of the public, or of individuals who have no connection with the case, it ought to be refused, unless there be an absolute necessity for it. . . . Still less can those advocates be justified, who, from borrowed anger and mercenary hate, strive to discredit an adverse party or witness, by raking up all the details of his life to discover unknown weaknesses, and who make a merit of this cowardly triumph. It belongs to the prudence of the judge to prevent these scandalous proceedings, but no absolute rule can be laid down.

*Id.*

25. See, e.g., *id.* at 235 ("We can imagine cases . . . where the defendant would be entirely exculpated, if he could bring out of a witness some disclosure which would ruin a woman of reputation, by establishing, for example, incest or adultery. It is clear that the evidence should be excluded, even to the injury of the defendant."); Bentham, *Introductory View*, *supra* note 11, ch. XX, at 98.

There are certain transgressions, the nature of which is such, that the evil which they are liable to produce is produced wholly or principally by disclosure. If on either side, on the occasion of a suit or cause, penal or non-penal, having a different object, evidence be called for, of which, if delivered, the effect may be to expose any person, party or not party to the suit or cause, to the suspicion of having been concerned in transgression of this description, it ought to be in the option of the judge . . . to prohibit and prevent the delivery of [such evidence].

*Id.*

26. TWINING, *supra* note 12, at 93 ("Bentham may have seriously underestimated both the variety of direct vexations and the gravity of some of them.").

27. V BENTHAM, RATIONALE, *supra* note 1, at 304. The attorney-client privilege protects only the guilty, because if the client is innocent

[t]here is nothing to betray: let the law adviser say every thing he has heard . . . from his client, the client cannot have any thing to fear from it. That it will often happen that in the case supposed no such confidence will be reposed . . . . What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present.

*Id.*; *id.* at 340 (asserting that spousal testimonial privilege goes far beyond making "every man's house his castle" and permits person to convert his house into "a den of thieves"; it secures "to every man in the bosom of his family, and in his own bosom, a safe accomplice"); see *Trammel v. United States*, 445 U.S. 40, 51-52 (1980) (quoting JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (J.S. Mill ed., London, Hunt & Clarke 1827)).

ported recognition of at least two evidentiary privileges—for religious confessions and government secrets. He opposed compelling Catholic priests to disclose communications made to them by way of confession, on the ground that such a law “would be contrary to the law of the state, which allows the exercise of the catholic religion” and would be “an act of tyranny over the conscience.”<sup>28</sup> He stated that “confession, instead of being attacked, ought to be encouraged, as exercising, in general, a salutary influence.”<sup>29</sup> In advocating a clergy-penitent privilege, Bentham favored a ground of exclusion that was not even recognized by English common law at the time.<sup>30</sup>

Bentham also opposed compelling the government to disclose information in political trials that would be “prejudicial to the public interest.”<sup>31</sup> At a minimum he supported a privilege for state secrets.<sup>32</sup> It is possible to broadly construe his writings to support what is now known as the official information or executive privilege.<sup>33</sup> His reasoning might also have led him to support the modern privilege protecting the identity of confidential government informants.

### C. Hearsay

Although some writers have said that “Bentham . . . would have ended the exclusion of hearsay altogether,”<sup>34</sup> this is an inaccurate char-

28. BENTHAM, *TREATISE*, *supra* note 11, at 237.

29. *Id.*

30. 8 JOHN H. WIGMORE, *EVIDENCE* § 2394, at 869 (McNaughton rev. 1961) (“But since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion . . . has denied the existence of a privilege.”); Jacob Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 *SANTA CLARA L. REV.* 95, 103 (1983) (“[T]here seems little doubt that a minister in post-Reformation England did not have a privilege against testifying.”).

31. BENTHAM, *TREATISE*, *supra* note 11, at 236 (“[I]n political trials, involving questions of national importance, disclosures may be demanded, which would be prejudicial to the public interest. Not only should the judge be authorized to stop it provisionally, but he ought to be enjoined to refuse, or modify it.”).

