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LOGICAL OR LEGAL RELEVANCY—A CONFLICT IN THEORY

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I. INTRODUCTION

Is there a rational theory which serves as a basis for determining the admissibility of circumstantial evidence?

Circumstantial evidence involves the offer in evidence of Fact A for the purpose of having the trier of fact (jury, judge, administrative agency or arbitrator) first believe that Fact A is true, and from it infer the existence or truth of Fact B. Fact B may be one of the ultimate questions of fact or propositions raised by the pleadings, or it may be a more remote fact or proposition which when established, again forms the basis for a further inference in the chain of proof toward the ultimate issue. Everyone agrees that in order for Fact A to be admitted in evidence for the purpose of proving the existence of Fact B there must be a logical relation between Fact A and Fact B. Thus, logical relevancy is the basic concept underlying all discussion of the admissibility of circumstantial evidence.[1] However, it is equally clear that in judicial trials there are many items of circumstantial evidence which are conceded to be logically relevant to a proposition before the court, but which are nevertheless excluded by the judge from the consideration of the trier of fact. Sometimes the exclusion is explained in terms of a lack of sufficient quantity of probative value—that the offered evidence is "too remote." In other instances the exclusion is based upon considerations other than logical relevancy. The result is a substantial difference between logical relevancy and admissibility in the law of Evidence. How is this difference to be determined?

This article is prepared in the belief that in no other phase of the law of Evidence have basic principles been relegated so far to the background.[2] Its purpose is to set forth in a law review article a basic theory which will adequately serve as a rational approach for determining the admissibility of all circumstantial evidence; to discuss the elements involved in this theory and show the peculiar mental processes which must be undertaken by the trial judge in applying it during the course of a trial; and finally to show the application of the theory to a few of the more controversial items of circumstantial evidence in contemporary litigation.

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1. THAYER, PRELIMINARY TREATISE ON EVIDENCE 263-76, 530 (1898); 1 WIGMORE, EVIDENCE §§ 9-10 (3d ed. 1940).

2. *Cf.* Carr, *The Proposed Missouri Evidence Code*, 29 TEXAS L. REV. 627 (1951).

II. SOME PROBLEMS DISTINGUISHED

(a) *Materiality and Relevance*

Since this article is concerned only with those cases where the problem involves relevancy and admissibility, and is not concerned with the cases which turn upon the materiality or immateriality of the proposition sought to be proved under the rules of substantive law and pleading, it is important at the outset to distinguish between materiality and relevancy. If Fact A is offered in evidence for the purpose of proving the existence of ultimate Fact B, but Fact B is not in issue in the case, Fact A will be excluded, not because it does not tend to prove Fact B, but because Fact B is not before the court for determination.[3] The court in excluding Fact A may say that it is "irrelevant," and when Fact A is considered in relation to the propositions before the court, it is irrelevant. But since Fact A may logically tend to prove Fact B and is offered for that purpose, the decision excluding Fact A can only mean that the court is not interested in the relation that Fact A bears to Fact B; it can only consider Fact A in relation to other propositions—*i.e.*, the propositions before the court. Thus an excluded item of circumstantial evidence may be described as "irrelevant" either (1) when the probandum which it tends to prove is not before the court, or (2) when although the probandum for which it is offered as proof is before the court the evidence offered does not meet the legal standards of relevancy. These two "wholly distinct" senses of irrelevance—materiality and relevance —have caused considerable confusion, particularly in the older authorities.[4] But since modern rules of pleading are so much more flexible and informal, leaving the rules of substantive law as the principal basis for determining the material propositions before the court, the confusion between the two concepts is not so pronounced in contemporary litigation.

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3. THAYER, PRELIMINARY TREATISE ON EVIDENCE 269; 1 WIGMORE, EVIDENCE § 2; AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, Rules 1(8), 1(12) (1942); see James, *Relevancy, Probability and the Law,* 29 CALIF. L. REV. 689, 689-93 (1941). "Thus, for example, in an action of debt upon a bond, if the defendant pleads non est factum, (which puts in issue whether it be the defendant's deed or not), he cannot give a release in evidence. Nor, in an action of trespass for an assault and battery, will the defendant be allowed to prove, under the general issue, that he was first assaulted by the plaintiff." PHILLIPPS, EVIDENCE 69 (1814), quoted in James, *supra* at 690.

4. Note 3, *supra.* But see Walker, *The Theory of Relevancy,* 63 JURID. REV. 1 (1951). This is an interesting discussion of the theory of the law of pleading in Scotland. "The plea to the relevancy" of the facts set forth in a pleading seems to be the Scottish equivalent of the American demurrer or motion to dismiss for failure to state facts sufficient to constitute a cause of action or defense. "To state a relevant case he [the pleader] must then set down in the condescendence all those facts which he believes are material, that is, all the facts which if admitted or proved will, in his submission, entitle the Judge to apply the proposition of law he has in mind and grant the decree he seeks." *Id* at 13. A less important kind of relevancy in regard to pleading is concerned with statements which are "not sufficiently specific." *Id.* at 23.

(b) *Admissibility and Weight of Evidence*

Since the law of Evidence is concerned only with the admissibility of evidence, it is important to distinguish the function of the judge with respect to an item of circumstantial evidence, and the function of the jury. Both judge and jury consider the logical relevancy of the evidence offered. But since the judge alone determines admissibility, his function has aptly been described as that of a "preliminary tester";[5] he determines first whether there is a logical relation between the item of evidence offered and one or more of the propositions before the court, and secondly, whether this relation is such that when measured by the policies of judicial administration, the item of evidence should be admitted for the consideration of the jury. It is the function of the jury, with the help of the argument of counsel, to explore more completely the logical relevancy of the evidence offered and decide its final weight; and it is in this function of the jury and counsel that the methods and rules of logic and reason are of greater service.[6]

III. The Basic Elements of Admissibility

Where Fact A is offered in evidence and an objection is made, the first question to be determined is: What logical relation does Fact A bear to the issues before the court? If we find that Fact A does tend to prove a proposition before the court *(i.e.,* ultimate Fact B), by what legal standard will the relation between Fact A and Fact B be measured in determining admissibility? Is there a legal minimum quantity of probative value which must be measured?[7] Or is there a rule of law which holds that a given Fact A is admissible to prove Fact B, but not to prove Fact C? Do the courts determine as law the status of the relation that all Facts A bear to all Facts B? If so, by what legal standards are such determinations made? On the other hand, if the rule of law is that the determination of the admissibility of Fact A for the purpose of proving Fact B rests in the discretion of the trial judge, by what legal standards are the trial judge's mental processes governed so as to prevent abuse of discretion? If there is a concept called "legal relevancy,"[8] how is it to be derived from logical relevancy?

5. 1 Wigmore, Evidence § 29.

6. See, in general, Good, Probability and the Weighing of Evidence (1950); Michael and Adler, The Nature of Judicial Proof (1931); Wigmore, The Science of Judicial Proof (3d ed. 1937).

7. 1 Wigmore, Evidence § 28: "But to a more important extent the effect is to require a generally *higher degree of probative value for all evidence to be submitted to a jury* than would be asked in ordinary reasoning. . . . In other words, legal relevancy denotes, first of all, *something more than a minimum of probative value.* Each single piece of evidence must have a plus value." Compare this with Model Code of Evidence 178 (1942): "It would be as futile as it would be unwise to attempt to prescribe measurements of logical value."

8. The term is used by Wigmore (see, *e.g.,* 1 Wigmore, Evidence § 28), and criticized sharply by James, *Relevancy, Probability and the Law,* 29 Calif. L. Rev. 689, 701 *et seq.* (1941). See also Morgan and Maguire, Cases and Materials on Evidence 138 n.10 (3d ed. 1951); Torrey v. Congress Square Hotel Co., 75 A.2d 451, 456 (Me. 1950).

Thayer's approach to the problem of admissibility is adequately indicated in the following:

> "Admissibility is determined, first, by relevancy,—an affair of logic and experience, and not at all of law; second, but only indirectly, by the law of evidence, which declares whether any given matter which is logically probative is excluded."[9]

> "The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."[10]

Here we see that the basic elements of admissibility are (1) logic and experience, and (2) policy or law. In order to understand how these elements together can provide a legal method for determining admissibility, it will be helpful to consider them briefly.