32. IV BENTHAM, *RATIONALE*, *supra* note 1, at 519; BENTHAM, *TREATISE*, *supra* note 11, at 236.

33. *See* Bentham, *Introductory View*, *supra* note 11, at 98.

On the ground of apprehended mischief to the public, the judges ought to be not only authorized, but required, to apply to the demanded disclosure, absolutely or provisionally, exclusion or modification, according to the exigency of the case . . . and if it be to the prejudice of the business of any particular official department, making communication of the matter to the chief of such department, giving at the same time notice to the parties of the communication so made, and appointing a day on which, on failure of sufficient cause shown for non-disclosure, disclosure shall be exigible. *Id.*; *see also* FED. R. EVID. 509 (Proposed Official Draft 1971) (codifying privilege for official information).

34. George W. Keeton & Oshley R. Marshall, *Bentham's Influence on the Law of Evi-*

acterization of his views. He generally supported admission of hearsay only where the "original narrator" was shown to be unavailable.<sup>35</sup> He would exclude hearsay where the declarant was "forthcoming and interrogable."<sup>36</sup> Bentham's proposed rule would result in the exclusion of numerous out-of-court statements.<sup>37</sup> Such a rule of preference is actually more restrictive than Federal Evidence Rule 803 which admits hearsay falling into any of twenty-four categories regardless of the availability of the declarant.<sup>38</sup>

#### D. Best Evidence Doctrine

Bentham's views on the Best Evidence Doctrine are strikingly similar to the rules ultimately adopted in article X of the Federal Rules of Evidence. Bentham stated that in the absence of "a special reason" an original writing must be produced when available in order to prove its contents.<sup>39</sup> This is the same principle codified by Federal Rule 1002. However, he approved admission of a copy where the original could not

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*dence*, in JEREMY BENTHAM AND THE LAW 79, 86 (George W. Keeton & George Schwarzenberger eds., 1948).

35. BENTHAM, TREATISE, *supra* note 11, at 203 ("Rule I. If the original narrator is not a party in the cause, and can be produced and examined, the hearsay evidence ought not to be admitted. . . . Rule II. The hearsay will be admitted in the following cases: 1. When the supposed direct witness is dead. 2. When, from sickness or distance, he cannot be examined. 3. When the object is to invalidate his own evidence given in the case at issue. 4. When the object is to confirm his evidence, if it has been attacked.").

36. III BENTHAM, RATIONALE, *supra* note 1, bk. VI, ch. II, at 408.

*Question.* Why not admit it ["casually-written" hearsay evidence, such as a letter]?  
*Answer.* Because, by excluding it . . . no information stands excluded. The person whose discourse it purports to be being forthcoming and interrogable in a mode less exposed to incorrectness and incompleteness, it rests with you to obtain whatever information it contains, and more. . . . [However] admit it . . . [if] the process of interrogation . . . [is] rendered either physically or prudentially impracticable: physically, as by death or incurable mental infirmity; physically or prudentially, as by expatriation or exprovinciation: the interrogation effectible either not on any terms, or not without preponderant inconvenience in the shape or delay, vexation, and expense.

*Id.*

37. See James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 937 n.32 (1962) ("Manifestly, [Bentham's view] involves retention of the hearsay rule as a rule of exclusion in a vast number of cases.").

38. However, Bentham would exempt certain categories of "pre-constituted evidence" (including some falling within exceptions to Federal Rule of Evidence 803, such as various public records) from the unavailability requirement. See BENTHAM, TREATISE, *supra* note 11, bk. IV.

39. *Id.* at 218 ("When the original can be produced or gotten at, no copy ought to be admitted without a special reason."). Bentham's view is more restrictive than Federal Rule of Evidence 1003, which generally allows a duplicate to be admitted in lieu of the original without a showing of inability to produce the original. FED. R. EVID. 1003.



be feasibly produced.<sup>40</sup> Such a rule of preference has a significant exclusionary impact, because copies, testimony, and other secondary evidence are rendered inadmissible absent a sufficient showing of inability to produce the original.

### III. EXCLUSIONARY RULES OF EVIDENCE IN ARBITRATION PROCEEDINGS

Arbitration proceedings come closer to absolute rejection of rules of exclusion than the litigation model Bentham envisioned. There is a greater danger of inviting judicial challenge to the arbitration award where the arbitrator admits too little evidence rather than too much.<sup>41</sup> Nonetheless, evidentiary principles have a more significant role in arbitration proceedings than is commonly recognized.<sup>42</sup> First, parties can stipulate in the arbitration clause or submission that the hearing be conducted pursuant to formal rules of evidence. Second, evidentiary principles are applied to assess the weight of the evidence.<sup>43</sup> Third, the

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40. Bentham's approved justifications for non-production of an original are similar to those adopted by Federal Rule 1004. Compare BENTHAM, TREATISE, *supra* note 11, at 218-22 with FED. R. EVID. 1004. Bentham approved introducing a copy where:

[1] the original is in a foreign country, [2] the original is in another province of the same state, [3] it is known that the original once existed, but that it does not now exist, [4] it is known that the original existed, but it is doubtful whether it now exists, [5] the copy is offered as being a copy, but the existence of the supposed original is not established, [6] the original is in possession of the adverse party.

BENTHAM, TREATISE, *supra* note 11, at 218-22.

41. United States Arbitration Act, 9 U.S.C. § 10(c) (1988) (listing as one ground of judicial challenge to arbitration award that "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy"). *But see* Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1274-75 (2d Cir. 1971) (stating not erroneous for arbitrator to exclude evidence found irrelevant). Arbitrators sometimes allow clearly irrelevant evidence as a form of catharsis for the parties to the dispute. *See* MAURICE A. TROTTA, ARBITRATION OF LABOR-MANAGEMENT DISPUTES 32 (1974):

Even though an experienced arbitrator may prefer to hear only logical arguments and pertinent reliable evidence, he recognizes the necessity of listening to *irrelevant* matter when it serves to release pent-up emotions. Having his day in court and being able to tell the other side exactly what is on his mind may be as important to a disputant as winning a case.

*Id.*

42. Edgar A. Jones, Jr., *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 UCLA L. REV. 1241, 1245 (1966).

It would be unrealistic . . . to conclude that the rules of evidence have no impact in arbitral hearings. Legally they may not, but psychologically they are omnipresent . . . . The echoes of Lord Chief Baron Gilbert's ipse dixits on evidence can still be heard even in arbitration hearing rooms vibrating to the jarring rhythms of stamping mills just beyond the walls.

*Id.* (footnotes omitted).

43. RICHARD S. WIRTZ, DUE PROCESS OF ARBITRATION, THE ARBITRATOR AND THE PARTIES 13 (1958). Wirtz states:

procedures followed in arbitration proceedings are generally consistent with the procedural aspects of the Federal Rules of Evidence.<sup>44</sup> Finally, the relevancy doctrine is enforced in arbitration hearings and additional exclusionary principles are also sometimes applied.

The exclusionary impact of the relevancy doctrine should not be underestimated, particularly because many arbitrators interpret the doctrine as going beyond mere logical relevancy to encompass collateral policy considerations such as those recognized in article IV of the Federal Rules of Evidence. For example, in the interests of an expeditious hearing, arbitrators may exclude evidence that is repetitive or cumulative, just as such evidence may be excluded under Federal Rule 403.<sup>45</sup> Some arbitral authority favors excluding character evidence regarding past conduct of an employee when offered to show the employee's conduct on the occasion in question for the same policy reasons that such evidence is excluded by Federal Rule 404.<sup>46</sup> Many arbitrators refuse to admit evidence revealing pre-hearing negotiations and offers of compromise in order to encourage parties to engage in settlement discussions,

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[Arbitrators] have established the pattern of ordered informality; performing major surgery on the legal rules of evidence and procedure but retaining the good sense of those rules; greatly simplifying but not eliminating the hearsay and parole evidence rules; taking the rules for the admissibility of evidence and remolding them into rules for weighing it . . . .