(a) *Logical Relevancy—Is There A Legal Minimum of Probative Value?*

Relevancy is "an affair of logic and experience." A fact is whatever it is, but the meaning of a fact is what it is known as. The significance of a fact is determined by human experience in relation to it. Since a fact can be known in different ways, it can have different meanings, and different propositions or conclusions can be inferred from it.[11] A proposition of fact is relevant to a probandum before the court if from what is known about that fact from human experience, it is possible to infer the existence of the probandum. No item of circumstantial evidence has inherent qualities of relevancy or admissibility. Relevancy can exist only as a relation based upon human experience between an item of evidence offered and a proposition sought to be proved. Thus Fact A will be said to be relevant to Fact B when, according to human experience, it is so related to Fact B that Fact A, considered either by itself or in connection with other facts renders probable the past, present or future existence or nonexistence of Fact B.

But a relevant fact may be more or less remote from a given probandum according as the number of intermediate probative propositions is greater or less.[12] In order to approximate the degree of remoteness involved it is necessary to analyze carefully the inference or series of inferences involved. Each step of reasoning must match a premise acceptable to the judge on the basis of his observation of human experience.[13] To borrow an excellent example:

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9. THAYER, PRELIMINARY TREATISE ON EVIDENCE 269.

10. *Id.* at 530.

11. MICHAEL AND ADLER, THE NATURE OF JUDICIAL PROOF 73 (1931).

12. *Id.* at 90 (proposition 44.4).

13. Compare the language in MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE 122 (3d ed. 1951): "which the judge judicially notices."

"[W]here the contested proposition is whether D killed H, and the evidence is a love letter from D to W, H's wife, the inferential series runs from (1) the expression in the letter to (2) D's love of W to (3) D's desire for exclusive possession of W to (4) D's wish to get rid of H to (5) D's plan to get rid of H to (6) D's execution of the plan by killing H. The unarticulated premises conjoined with and supposed to justify the inferential steps are:

(1-2) A man who writes a love letter to a woman probably does love her.
(2-3) A man who loves a woman probably desires her for himself alone.
(3-4) A man who loves a married woman probably wishes to get rid of her husband.
(4-5) A man who wishes to get rid of the husband of the woman he loves probably plans to do so.
(5-6) A man who plans to get rid of the husband of the woman he loves probably kills him."[14]

But the rules of logic tell us that a fact is either relevant to a probandum or it is not; it is relevant whether it is more or less remote from the probandum with respect to which it is probative. Degrees of remoteness of relevancy are not to be understood as meaning degrees of relevancy.[15] While judges and juries ordinarily use the inductive type of reasoning to determine whether there is a logical relevance between an item of evidence offered and the probandum to be proved, the transmutation into the deductive (though not strictly syllogistic), by setting forth the premise involved as indicated above, is helpful in evaluating the degree of proof involved.[16]

Assuming that the trial judge believes that there is logical relevance between the item of evidence offered (Fact A), and an ultimate probandum in the case (Fact B), is it necessary for the trial judge to weigh such evidence for the purpose of determining a legal minimum quantity of probative value? Thayer's answer was "that everything which is thus probative, should come in, unless a clear ground of policy or law excludes it."[17] The American Law Institute's Model Code of Evidence, Rule 9(f), states that "all relevant evidence is admissible"; but this rule is made subject to Rule 303 which provides that the trial judge may in his discretion exclude evidence if he find that its probative value "is outweighed" by certain policy considerations, namely, that the risk of its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly surprise a party who has not had reasonable ground to anticipate that such

14. *Ibid.* One still reads that the law will not permit an "inference upon an inference," see Miller & Miller Motor Freight Lines v. Hunt, 242 S.W.2d 919, 922 (Tex. Civ. App. 1951); but that there can be no such rule of law in a rational system of evidence has been demonstrated many times. See 1 WIGMORE, EVIDENCE § 41.

15. MICHAEL AND ADLER, THE NATURE OF JUDICIAL PROOF 90.

16. *Compare* 1 WIGMORE, EVIDENCE § 30, *with* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 694-99 (1941).

17. THAYER, PRELIMINARY TREATISE ON EVIDENCE 530.

evidence could be offered. While the Introductory Note to Rules 303 to 311 states that "It would be as futile as it would be unwise to attempt to prescribe measurements of logical value," Rule 303 expressly provides that the judge may exclude the offered evidence if he finds that its probative value is "outweighed" by the above policy considerations.[18] Wigmore champions a concept called "legal relevancy," of which "the effect is to require a generally higher degree of probative value for all evidence to be submitted to a jury" and that "legal relevancy denotes, first of all, something more than a minimum of probative value. Each single piece of evidence must have a plus value."[19]

It is precisely in this weighing function to be performed by the trial judge that a considerable amount of confusion has arisen, resulting in a controversial concept called "legal relevancy." Courts, commentators and encyclopedias have frequently reflected this confusion in stating that legal relevancy demands a higher standard of probative value; that it includes logical relevancy, but demands a "close connection between the fact to be proved and the fact offered to prove it."[20] Nothing is said about policy considerations being the basis of exclusion. Indeed, the New York Court of Appeals in *Engel v. United Traction Co.*[21] demanded a legal minimum of probative value measured by the following test:

> "A fact is admissible as the basis of an inference only when the desired inference is a probable or natural explanation of the fact *and a more probable and natural one than the other explanations, if any.*"[22]

It takes no keen analysis to comprehend that if an item of circumstantial evidence may be submitted to the jury only when the probandum before the court is the most probable explanation of the offered evidence, very few items of circumstantial evidence could be admitted. Most items of circumstantial evidence standing by themselves are capable of several rational meanings. Since each item of circumstantial evidence is offered singly, the effect of this test of relevancy would be to require a higher probative value at the beginning of the trial than when offered near the end when the other evidence has been presented.

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18. If the writer has any disagreement with Rule 303, it is that the word "may" should have been "shall."

19. 1 WIGMORE, EVIDENCE § 28.

20. Torrey v. Congress Square Hotel Co., 75 A.2d 451, 456 (Me. 1950); Hebert v. Boston & M.R.R., 90 N.H. 324, 8 A.2d 744 (1939); Dalpe v. Bissette, 99 Vt. 179, 130 Atl. 591, 592 (1925); Engel v. United Traction Co., 203 N.Y. 321, 96 N.E. 731. (1911). See also 1 WIGMORE, EVIDENCE §§ 28, 32; 31 C.J.S., *Evidence* § 159 (1942).

21. 203 N.Y. 321, 96 N.E. 731 (1911).

22. 96 N.E. at 732 (italics added).

Thayer maintained that there are no legal rules of relevancy:

> "How are we to know what these forbidden things are (that are not logically probative)? Not by any rule of law. The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience. . . ."[23]

Wigmore took issue with this position of Thayer, contending that "It is none the less law because it is also logic. . . . Being a legal precedent, it must be studied and observed by the profession."[24] His authority was Chief Justice Cushing in *State v. Lapage*.[25] When the spurious notion that there is a legal minimum quantity of probative value required in order to admit an item of circumstantial evidence is added to the Wigmore-Cushing theory that legal precedent determines relevancy, it is not difficult to understand how the basic principles for determining the admissibility of circumstantial evidence have been so far relegated to the background as to be almost forgottten; and a vast morass of legal precedent presented in their stead, classified first in terms of the many different types of evidence offered, and secondly in terms of the type of probandum to be proved. A workable basic theory of admissibility should provide a method for solving all of the cases, and since the factual detail presented in the trial of each case is always somewhat different, the results arrived at in previous cases should be of secondary importance.

To an increasing extent courts are now approaching the problem of admissibility of circumstantial evidence with the simple but sweeping declaration that "all facts having rational probative value are admissible unless some specific rule forbids."[26] With such an approach the trial judge is certainly not required to weigh or measure off any legal minimum quantity of probative value; it is enough if Fact A "may tend, even in a slight degree, . . . though remotely" to prove Fact B.[27] While the Wigmore-Cushing approach

23. THAYER, PRELIMINARY TREATISE ON EVIDENCE 265.

24. 1 WIGMORE, EVIDENCE § 12.