*Id.*

44. For example, arbitrators may consider an offer of proof before making a final ruling on admissibility, *cf.* FED. R. EVID. 103, admit evidence for a limited purpose, *cf.* FED. R. EVID. 105, allow the remainder of writings or related writings to be introduced contemporaneously for completeness, *cf.* FED. R. EVID. 106, take judicial notice, *cf.* FED. R. EVID. 201, utilize presumptions, *cf.* FED. R. EVID. 301, require witnesses to take oaths, *cf.* FED. R. EVID. 603, control the mode and order of interrogating witnesses, *cf.* FED. R. EVID. 611(a), limit the use of leading questions on direct examination, *cf.* FED. R. EVID. 611(c), exercise discretionary control over the scope of cross-examination, *cf.* FED. R. EVID. 611(b), require production of writings used to refresh a witness's memory, *cf.* FED. R. EVID. 612, undertake questioning of witnesses themselves, *cf.* FED. R. EVID. 614(b), and exclude witnesses other than parties from the hearing, *cf.* FED. R. EVID. 615. *See generally* MARVIN M. HILL, JR. & ANTHONY V. SINICROPI, *EVIDENCE IN ARBITRATION* (2d ed. 1987) (suggesting arbitrators implement traditional evidentiary standards used in judicial forum but avoid per se application of rules of evidence).

45. ROBERT M. RODMAN, *COMMERCIAL ARBITRATION* § 19.21 (1984); *see also* National Post Office Mailhandlers Union v. United States Postal Serv., 751 F.2d 834, 841 (6th Cir. 1985) (holding that arbitrator did not abuse discretion in refusing to permit cumulative testimony); FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.").

46. HILL & SINICROPI, *supra* note 44, at 35-36; *see also* FED. R. EVID. 404 ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.").

thereby adopting the policy of Federal Rule 408.<sup>47</sup> Arbitrators often refuse to accept or credit polygraph evidence because of its questionable reliability and possible unfairness.<sup>48</sup> In extreme cases, the relevancy doctrine is also sometimes used to exclude opinion evidence on the theory that speculation, surmise, and other unsupported judgments do not advance the factfinding process.<sup>49</sup>

Some arbitrators have crafted an exclusionary doctrine under which improperly obtained evidence will be excluded as a sanction.<sup>50</sup> For instance, arbitrators have excluded evidence obtained by breaking and entering an employee's personal property,<sup>51</sup> and confessions that were obtained by unreasonably harsh or unfair methods.<sup>52</sup>

Although relatively little has been written about the status of evidentiary privileges in arbitration hearings, there is general agreement that fundamental privileges apply,<sup>53</sup> thereby protecting a party or witness from compelled disclosure of privileged communications, such as to an attorney or spouse.<sup>54</sup> The Fifth Amendment privilege against self-in-

47. See NATIONAL ACADEMY OF ARBITRATORS, PROBLEMS OF PROOF IN ARBITRATION 253 (1966) ("Most arbitrators and advocates agree that the exclusion rule [regarding offers of compromise] should be absolute in arbitration cases. Successful solution of grievances short of arbitration is vital to the process. . . . There are many reasons why offers of settlement are made, and they do not necessarily imply that the offering party admits it was wrong."); HILL & SINICROPI, *supra* note 44, at 57 ("[A]bsent a compelling reason, such evidence [of compromise offers] should be summarily excluded."); see also FED. R. EVID. 408 ("Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible."); NATIONAL ACADEMY OF ARBITRATORS, *supra*, at 86-89.

48. HILL & SINICROPI, *supra* note 44, at 69-74.

49. *Id.* at 18.

50. See, e.g., Needham Packing Co., 44 Lab. Arb. Rep. (BNA) 1057, 1080, 1095 (July 23, 1965) (Davey, Arb.) (excluding wiretap evidence obtained without consent of one of parties to conversation). See generally FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS 283-87 (3d ed. 1973) (discussing exclusion of evidence obtained through violation of constitutional or contractual rights); NATIONAL ACADEMY OF ARBITRATORS, *supra* note 47, 105-06, 129-34, 138-39 (discussing exclusion of evidence obtained by company in violation of employee's constitutional rights).

51. R.W. FLEMING, THE LABOR ARBITRATION PROCESS 189 (1965); HILL & SINICROPI, *supra* note 44, at 77-83.

52. NATIONAL ACADEMY OF ARBITRATORS, *supra* note 47, at 205 (West Coast Tripartite Committee) ("[T]he concern of the arbitrator at the proffer of evidence of 'confessions' . . . will be for its reliability, and, in egregious circumstances, for its allowability in terms of fair play and reasonable privacy.").

53. 1 WIGMORE, EVIDENCE, *supra* note 2, § 4e, at 249 (stating that fundamental evidentiary privileges apply in arbitration proceedings).

54. See NATIONAL ACADEMY OF ARBITRATORS, *supra* note 47, at 298-99 (quoting guidelines of New York Tripartite Committee supporting recognition of following privileges in arbi-

crimination operates in the arbitral context to protect a witness from being compelled to give incriminating testimony, although an adverse inference can generally be drawn from such refusal.<sup>55</sup>

#### IV. EVIDENTIARY PRINCIPLES VERSUS RULES OF EXCLUSION

As the preceding discussion demonstrates, the writings of Jeremy Bentham and contemporary arbitration proceedings recognize a number of exclusionary principles. These principles survive for the same reasons they are accepted by modern evidence law—to ensure a rational factfinding process, to avoid improper collateral effects that outweigh probative value, to prevent undue delay or consumption of time, and occasionally to further policies extrinsic to the adjudicatory process that override the objective of ascertaining truth.

Nonetheless, it is clear that Bentham and the ADR movement both share the following fundamental philosophical premise: that rules of exclusion should be narrowly confined; and that evidence offered by parties, provided it is relevant, should generally be received, with concerns regarding its probative force going to weight rather than admissibility.<sup>56</sup> Bentham's criticisms have contributed to significant liberalization of the rules of evidence in court proceedings since the time he wrote,<sup>57</sup> an evolution that seems likely to continue. What implications does the diminishing role of exclusionary rules have for evidence scholarship and teaching evidence law in the 1990s?

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tration proceedings: physician-patient, husband-wife, grand jury, classified information, witness-attorney).

55. HILL & SINICROPI, *supra* note 44, at 102; NATIONAL ACADEMY OF ARBITRATORS, *supra* note 47, at 300.

56. Bentham strongly supported the principles that underlie the ADR movement and often lauded various alternative models of dispute resolution. See GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 352-53 (1986).

[Bentham] took pains to point out that there existed in more recent history working examples of his domestic model—systems of dispute resolution which, he believed, worked admirably well. In his procedural writings, the litany of such institutions varies occasionally, but the following make regular appearances: (i) courts martial of various sorts, (ii) local magistrates' courts and justices of the peace, (iii) courts of request or courts of conscience, designed to avoid the complication of Common Law and Chancery courts, dealing largely with small debts and claims, (iv) courts of arbitration established by William III, and finally (v) Danish courts of reconciliation and their French equivalents.

*Id.* (footnotes omitted).

57. Keeton & Marshall, *supra* note 34, at 100 ("Bentham's works may have gone out of favour, but the system which he set out to destroy has been rebuilt to no mean extent on Benthamite principles."); TWINING, *supra* note 12, at 170 ("[N]early all reforms of evidence and procedure since his day have tended in the direction that Bentham so boldly advocated . . .").

First, it is important to recognize that the chasm between an adjudicatory system with strict principles of evidentiary exclusion and a system where such principles go only to the weight of the evidence is not as wide as is sometimes assumed. There is likely to be little practical difference between a court trial where testimony by a witness without personal knowledge is excluded by Federal Rule 602 and an arbitration hearing where such testimony is received but disregarded.

The principles underlying rules of exclusion have a direct bearing on questions of weight. Although hearsay may be received in an arbitration hearing, it is generally given less weight than live testimony,<sup>58</sup> and although secondary evidence of an important writing may be received, an adverse inference may be drawn from failure to produce the writing itself.<sup>59</sup> For this reason arbitrators and other participants in the ADR process should be familiar with rules of exclusion<sup>60</sup> because their underlying rationale helps guide the evaluation of evidence.<sup>61</sup>

Second, even in adjudicatory systems rejecting formal evidentiary rules, evidence scholarship can continue to play an important role in critically evaluating new forms of proof.<sup>62</sup> Such scholarship has at least as

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58. See NATIONAL ACADEMY OF ARBITRATORS, *supra* note 47, at 189.