25. 57 N.H. 245, 288 (1876): "[A]lthough undoubtedly the relevancy of testimony is originally a matter of logic and common sense, still there are many instances in which the evidence of particular facts as bearing upon particular issues has been so often the subject of discussion in courts of law, and so often ruled upon, that the united logic of a great many judges and lawyers may be said to furnish evidence of the sense common to a great many individuals, and, therefore, the best evidence of what may be properly called common-sense, and thus to acquire the authority of law. It is for this reason that the subject of relevancy of testimony has become, to so great an extent, matter of precedent and authority, and that we may with entire propriety speak of its legal relevancy."

26. Hadley v. Baltimore & O.R.R., 120 F.2d 993 (3d Cir. 1941); Bogorad v. Kosberg, 8 A.2d 342 (D.C. Cir. 1951); Haile v. Dinnis, 184 Md. 144, 40 A.2d 363 (1944); Godsy v. Thompson, 352 Mo. 681, 179 S.W.2d 44 (1944); Trook v. Sagert, 171 Ore. 680, 138 P.2d 900 (1943). For other cases see DEC. DIG., *Evidence* # 99, and DEC. DIG., *Crim. Law* # 369; 31 C.J.S., *Evidence* § 158 (1942).

27. Stevenson v. Stewart, 11 Pa. 307 (1849) (leading case); Holmes v. Goldsmith, 147 U.S. 150, 164, 13 Sup. Ct. 288, 37 L. Ed. 118 (1893); Williamson v. United States, 207 U.S. 425, 451, 28 Sup. Ct. 163, 52 L. Ed. 278 (1907); Bardeen v. Commander Oil Co., 40 Cal. App.2d 341, 104 P.2d 875 (1940); Riss & Co. v. Galloway, 108 Colo. 93, 114 P.2d 550, 135 A.L.R. 878 (1941); Trook v. Sagert, 171 Ore. 680, 138 P.2d 900 (1943).

for determining the "plus values" necessary to constitute "legal relevancy" by the classifying and indexing of cases continues to have a dominant influence upon the profession, the simple approach of Thayer "that everything which is thus probative should come in," unless excluded by a rule of policy, is now receiving a substantial re-emphasis in the effort to prove a more workable approach to the problem of admissibility.[28] Under this approach policy considerations alone—the policies affecting judicial administration in all trials and especially in jury trials—constitute the only basis for excluding an item of logically relevant circumstantial evidence; and if there is any weighing to be done by the trial judge, it is not a measuring off of a "legal minimum" predetermined for different evidential relations.

(b) *Judicial Policies of Exclusion*

It is generally accepted that the trial judge should exclude circumstantial evidence, even though logically relevant, if its probative value is "outweighed" by the risk that its admission will (1) consume too much time, or (2) unnecessarily confuse the jury concerning the issues to be determined, or (3) tend to excite the emotions of the jury to the undue prejudice of the opponent, or (4) unfairly surprise the opponent, or (5) unnecessarily embarrass the personnel of the court, the litigants or the public.[29] These bases of exclusion find their roots in traditional policies formulated for the administration of trials before judicial tribunals, particularly jury cases. Recognizing the trial as an adversary proceeding taking place under the dramatic conditions of emotional disturbance, with defiance, antagonism, surprise, sympathy, contempt, ridicule and anger permeating the atmosphere of the entire proceeding, and with members of the jury chosen from the public at large, with no required experience in determining controversial issues of fact under such circumstances, the courts at an early date excluded logically revelant circumstantial evidence when the risks involved in the above policy considerations were found to be so out of proportion to the probative value of the offered evidence as to constitute a *clear* basis of exclusion.[30]

Thus, where Fact A is offered for the purpose of proving Fact B, and the existence of Fact A is itself disputed, an additional issue is raised. If the probative value of Fact A and its importance to the proponent for the

28. See notes 26 and 27 *supra;* MODEL CODE OF EVIDENCE, Rule 9(f). But compare 1 WIGMORE, EVIDENCE §§ 9, 10 with 1 *id.* § 28, 2 *id.* § 283.

29. Reeve v. Dennett, 145 Mass. 23, 11 N.E. 938, 943 (1887) (leading case); Jones v. Terminal R.R. Ass'n of St. Louis, 242 S.W.2d 473 (Mo. 1951); Commonwealth v. Morgan, 358 Pa. 607, 58 A.2d 330 (1948); Kurn v. Radencic, 193 Okla. 126, 141 P.2d 580 (1943); 1 WIGMORE, EVIDENCE §§ 29a, 42; 2 *id.* § 443; 6 *id.* § 1904; 31 C.J.S., *Evidence* § 869 (1942).

30. See THAYER, PRELIMINARY TREATISE ON EVIDENCE 2, 266; 2 WIGMORE, EVIDENCE § 443.

purpose of establishing Fact B is slight, and the time required to hear the evidence for and against the existence of Fact A would be so much as to be out of proportion to the probative value of Fact A, the courts have always considered it proper to exclude such evidence, not only because of the undue consumption of time, but also because of the tendency to confuse the issues.[31]

The above policy considerations are said to be vested largely in the discretion of the trial judge for proper administration.[32] While this is an effort to create an area in which the judgment of the trial judge tends toward finality, the function of the trial judge within this area cannot be exercised by either whim, caprice or mechanical rules. There must be some legal standard by which his rulings can be measured against possible abuse of discretion, and because of this necessity, the trial judge must be provided with an acceptable legal theory for determining admissibility. The theory provided requires first a determination of logical relevancy, and secondly a careful comparison of the probative value of the evidence offered against whatever possibility there may be of one or more of the disproportionate risks implicit in the policy considerations mentioned above. Without a doubt, the application of this theory is one of the most delicate and difficult functions to be performed by the trial judge—one that calls for genuine judicial statesmanship. It is understandable that many trial judges would prefer to look to precedent as the complete answer to the problem. But to do this is to submit to the temptation to dispense entirely (1) with the relational test of relevancy itself, or (2) with the function of determining in each case whether or not there exists a disproportionate policy risk. An example of the mental processes of a trial judge who approached the problem of admissibility looking solely to precedent might be stated somewhat as follows: "In a criminal case evidence of other crimes is admissible to prove intent; here the prosecution offers evidence of another crime committed by the accused for the purpose of proving intent; therefore the evidence is admissible." In a mechanical approach of this type no consideration is likely to be given either (1) to the relevancy of the offered evidence to prove intent, or (2) to whether the offered evidence is necessary or substantially helpful to the prosecution for the purpose of proving intent. While precedent may be comforting to the trial judge, there is no positive rule here of either exclusion or admissibility. The mental processes required of the trial judge demand a careful comparison of the two basic elements of admissibility, and unless he tests the offered evidence by both of these basic

31. See note 29 *supra*.

32. Indicative cases are United States v. Sebo, 101 F.2d 889 (7th Cir. 1939); Adkins v. Brett, 184 Cal. 252, 193 Pac. 251, 254 (1920); People v. Darby, 64 Cal. App.2d 25, 148 P.2d 28 (1944); *cf.* 1 WIGMORE, EVIDENCE § 16; 2 *id.* § 444.

elements, he is likely to be reversed for abuse of discretion, notwithstanding the fact that he followed precedent reaching the identical result.[33] The scope of the area of discretionary exclusion by the trial judge is determined largely by those circumstances occurring at the trial which the trial judge has the better opportunity to evaluate.[34]

In other instances the courts have for reasons solely of policy set forth rules of absolute exclusion. In such instances the trial judge has no discretion. He must exclude the evidence offered regardless of its possible high degree of probative value. Here the policies of exclusion are deemed so compelling as to require exclusion regardless of those circumstances occurring at the trial which might cause the trial judge to reach a different result, if he were free to evaluate the elements. Examples are the character rule in a criminal case excluding evidence of the accused's bad character as a part of the prosecution's case in chief (judicial policy against undue prejudice); the rule excluding evidence of specific acts or instances of conduct for the purpose of proving character (judicial policy against undue prejudice and unfair surprise); the rule in a criminal case that prohibits evidence of other crimes if, but only if, the only logical series of inferences from the offered evidence is that the accused has a criminal disposition and therefore he probably committed the offense now charged (judicial policy against undue prejudice);[35] evidence in a civil case of subsequent repairs and precautions (judicial policy to encourage improvements to prevent accidents); offers of compromise (judicial policy to encourage settlement of disputes), and others.