Unless corroborated by truth-tending circumstances in the environment in which it was uttered, [hearsay] is unreliable evidence and should be received with mounting skepticism of its probative value as it becomes more remote and filtered. If a witness can testify at the hearing and does not, his statements outside the hearing should be given no weight, indeed, should even be excluded if there appears to be no therapeutic, nonevidentiary reason to admit it.

*Id.*

59. See *id.* ("Failure, without adequate explanation, to produce a more reliable form of evidence should itself be recognized to have evidentiary weight adverse to the profferer of the lesser valued proof.").

60. *Id.* at 89.

We believe it is fundamental, however, to the proper conduct of an arbitration hearing that the arbitrator himself be familiar with and fully understand the rules of evidence. . . . The rules are based on many generations of judicial experience. They have as their primary objective the search for truth and generally the seeking to confine evidence so as to remove confusion, irrelevancy and manufactured facts.

*Id.*

61. *Id.* at 246.

[P]roperly understood legal rules of evidence have their foundation in reason, common sense, and necessity, and . . . the rules for the admissibility of evidence in court trials may be re-molded into rules for weighing evidence by arbitrators, even if no evidence is absolutely excluded as inadmissible. . . . It is difficult to imagine that the legal rules of evidence which have evolved over centuries could not yield helpful suggestions for use by arbitrators and participants in arbitration cases.

*Id.*

62. For recent examples of such critical scholarship, see Edward J. Imwinkelried, *The Debate in the DNA Cases Over the Foundation for the Admission of Scientific Evidence: The Importance of Human Error as a Cause of Forensic Misanalysis*, 69 WASH. U. L.Q. 19 (1991); David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admis-*

much value to adjudicators in systems where exclusionary rules are not enforced, because they need to assess how much credit to give such evidence if it is introduced.

The scope of evidence scholarship should expand, however, to encompass all efforts—legislative, administrative and judicial—to establish standards or cautionary guidelines for the evaluation of evidence in any legal proceeding.<sup>63</sup> The process of evaluating evidence will assume increased importance as rules of exclusion are relaxed. At present the concerns of evidence law are often viewed as complete once the decision on admissibility has been made.<sup>64</sup> Weighing the evidence is said to be exclusively a matter for the trier of fact.<sup>65</sup> Yet in most jurisdictions cautionary guidelines for the evaluation of evidence have been established by court decision<sup>66</sup> or statute<sup>67</sup> and have become part of pattern jury instruc-

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*sibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19 (1987); Len A. Wade, Comment, *Do the Eyes Have It? Psychological Testimony Regarding Eyewitness Accuracy*, 38 BAYLOR L. REV. 169 (1986).

63. See, e.g., *United States v. Pujana-Mena*, 949 F.2d 24, 30 (2d Cir. 1991) (noting conflict of authority on question whether criminal defendant entitled to instruction that character evidence "standing alone" may create reasonable doubt; ultimately rejecting such instruction).

64. 1A WIGMORE, *supra* note 2, § 29, at 978 ("[T]he judge merely puts upon the material its ticket of admission as relevant and leaves the weight, or final persuasive effect, for the jury to determine.").

65. *Id.* § 26, at 957 ("The rules of admissibility have nothing to say concerning the weight of evidence when once admitted. . . . Indeed, it can be said that there are no rules, in our system of evidence, prescribing for the jury the precise effect of any general or special class of evidence.").