It is necessary, therefore, to distinguish between those instances where policy control of logically relevant circumstantial evidence is vested in the judgment of the trial judge, where the weighing function is to be performed, and the instances where the appellate courts have set forth rules of absolute exclusion.

But the point to be emphasized here is that in either situation, the only basis for excluding logically relevant circumstantial evidence must be upon grounds of policy. And the sooner we recognize policy considerations as

33. Frequently the writer hears his friends who are trial judges say that if the appellate court likes the results reached below, the trial judge acted within his discretion; but if not, the trial judge abused his discretion. Perhaps a lesser tendency to rely automatically on precedent and more attention to evaluating the two elements of admissibility under the circumstances of each case will make more predictable the decision of the appellate court.

34. See McElroy, *Some Observations Concerning the Discretions Reposed in Trial Judges by the American Law Institute's Code of Evidence*, in MODEL CODE OF EVIDENCE 356 (1942).

35. Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

the only basis for excluding such evidence, the sooner can we identify, define the scope of, and evaluate such policies in terms of efficient judicial administration.

Also, when we recognize policy reasons as the only basis for excluding logically relevant circumstantial evidence, the apparent paradox of sometimes admitting evidence with slight probative value, and on other occasions excluding evidence with an established record of high probative value disappears.[36] It is as if we set up two test tubes side by side, labelling one "logical relevancy" and the other "policies of exclusion." If the probative value of the offered evidence barely covered the bottom of the tube labeled "logical relevancy" and there are no policy reasons for excluding the evidence, it should be admitted. On the other hand there are several instances where the probative value of a certain Fact A in relation to a certain Fact B is so high as almost to constitute a sufficient basis for a presumption, and yet such evidence is consistently excluded. For example, human experience with the lie detector has indicated a minimum of 75% accuracy in the results. Yet evidence of the results of the lie detector is unanimously excluded by the courts,[37] whether offered by either the accused or the state, and even when agreed to by both parties in a civil suit. Why? Is it any help to say that the lie detector test has "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made?"[38] Such an explanation sounds very much like the repudiated doctrine of *Engel v. United Traction Co.*,[39] that a fact is admissible as a basis for an inference if, but only if, the desired inference is a more probable and natural explanation than any other. Obviously the traditional explanation for the exclusion of the lie detector results is contrary to the accepted doctrine that all facts having rational probative value are prima facie admissible, even though they tend only to a "slight

36. *E.g.*, the results of the "lie detector," and the "drunkometer."

37. Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923); State v. Lowry, 163 Kan. 622, 185 P.2d 147, 150 (1947); People v. Becker, 300 Mich. 562, 2 N.W.2d 503, 505, 139 A.L.R. 1171 (1942); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945); Boeche v. State, 151, Neb. 368, 37 N.W.2d 593 (1949); People v. Forte, 167 Misc. 868, 4 N.Y.S.2d 913 (Co. Ct. 1938), *aff'd*, 279 N.Y. 204, 18 N.E.2d 31 (1938); State v. Pusch, 46 N.W.2d 508 (N.D. 1950); Henderson v. State, 230 P.2d 495, 500-05 (Okla. 1951); State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933); Le Fevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1943). But see People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (Co. Ct. 1938). See Note, 139 A.L.R. 1174 (1942); Inbau, *The Lie-Detector*, 26 B.U.L. Rev. 264 (1946); Note, *Lie Detectors: Discussions and Proposals*, 29 Cornell L.Q. 535 (1944); Streeter and Belli, *The "Fourth Degree": The Lie Detector*, 5 Vand. L. Rev. 549 (1952).

38. Henderson v. State, 230 P.2d 495, 505 (Okla. 1951), quoting Inbau, *The Lie-Detector*, 26 B.U.L. Rev. 264, 271 (1946), who in turn quoted the phraseology of the previous decisions. Who are these physiological and psychological authorities? And what about the vast daily human experience with the lie detector by police, detective and other investigative agencies, who indicate a minimum of 75% accuracy?

39. 203 N.Y. 321, 96 N.E. 731, 732 (1911); see note 21 *supra*.

degree" to prove an issue before the court.[40] Otherwise, we must resign to the Wigmore-Cushing approach and look simply to precedent to determine the legal minimum quantity of probative value required for each type of evidentiary fact offered in relation to each different type of probandum, in order to determine the "legal relevance" of the evidence offered? The sooner we recognize that even though our experiences with the lie detector indicate a very high degree of accuracy and probative value (a much higher degree of probative value than many other items of circumstantial evidence readily admitted), and that the only rational basis for excluding such evidence is upon considerations of policy (perhaps a judicial fear of undue prejudice in the minds of the jury resulting from a lack of proper administrative standards for controlling the competency of the operator, the type of machine used and the circumstances under which it is used),[41] the sooner we can identify the real difficulty and guide our efforts toward setting up proper standards of control and permissible areas of evidentiary usefulness.

The recent Michigan case of *Stone v. Earp*[42] was a chancery suit in which the plaintiff sought a decree that he was the owner of a certain truck and trailer. The defendant contended that he had purchased the equipment from plaintiff and that plaintiff was a lessee of the equipment. The principal issue before the trial court was whether or not defendant had paid $6,500 to plaintiff in payment of the purchase price for the equipment. Since the evidence consisted of the conflicting testimony of the respective parties, who were evidently the principal witnesses, the trial judge, sitting without a jury, stated that he was not going to decide the case unless both parties agreed to take a lie-detector test. The parties agreed that each would submit to the test and stipulated that the test should be made by Mr. Gregory, a personnel consultant who "conducts lie detector examinations." After making the test, Mr. Gregory testified that he had formed an opinion in the matter, and that it was his opinion that plaintiff was not telling the truth, and that defendant was telling the truth in regard to the payment of the money. At the close of the evidence the trial judge filed a decree and opinion that the defendant was the owner of the equipment, stating that the lie-detector test had been a definite aid in "supporting what appeared to be the preponderance of the evidence." Plaintiff appealed. The Supreme Court of Michigan held that it was error to admit in evidence the result of the test, but not prejudicial error, because the trial judge "had about concluded that the preponderance

40. See notes 25 and 26, *supra*.

41. *Cf.* Note, *Lie Detectors: Discussions and Proposals*, 29 CORNELL L.Q. 535 (1944). Professor Fred E. Inbau made a comment before the Southeastern Conference of Law Teachers at Gatlinburg, Tennessee, in Septembr 1949, to the effect that there was only one operator in the United States whom he would trust sufficiently to submit to a lie detector test on an important issue.

42. 50 N.W.2d 172 (Mich. 1951).

of evidence was in defendant's favor prior to admission of such tests."[43] The court approved the usual phraseology "that such tests . . . are still too much in the experimental field for courts to approve of their general use."[44] But if policy considerations concerning undue prejudice to the opponent and lack of safe standards for making the tests constitute the only rational basis for excluding evidence of this type, why should the trier of fact be deprived of this relevant evidence under circumstances where the parties agree that the feared hazards either do not exist or are of slight consequence.

By recognizing disproportionate policy risks as the sole basis for excluding logically relevant evidence, we can clarify our thinking immeasurably when confronted by the more controversial items of circumstantial evidence. Evidence of other crimes,[45] of other accidents,[46] the results of the Harger Drunkometer,[47] and other scientific tests and controversial items of evidence to confront us in the future can be handled then with a sound basic approach for determining admissibility. We have only first to ask: Is the offered evidence logically relevant? If so, precisely what policy considerations tend to exclude it? It is in the very process of making explicit the applicable policies of exclusion that we clear away the confusion and provide a rational basis for determining admissibility. This is particularly important in those instances where the courts have established rules of absolute exclusion.

Likewise, in those areas where exclusion is vested in the trial judge, the basic theory is the same, and its use is equally helpful. Of course there is a variable here that cannot be solved properly by looking to precedent. When the offered evidence is itself disputed, will its presentation tend to consume too much time or confuse the issues? Will it unfairly surprise the opponent? Is this evidence really necessary or substantially helpful to the proponent to establish the probandum for which it is offered, or is it likely that his real purpose is to excite the emotions of the jury against the opponent?[48] If the trial judge decides to exclude, his ruling will be more

43. *Id.* at 174.

44. *Ibid.*

45. See note 35 *supra.*

46. *Cf.* Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205 (1948).

47. *Compare* People v. Bobczyk, 343 Ill. App. 504, 99 N.E.2d 567 (1951), and McKay v. State, 235 S.W.2d 173 (Tex. Crim. App. 1950), *with* People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949), 3 VAND. L. REV. 318 (1950). But see State v. Hunter, 4 N.J. Super. 531, 68 A.2d 274 (1949). As to the applicability of the self-incrimination privilege to the result of an involuntary "drunkometer" test consider 8 WIGMORE, EVIDENCE § 2265; INBAU, SELF INCRIMINATION—WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO 72-83 (1950); State v. Cram. 176 Ore. 577, 160 P.2d 283 (1945); People v. Tucker, 88 Cal. App.2d. 333, 198 P.2d 941 (1948).

48. In Adkins v. Brett, 184 Cal. 252, 193 Pac. 251, 254 (1920), Justice Olney stated one phase of the exclusionary doctrine as follows: "If the point to prove which the evidence is competent can just as well be proven by other evidence, or if it is of but slight weight

understandable to all concerned when enunciated in terms of the basic theory —either (1) that the offered evidence is not logically relevant or (2) because of stated policy considerations. Surely this approach is a rational one; and because it is rational, it provides a sound approach for determining the question of admissibility of circumstantial evidence in all of the cases.

IV. SIMILIAR HAPPENINGS AND TRANSACTIONS IN CIVIL CASES

An offer to prove other accidents or other transactions than the one presently before the court is likely to be the starting point of a heated debate resulting in considerable delay and uncertainty. Here one is likely to hear such phrases as "collateral issues" and *"res inter alios acta."* A sound legal principle for determining the admissibility of circumstantial evidence should go far toward avoiding the uncertainty in these cases. The effort here will be to show that the basic theory discussed above is a rational approach to the problem, and that the only other alternative is to bog down in the endless classification of cases in terms of the types of circumstantial evidence offered and the various probandi before the court, always attempting to define "rules of law" in terms of specific conduct instead of principle.[49]

Notwithstanding many older cases to the contrary,[50] it is now generally accepted that evidence of other accidents logically relevant to an issue before the court is admissible, subject to the power of the trial judge to exclude if he finds that one or more of the risks of confusing the jury, surprise, prejudice or consumption of time is so disproportionate to the probative value of the evidence offered as to constitute a clear basis for exclusion.[51] This is no rule of positive exclusion. To say that circumstantial evidence

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or importance upon that point, the trial judge might well be justified in excluding it entirely, because of its prejudicial and dangerous character as to other points. . . . This would emphatically be true where there is good reason for believing that the real object for which the evidence is offered is not to prove the point for which it is ostensibly offered and is competent, but is to get before the jury declarations as to other points, to prove which the evidence is incompetent. . . . The point of the matter is that the opponent of such evidence, so likely to be misused against him, is entitled to such protection against its misuse as can reasonably be given him without impairing the ability of the other party to prove his case, or depriving him of the use of competent evidence reasonably necessary for that purpose." While the above statement is directed to hearsay evidence admissible under an exception, it is descriptive of the weighing process to be performed by the trial judge in comparing logical relevancy and importance to the proponent against possible policies of exclusion.

49. *Cf.* POUND, JUSTICE ACCORDING TO LAW 58 (1951).

50. Martinez v. Planel, 36 Cal. 578 (1869); Diamond Rubber Co. v. Harryman, 41 Colo. 415, 92 Pac. 922, 15 L.R.A. (N.S.) 775 (1907); Hudson v. Chicago & N.R.R., 59 Iowa 581, 13 N.W. 735 (1882); Parker v. Portland Publishing Co., 69 Me. 173, 31 Am. Rep. 262 (1879); Collins v. Inhabitants of Dorchester, 6 Cush. 396 (Mass. 1850); see Note, 128 A.L.R. 595, 605 (1940).

51. Cogswell v. C.C. Anderson Stores Co., 68 Idaho 205, 192 P.2d 383 (1948); Robitaille v. Netoco Community Theatres, Inc., 305 Mass. 265, 25 N.E.2d 749, 128 A.L.R. 592 (1940); Biener v. St. Louis Public Service Co., 160 S.W.2d 780 (Mo. App. 1942); see Note, 128 A.L.R. 595 (1940); 65 C.J.S., *Negligence* §§ 234 *et seq.* (1950). But *cf.* Note, 20 A.L.R.2d 1210 (1951).

will raise collateral issues or is *res inter alios acta* is not a legitimate basis in and of itself for excluding such evidence, because by definition all circumstantial evidence involves the offer of collateral facts for the purpose of having the trier infer the truth of a proposition before the court.

(a) *Accident Proneness as Evidence of Negligent Conduct*

The recent case of *Hall v. Young*[52] was an action to recover for injuries sustained in an automobile collision alleged to have been caused by the negligent driving of the defendant. There was evidence that the defendant had been drinking and drove his car on a rainy night at a high rate of speed on a narrow and slippery road. On cross-examination of the defendant he was asked to state how many accidents he had been in while driving an automobile. The trial judge overruled the objection and the defendant answered that he had been in four other accidents while driving. The court reversed a verdict and judgment for the plaintiff with the statement that "This court has adopted the rule, where the sole issue is one of negligence or non-negligence on the part of a person on a particular occasion, that previous acts of negligence are not admissible."[53] Where the defendant is the driver of the car, as distinguished from the cases where the principal defendant is the driver's employer, parent or the owner who allowed the driver to operate the car, the cases generally exclude evidence of other accidents.[54] Why? Does the fact that a certain automobile driver has been in four other automobile accidents while driving logically tend to prove that he was probably guilty of faulty driving in the fifth accident? During the last thirty years there have been several studies in psychological literature showing that some individuals are more likely to have accidents than are people at large;[55] their greater likelihood to have accidents has been called "accident proneness," which "may be regarded as a combination of human abilities which make a person highly proficient in bringing about accidents."[56]

52. 236 S.W.2d 431, 20 A.L.R.2d 1207 (Ark. 1951).

53. 236 S.W.2d at 432.

54. See Note, 20 A.L.R.2d 1210 (1951).

55. U.S. BUREAU OF PUBLIC ROADS, HIGHWAY ACCIDENTS (U.S. Gov't Printing Office, 1938); Blain, *The Automobile Accident—A Medical Problem*, 3 J. CRIM. PSYCHOPATHOLOGY 37 (1941); Johnson, *Born to Crash*, Collier's, July 25, 1936, pp. 28, 60; Rawson, *Accident Proneness*, 6 PSYCHOSOMATIC MEDICINE 88 (1944). See James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950), for reference to other studies.

56. N. MAIER, PSYCHOLOGY IN INDUSTRY 350 (1946), quoted in James and Dickinson, *supra* note 55, at 769. In June, 1936, Congress directed the Bureau of Public Roads to make a study of the problems involved in the advancement of safety on the highways. By analyzing the records through six consecutive years of 29,531 Connecticut drivers on file in the department of motor vehicles of that state, it was determined that: (1) accidents are not distributed among drivers according to the laws of chance; (2) nearly 40% of all accidents of this population accrued to less than 4% of the drivers; (3) once a driver has been involved in an accident, his liability to another accident within a prescribed time is approximately doubled; (4) accident repeaters tend, as a class, to shorten the time between

Because of the many variables other than the human factor involved in different types of accidents, evidence that a certain person was involved in several automobile accidents would not seem to indicate that he is more likely to have accidents, in other walks of life, although some writers apparently believe that the attribute of "accident proneness" follows the unfortunates in everything they do.[57] But as the inquiry is narrowed so that the nonhuman factors tend to be more similar, such as tests made of truck drivers over given highways,[58] bus drivers [59] and motormen,[60] the susceptibility to accidents of a particular type becomes more specific.[61] If the evidence was that the defendant had driven in a faulty and reckless manner in the first four accidents under similar circumstances of drink and open road, the above studies indicate that it would be logical to say that he was probably following the same pattern of conduct at the time of the fifth accident.