66. See, e.g., *United States v. Leonard*, 494 F.2d 955, 961-62 (D.C. Cir. 1974) (holding defendant entitled to instruction that testimony of government witnesses who had been granted immunity should be considered with caution); *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (establishing detailed cautionary instructions for evaluation of eyewitness identification); *Milligan v. State*, 708 P.2d 289, 294 (Nev. 1985) (finding no error in instruction that "if you believe that a witness willfully lied as to a material fact, you should distrust the rest of his testimony and you may, but are not obliged to, disregard all the testimony"), *cert. denied*, 479 U.S. 870 (1986); *State v. Green*, 430 A.2d 914, 919 (N.J. 1981) ("Though the jury decided the identification question, the defendant had a right to expect that the appropriate guidelines would be given, focusing the jury's attention on how to analyze and consider the factual issues with regard to the trustworthiness of Ms. Wadley's in-court identification.").

67. See, e.g., OR. REV. STAT. § 10.095 (1987). On all proper occasions the jury should be instructed:

(3) That a witness false in one part of the testimony of the witness is to be distrusted in others; (4) That the testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party with caution; . . . (8) That if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

*Id.*; see also ALASKA R. CRIM. PRO. 30(b)(2) (testimony of accomplice viewed with distrust and evidence of oral admission by party viewed with caution); V.I. CODE ANN. tit. 5, § 740 (1967) (containing substantially similar instructions).

tions.<sup>68</sup> Such cautionary instructions, which are often derived from former evidentiary rules of exclusion, should be given critical scrutiny by evidence scholars rather than being viewed as merely an aspect of trial practice or procedure.<sup>69</sup>

Much of Bentham's writing focused on the broader issues of how much probative value specific categories of evidence should have, and what factors entitle evidence to greater or lesser credit.<sup>70</sup> Bentham favored the development of legislative guidelines for judges regarding the evaluation of evidence, and he included sample cautionary instructions as part of his own writings.<sup>71</sup> Bentham viewed such instructions as having value not only to judges and juries, but to parties and their attorneys as well as to the world at large.<sup>72</sup> Whether cautionary instructions should be given, at what point during the trial they should be given<sup>73</sup> and their comprehensibility to jurors<sup>74</sup> are all issues that merit continuing schol-

68. See, e.g., FEDERAL JUDICIAL CENTER PATTERN CRIMINAL JURY INSTRUCTIONS 34 (1988) (No. 25—testimony of paid informer should be viewed with caution); *id.* at 41 (No. 32—if witness impeached by prior inconsistent statement there may be reason to doubt testimony); *id.* at 44 (No. 35—cautionary instruction regarding eyewitness testimony); *id.* at 50 (No. 40—proper to consider criminal defendant's stake in outcome on issue of credibility); *id.* at 49 (No. 39—inference from fact that witness not called); *id.* at 53 (No. 43—comment on defendant's incriminating actions after crime); *id.* at 54 (No. 44—comment on defendant's false exculpatory statement); *id.* at 55 (No. 45—comment on defendant's failure to respond to accusatory statements).

69. As more evidence is admitted, there may be increasing pressure to allow judicial comment on the evidence in state proceedings. A majority of states currently prohibit such comment. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 420 (1966). *But see* Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 22-51 (1978) (opposing judicial comment on evidence).

70. See 1 BENTHAM, *RATIONALE*, *supra* note 1, at chs. V-VII.

71. 5 *id.*, bk. X.

72. 6 Bentham, *Introductory View*, *supra* note 11, at 151-52.

Though addressed professedly only to judges, instructions, if published, as of course, if sanctioned, they would be, are in effect addressed to all the world. In effect, they are consequently addressed as well to the parties as to their advocates. . . .

. . . .

. . . . Addressed nominally to judges only, but virtually to all ranks without distinction—addressed to them, and received by them, according to the measures of their several capacities and opportunities, they will have a further effect beyond that which they claim in words. By putting the reader upon his guard against those frauds, the exposure to which constitutes so many causes or modes of infirmity in the respective corresponding species of inferior evidence, a natural effect of them will be to prevent the fraud itself. . . .

*Id.*

73. See William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 740-43 (1981); Janice C. Goldberg, Comment, *Memory, Magic, and Myth: The Timing of Jury Instructions*, 59 OR. L. REV. 451, 452-53 (1981).