Admittedly, the trial judge may exclude such evidence in some instances for one of the discretionary policy risks mentioned above. But we have already seen that this determination is a variable depending upon the circumstances of each case. Is there a rule of absolute exclusion here? It is said that accident proneness means "predisposition to have an undue number of accidents."[62] In criminal cases there is a well recognized rule of absolute exclusion which prohibits evidence of other crimes when the only possible series of inferences from such evidence is that the defendant has a disposition to commit crime, and therefore he probably committed the crime in question.[63] Admittedly, the rule in criminal cases is based upon the judicial policy protecting such defendants against what the law considers to be undue prejudice. Are the same considerations applicable in civil litigation where recompense as distinguished from punishment is the primary objective? On the other hand, where the action is against the employer, parent or

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consecutive accidents as they accumulate them. See Johnson, *Biographical Methods of Detecting Accident-prone Drivers*, 35 Psych. Bull. 511, 512 (1938). The U.S. Bureau of Roads states that there "is a relatively small group of definitely accident-prone drivers who experience a relatively large number of accidents." See Highway Accidents, *op. cit. supra*, note 55, at 3.

57. See James and Dickinson, *supra* note 55, and studies there cited; *cf.* Rawson, *Accident Proneness*, 6 Psychosomatic Med. 88, 89 (1944).

58. Rawson, *supra* note 57.

59. Farmer and Chambers, A Study of Accident Proneness Among Motor Drivers (Industrial Health Research Board, London, Report 84, 1939); Ghiselli, Brown and Minium, The Use of Test Scores for the Prediction of Accidents of Streetcar Motormen (Dep't of Psychology, Univ. of Calif., Berkeley, 1946). *Cf.* Rawson, *supra* note 57.

60. Slocombe, *Consistency of Operating Efficiency*, Person. J. [No. 8] 413-14 (1930).

61. Newbold, Contribution to the Study of the Human Factor in the Causation of Accidents (Indust. Fatigue Research Bd., Report 34, 1926); Brown, Ghiselli and Minium, Experience and Age in Relation to Proficiency of Streetcar Motormen (Report to Municipal Railway System of San Francisco, 1946).

62. James and Dickinson, *supra* note 55, at 771.

63. See Stone, *supra* note 35; Model Code of Evidence, Rule 311 (1942).

owner who allowed the driver to operate the car, evidence of other accidents is generally admitted where it logically tends to show either (1) that the driver was incompetent or (2) that the owner had notice of the driver's incompetency.[64]

The different results on the question of admissibility of other automobile accidents between the cases where the driver is the defendant and the cases where the employer or owner is the defendant would indicate rather clearly that the exclusion in the former cases is based upon a policy against undue prejudice. If there is a policy of absolute exclusion here borrowed *sub silentio* from the "character" rule in criminal cases, it would seem to be highly questionable in view of the widespread national effort to achieve safety on the highways.

As indicated by the social science studies, other automobile accidents under similar circumstances may tend to prove faulty driving. Thus under some circumstances at least it may be logically relevant. But if nevertheless it is to be excluded in all cases, the policy basis for doing so should be made explicit. Unless there is a policy that justifies exclusion in all cases; sound principle would seem to require that exclusion be placed within the area of trial court discretion.

(b) *Negligence with Respect to Places, Machines and Other Instrumentalities*

It is now generally conceded that logically relevant evidence of other accidents may be admitted as proof either (1) of the dangerous or defective condition of a given place, machine or other instrumentality; or (2) that the person responsible for the maintenance of the place, machine or instrumentality either knew or had a reasonable opportunity to know of the dangerous condition.[65] If the evidence is offered to prove dangerous condition, it would seem to make no difference whether the other accidents occurred before or after the one in question. The older cases tending to exclude such evidence under a rule of absolute exclusion on the ground that it raised collateral issues are now recognized as obsolete.[66] The determination of admissibility is now generally placed within the area of trial court judgment, where the legal standard for determination requires (1) a finding that the evidence offered is logically relevant to an issue before the court, and (2) a determination of whether or not there is a disproportionate risk of confusion, surprise, prejudice or undue consumption of time. In many of the cases

64. Clark v. Stewart, 126 Ohio St. 263, 185 N.E. 71 (1933); Guedon v. Rooney, 160 Ore. 621, 87 P.2d 209, 120 A.L.R. 1298 (1939); see Note, 120 A.L.R. 1311 (1939).

65. Cogswell v. C.C. Anderson Stores Co., 68 Idaho 205, 192 P.2d 383 (1948); Robitaille v. Netoco Community Theatres, Inc., 305 Mass. 265, 25 N.E.2d 749, 128 A.L.R. 592 (1940); Taylor v. Northern States Power Co., 192 Minn. 415, 256 N.W. 674 (1934); Sullivan v. Detroit & Windsor Ferry Co., 255 Mich. 575, 238 N.W. 221 (1931). See Note, 128 A.L.R. 595 (1940); 65 C.J.S., *Negligence* § 234 (1950).

66. See note 65 *supra* and authorities there cited.

where this evidence is excluded, only evidence of the happening of the other accidents is offered without any showing of its logical relation to an issue before the court.[67] On the other hand, even if it is logically relevant, the trial court may exclude it on policy grounds where it is not substantially helpful to the proponent for the purpose for which it is offered. Thus where the jury can sufficiently understand the dangerous potentialities of a defective place or machine from the description by witnesses who observed it, evidence of other accidents to show its dangerous qualities may add little to the understanding of the jury and be much more likely to excite their emotions against the defendant.[68] But there are many instances where the dangerous potentialities of the particular place or machine are not readily apparent from the testimonial description of lay witnesses, or even expert witnesses, in which case evidence of other accidents may be substantially helpful to jury understanding and therefore admitted.[69] Also, it is possible that such evidence might be a welcome substitute for a prolonged and detailed testimonial description of the dangerous condition.

"Substantial similarity of circumstances" would not seem to be an independent requisite of admissibility.[70] The only requisite is that the evidence of another accident will logically illustrate or tend to prove either the dangerous condition or the defendant's opportunity to know of the dangerous condition in time to have taken adequate preventive measures. If the proof of other accidents is offered to establish dangerous condition, logic would require similarity of hazard. But if offered to prove notice of danger, the requisite is the warning quality of the other accident. Thus evidence of a previous accident at the place, unknown to the owner defendant, would be irrelevant to prove notice of the danger, but it may be relevant to prove the dangerous condition of the place. Likewise, evidence that is unnecessary to prove dangerous condition may be logically relevant to prove the notice of the hazard.[71] Of course as the circumstances of other accidents are more similar to the one in question, the probative value of such evidence for either or both purposes is likely to be greater.

Evidence that no injury or accident had occurred at the place or instrumentality over a long period of use may logically show both a lack of a

67. Plough v. Baltimore & O.R.R., 164 F.2d 254 (2d Cir. 1947); Robitaille v. Netoco Community Theatres, Inc., 305 Mass. 265, 25 N.E.2d 749, 128 A.L.R. 592 (1940).

68. Gable v. Kansas City, 148 Mo. 470, 50 S.W. 84 (1899); Dean v. Murphy, 169 Mass. 413, 48 N.E. 283 (1897).

69. Georgia Cotton-Oil Co. v. Jackson, 112 Ga. 620, 37 S.E. 873 (1901); Wight v. H.G. Christman Co., 244 Mich. 208, 221 N.W. 314 (1928); Stock v. Le Boutiller, 18 Misc. 349, 41 N.Y. Supp. 649 (N.Y. City Ct. 1896); Winfree v. Coca-Cola Bottling Works of Lebanon, 18 Tenn. App. 144, 83 S.W.2d 903 (M.S. 1935).

70. But see Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205, 225 (1948); 65 C.J.S., *Negligence* § 234 (1950).

71. Morris, *supra* note 70, at 243.

dangerous condition and a lack of reason to anticipate injury, and there would seem to be no sound policy reason for excluding such evidence. Accordingly, it should be admitted. But there is a remarkable conflict in the cases, with several courts excluding it in words of absolute exclusion for reaons of "collateral issues," "confusion of issues," and some with no reason at all[72]—depending solely upon legal precedent.

V. Evidence of Other Crimes

In no area of circumstantial evidence is it so necessary as this to have at hand a set of basic principles providing a rational method for determining the problem of admissibility; and probably in no area of judicial administration is there greater uncertainty, due in part to a lack of analysis with respect to logical relevancy, and in part to the substantial confusion in the cases concerning the policies of exclusion. The vigor with which scores of reported cases are litigated each year is only indicative of the uncertainty that exists; and quite understandably so when one considers first that if evidence of other crimes committed by the accused is admitted against him, it is likely to be a most persuasive factor in convicting him, thus constituting undue prejudice in extreme form if improperly admitted, and secondly, that the very persuasiveness of such evidence is frequently indicative of its relatively high degree of probative value.

(a) *The Rule of Absolute Exclusion*

At the outset it is important to define and distinguish the rule of absolute exclusion from the rule of discretionary exclusion by the trial judge. It is generally agreed that there is a rule of absolute exclusion with respect to evidence of other crimes offered as substantive evidence. But unfortunately there is a basic conflict in the authorities as to what that rule is.[73] A rational approach to the problem would seek to identify the basis of exclusion, and if it is one of judicial policy, to define precisely its scope so as to avoid future uncertainty.

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72. *Compare* William Laurie Co. v. McCullough, 174 Ind. 477, 90 N.E. 1014 (1910), Nubbe v. Hardy Continental Hotel System of Minnesota, 225 Minn. 496, 31 N.W.2d 332 (1948), Menard v. Cashman, 93 N.H. 273, 41 A.2d 222 (1945); *with* Cassanova v. Paramount-Richards Theatres, Inc., 204 La. 813, 16 So.2d 444 (1943), Dilione v. Vogel's Department Store, Inc., 2 N.J. Super. 85, 64 A.2d 628 (1949), City of Radford v. Calhoun, 165 Va. 24, 181 S.E. 345, 100 A.L.R. 1378 (1935). See 65 C.J.S., *Negligence* § 234, at 1056 (1950).

73. See Stone, *The Rule of Exclusion of Similar Fact Evidence: England,* 46 HARV. L. REV. 954 (1933); Stone, *The Rule of Exclusion of Similar Fact Evidence: America,* 51 HARV. L. REV. 988 (1938).

The great majority of American jurisdictions[74] state the rule in the form of a broad rule excluding all evidence of other crimes committed by the accused:

> "The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged."[75]

To this broad rule of exclusion the courts applying it then provide a long list of exceptions admiting evidence of other crimes by the accused when it is logically relevant to prove the identity, motive, intent, guilty knowledge, design plan or common scheme; when the other crime is an inseparable part of the crime in question (*"res gestae"*); to contradict claims of accident or mistake; and sometimes to contradict sweeping assertions of virtue and good conduct by the accused.[76] The scope of these exceptions is so broad as to have prompted the remark that "it is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions."[77]

The excellent research of Professor Julius Stone on the history and devolpment of the rule of absolute exclusion[78] has persuasively demonstrated that originally this rule was a very narrow one,—that if the offered evidence is relevant solely by a series of inferences which proceed from the other crimes to the disposition of the accused to commit such crimes, and thence to the probability of his having committed the crime charged, it is not admissible. Under this narrow rule evidence of other crimes (which does not depend upon evil dispositions as a basis of logical inference) may be freely admitted in the discretion of the trial judge whenever it is logically relevant to either an ultimate or intermediate probandum before the court; not just in case it can be fitted into the pigeonhole of an exception to the broad rule of exclusion, but rather because it is completely outside the scope

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74. See UNDERHILL, CRIMINAL EVIDENCE § 180 (4th ed. 1935), for the cases in each state; 1 WHARTON, CRIMINAL EVIDENCE § 343 (11th ed. 1935); DEC. DIG., *Crim. Law* ## 369-74.

75. People v. Molineux, 168 N.Y. 264, 61 N.E. 286, 293 (1901). "The general rule has been well established that on prosecution for a particular crime evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same character, is irrelevant and inadmissible. . . ." May v. State, 145 Tenn. 118, 140, 238 S.W. 1096, 1102 (1921).

76. See Note, 3 VAND. L. REV. 779 (1950), illustrating the logical relevancy of other-crime evidence to each exception. And see UNDERHILL, CRIMINAL EVIDENCE §§ 181 *et seq.* (4th ed. 1935).

77. Trogdon v. Commonwealth, 31 Gratt. 862, 870 (Va. 1878). The general rule together with its exceptions, is usually treated as a part of the common law of each particular jurisdiction. But Michigan, Ohio and Pennsylvania have statutes which have incorporated the rule and its exceptions, or some part of it. MICH. STAT. ANN. § 28.1050 (1938); OHIO GEN. CODE ANN. § 13444-19 (1938); Commonwealth v. Darcy, 362 Pa. 259, 282, 66 A.2d 663, 675 (1949).

78. Stone, articles *supra* note 73.

of the rule of absolute exclusion. "As so easily occurs in the common law, however, the tendency to crystallize particular determinations of relevance into categories of admissibility appeared. Toward the middle of the century the notion appears that the register of types of relevant similar facts is closed. From that position to the position that the register of types of admissible similar facts is closed is but a short step."[79]

The rule of narrow exclusion originally announced by the early English and American decisions has been given new life in recent years by the American Law Institute's Model Code of Evidence. Rule 9(f) provides that "all relevant evidence is admissible"; Rule 303 provides for the area of discretionary exclusion; and Rule 311 makes explicit the policy of absolute exclusion in the following words:

> "... evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally."

The precision and simplicity of the rule of narrow exclusion is also attracting the attention of the courts.[80] It was excellently stated in affirmative style in a recent opinion by Chief Justice Gibson of the California Supreme Court:

> "It is settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge."[81]

There are several important advantages to the narrow rule of absolute exclusion and its statement in affirmative form. It makes clear the basis of exclusion and directs the attention of the trial courts to the question of logical relevancy. But even more important to the thesis of this paper is the fact that the particular policy of exclusion so identified can now be evaluated in terms of efficient judicial administration.

Is there any justification for a rule of absolute exclusion, as distinguished from a rule of discretionary exclusion, with respect to evidence of other crimes that tend to prove only the disposition of the accused? There is

79. Stone, *The Rule of Exclusion of Similar Fact Evidence: England,* 46 HARV. L. REV. 954, 966 (1933).

80. People v. Woods, 35 Cal.2d 504, 218 P.2d 981, 984 (1950); People v. Kozakis, 102 Cal. App.2d 662, 228 P.2d 58, 60 (1951); State v. Scott, 111 Utah 9, 175 P.2d 1016 (1947); *cf.* People v. Moorehouse, 328 Mich. 689, 44 N.W.2d 830 (1950).

81. People v. Woods, 35 Cal.2d 504, 218 P.2d 981, 984 (1950); see also State v. Scott, 111 Utah 9, 175 P.2d 1016 (1947).

certainly a substantial difference between a disposition to commit crime generally and a disposition to commit a particular type of crime.[82] If by disposition to commit crime generally is meant a disposition to commit crimes of widely different types under different factual situations independent of any particular objective or motive—a general criminal proneness, so to speak—the enormity of the proposition is such that evidence of one or two or three different types of crimes would seem at best very weak in probative value. So a rule of absolute exclusion based upon the policies of undue prejudice, surprise and collateral issues may be reasonable enough when the best that can be said for the evidence offered is a tendency to prove a proposition of such broad scope. But when the evidence offered shows clearly a disposition to commit the particular type of crime now charged, a much more narrow proposition is asserted, which in turn under the peculiar circumstances of some cases may have such a high probative value as to be near certainty. The sex cases, particularly those involving homosexuals, are an example. Because of the increasing belief that sexual psychopaths have a disposition to repeat their acts of aggression,[83] the probative value of evidence of other such offenses is considered to be so high that some courts are beginning to question even the narrow rule of absolute exclusion.[84] Is there a variable here that can be handled better under a rule of discretionary exclusion? It is not the purpose of this paper to attempt an answer to the question; but rather it is to emphasize that only by so identifying and defining the existing policies of exclusion can there be an evaluation and improvement for the future of this part of the law of evidence.