74. See David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976).

arly attention.<sup>75</sup>

Finally, law school evidence classes should place greater emphasis on the inductive and inferential reasoning process, fact analysis and the logic of proof, all aspects of the doctrine of relevancy.<sup>76</sup> The relevancy doctrine is retained in the litigation model envisioned by Bentham as well as in modern arbitration proceedings and appears certain to survive as a core doctrine in any future model of dispute adjudication.<sup>77</sup> Even where relevancy principles are not used to restrict the admissibility of evidence, they are central to the process of persuasion.<sup>78</sup> We should recall Wigmore's warning of more than half a century ago:

[T]he judicial rules of Admissibility are destined to lessen in relative importance during the next period of development. Proof will assume the important place; and we must therefore prepare ourselves for this shifting of emphasis. If we do not do this, history will repeat itself, and we shall find ourselves in the present plight of Continental Europe. There, in the early 1800s the ancient worn-out numerical system of "legal proof" was abolished by fiat, and the so-called "freeproof"—namely, no system at all—was substituted. For centuries, lawyers and judges had evidenced and proved by the artificial numerical system; they had no training in any other,—no understanding

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75. See, e.g., Steven E. Holtshouser, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 WASH. U. L.Q. 1387, 1431-32 (1983); see also Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 325 & n.17 (1980) (urging integrated approach for structuring jury decision-making in conformity with constitutional standards).

76. For pioneering teaching materials in this area, see generally TERENCE J. ANDERSON & WILLIAM L. TWINING, *ANALYSIS OF EVIDENCE: HOW TO DO THINGS WITH FACTS, BASED ON WIGMORE'S SCIENCE OF JUDICIAL PROOF* (1991); see also DAVID A. BINDER & PAUL BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* at xvii (1984) (offering text to fill gap between actual experience of trial lawyers and skills taught in law schools). See generally Peter Tillers & David Schum, *Charting New Territory in Judicial Proof: Beyond Wigmore*, 9 CARDOZO L. REV. 907 (1988) (examining relationship between legal, temporal and rational analysis of proof); Eric D. Green, *Symposium-Forward*, 66 B.U. L. REV. 377 (1986) (examining whether, and to what extent mathematical or probabilistic proof should be admitted).

77. JOHN H. WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* § 1, at 5 (3d ed. 1937) ("[The] process of Proof is after all the most important in the trial. . . . All the artificial rules of Admissibility might be abolished; yet the principles of proof would remain.").

78. ANDERSON & TWINING, *supra* note 76, at 104.

[T]he principles of practical reasoning and the assumptions upon which they are based will remain central to the common law model of adjudication, notwithstanding any changes that may be made in the formal rules. For that reason, the ability to apply them in analysis and argument is and will remain an essential lawyering skill.



of the living process of belief. In consequence, when "legal proof" was abolished, they were unready, and judicial trials have been carried on for a century past (except for a few rules about proof of documents) by uncomprehended, unguided, and therefore unsafe mental processes. . . . Such will be our own fate, when the time comes, if we do not lay foundations to prepare for the new stage of procedure. . . . If the Rules of Trial Evidence ever come to be radically revised and simplified, the revision must rest upon some scientific foundation. . . . [I]t would be dangerous to put into effect such a simplification until the practitioners and the judges were themselves equipped with some knowledge of the science [of judicial proof]. Hence, the wisdom of cultivating the study of the science by practitioners and judges.<sup>79</sup>

## V. CONCLUSION

Although the extent of scholarly and institutional rejection of exclusionary principles is sometimes overstated, it is clear that today's law students will be operating in a future legal environment where rules of evidentiary exclusion have diminishing importance. The direction of evidence reform is toward increased liberalization, and many legal disputes will be resolved in alternative forums where rules of evidence are not even formally recognized.

We are nearing the point, if we have not already reached it, where a recent law school graduate is as likely to be assigned or retained to represent a client at an arbitration proceeding as in a jury trial. The evidence class should provide—and be perceived as providing—training that is as valuable to students planning to pursue a career in the ADR field as to future litigators. Although rules of exclusion may diminish in importance over the coming decades, their underlying principles will have enduring value in any form of proceeding which seeks the rational ascertainment of truth in legal disputes.

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79. WIGMORE, *supra* note 77, § 1, at 4-5.