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82. *Cf.* Model Code of Evidence, Rule 311 (1942).

83. Orenstein, *The Sex Offender,* National Probation and Parole Yearbook 195, 197 (1950); Wall & Wylie, *Institutional and Post-Institutional Treatment of The Sex Offender,* 2 Vand. L. Rev. 47 (1948). It is said that the District of Columbia and some fourteen states now have statutes dealing especially with sexual psychopaths, and that most of the statutes have been enacted since the outbreak of World War II. See Ludwig, *Control of The Sex Criminals,* 25 St. John's L. Rev. 203, 212 *et seq.* (1951). Studies based upon a comparison of reconvictions for sex crimes as against reconvictions for other types of crime would not seem to be helpful on the question whether sex offenders are more likely than other criminals to repeat their crimes. Healy and Bronner, New Light on Delinquency and Its Treatment 38 (1936). But at least two studies indicate that the percentage of reconviction for sex offenders is not as large as it is for other offenders. Ludwig, *supra* at 218 *et seq.*; East, Society and The Criminal 132-33 (1951). That the sexual phychopath should not be treated as other criminals, see generally de River, The Sexual Criminal—A Psychoanalytical Study (1951); Ploscowe, Sex and the Law (1951); and Wall and Wylie, *supra.*

84. Admissibility of other sex crimes to prove the disposition of the accused to commit the act now charged was originally limited to other acts by the accused upon the prosecutrix. Hodge v. United States, 126 F.2d 849 (D.C. Cir. 1942); State v. Clough, 33 Del. 140, 132 Atl. 219 (1925); Commonwealth v. Bemis, 242 Mass. 582, 136 N.E. 597 (1922). But as soon as it is admitted that the sole basis of admissibility is to show disposition, it becomes difficult to so limit it. Accordingly, some cases admit evidence concerning acts with persons other than the prosecutrix to prove disposition. Bracey v. United States, 142 F.2d 85 (D.C. Cir. 1944); Commonwealth v. Kline, 361 Pa. 434, 443, 65 A.2d 348, 351 (1949). But contrast the analysis of Lovely v. United States, 169 F.2d 386 (4th Cir. 1948), s.c. 175 F.2d 312 (4th Cir. 1949), *cert. denied,* 338 U.S. 834 (1949). See Notes, 167 A.L.R. 565 (1947), 39 Calif. L. Rev. 584 (1951).

(b) *The Area of Trial Court Discretion*

Even though we define the rule of absolute exclusion in terms of the narrow policy described above, we are not left with a broad rule mechanically admitting evidence of other crime to prove a probandum other than criminal disposition. There is no escape from the necessity of thinking—from the necessity of a thorough analysis of the logical relation of the evidence offered to a genuine issue in the case. In many instances the cases show a failure or a refusal by the lawyers and judges to make this logical analysis.[85] Identity, motive, intent, guilty knowledge, design plan or common scheme are typical of the probandi which may be proved by evidence of other crimes; but this is true only in those instances where the circumstances of the other crime are such that independently of its tendency to show criminal disposition, it can be said fairly that it in fact tends to prove identity or motive or some other proposition before the court.

Holmes v. Commonwealth[86] was an indictment for murder alleged to have been committed in the course of breaking in the home of the deceased. The accused signed a written statement that included other offenses committed by him and his codefendants prior to the attack upon the deceased. There is nothing in the opinion that indicates that the other offenses were logically related to an issue before the court; for aught that appears the only possible inference from the other offenses is that the accused had a criminal disposition. But the court merely stated the broad rule of exclusion, enumerated seven exceptions including identity motive, intent, etc., and concluded: "Clearly the evidence complained of comes within one or more of the enumerated exceptions."[87]

In *Jones v. Commonwealth,*[88] a young woman was charged with uttering a forged check. The accused denied the charge, asserting that she had never been in this particular store. Thus the issue was one of identity. On rebuttal the Commonwealth offered evidence that three other forged checks, with different payors and payees, had been passed by this defendant "at different places and at different times." The trial court ruled that this evidence would not have been competent in chief but was competent in rebuttal. The opinion of the court does not show whether the other instances were close in point of time to the act charged. What does this evidence tend to prove other than a disposition to pass forged checks? Does it help

85. Indicative cases are Kempe v. United States, 151 F.2d 680 (8th Cir. 1945); State v. Thomas, 71 Ariz. 423, 229 P.2d 246 (1951); Jones v. Commonwealth, 303 Ky. 666, 198 S.W.2d 969 (1947); Holmes v. Commonwealth, 241 Ky. 573, 585, 44 S.W.2d 592, 598 (1931); and State v. Doty, 167 Minn. 164, 208 N.W. 760 (1926).

86. 241 Ky. 573, 44 S.W.2d 592 (1931).

87. 241 Ky. at 585, 44 S.W.2d at 598.

88. 303 Ky. 666, 198 S.W.2d 969 (1947).

identify the accused as the person who passed the check in question? The conviction was reversed on the ground that there was no logical relevancy between the evidence offered and the issue of identity other than through an inference based on disposition. But where the crime charged was committed by a novel means or in a peculiar manner, evidence that the accused used such a means in committing other similar crimes would logically tend to identify the accused as the person who committed the act charged without relying on disposition as a basis of inference.[89]

Likewise, in *Kempe v. United States,*[90] the accused was charged with violation of the Second War Powers Act of 1942 in that he sold and delivered five hundred gallons of gasoline in a specified transaction without receiving the required ration coupons. The trial court admitted evidence over objection that the accused had made several other deliveries of gasoline for excessive prices without requiring coupons. The Government contended that the evidence of other offenses was offered to identify the accused and to prove that the acts charged in the information were not done inadvertently or by accident, but with wilful intent. Identity does not appear to have been an issue, and the court of appeals held that intent was not an element of the crime prohibited by the Act. Therefore, the court reversed the conviction. But from a reading of the opinion the circumstances of the other offenses would seem to provide a basis for a logical inference that the accused had formulated a specific plan and a motive to make illegal profits from unauthorized sales of gasoline during the war effort, which in turn could have served as a basis for an inference that he probably committed the act charged.

In *McKensie v. State,*[91] the accused was charged with assault with intent to rape *A* in June, 1946. The prosecutrix testified that the accused drove her out to a by-road several miles from town and began to make improper advances to her, accompanied with threats to do her bodily harm unless she acceded to his demands; but after much dissuasion on her part, the defendant abandoned his asserted aim and carried her back to the city. The accused admitted practically all of the details of this incident, but denied the intent to rape. Thus the sole issue at the trial was whether or not the accused at the time of his act of assualt had an intent to satisfy his desire by force. The State offered evidence that in August, 1946 (two months later) the accused drove *B* out to the same spot and made improper advances to her and threatened to do her bodily harm, but after much dissuasion on her

89. People v. Peete, 28 Cal.2d 306, 169 P.2d 924 (1946); see other cases cited in DEC. DIG., *Crim. Law* # 369(15).

90. 151 F.2d 680 (8th Cir. 1945).

91. 250 Ala. 178, 33 So.2d 488 (1947), s.c. 33 Ala. App. 7, 33 So.2d 484 (1946).

part, the accused again abandoned his aim and returned *B* to the city. Assuming that the evidence was such that an intent to rape *B* might be inferred, does it tend to prove an intent to rape *A* other than by an inference that the accused had a disposition to commit rape, and therefore he probably intended to rape *A*? One may say that the offered evidence tends to prove a plan, and so it does. But a plan to do what? Is it not at best a plan to make improper proposals to females at a given geographical location? But here the accused admits that fact. It is difficult to see how this evidence tends to prove intent other than by an inference based on the disposition of the accused. But the majority opinions in both the Court of Appeals and the Supreme Court of Alabama seem to proceed upon the theory that since the evidence was offered to prove intent it is admissible regardless of the prohibited use of criminal disposition as a basis for inference. Perhaps the case is best explained as another example of a growing tendency to relax the rule of absolute exclusion in the sex cases.[92]

The opinions in these cases show a reluctance to attempt a logical analysis of other crime evidence, and an overreliance upon the result reached in legal precedent as a complete solution to problems of admissibility. Of course there are many instances where evidence of other crimes committed by the accused may tend to prove a probandum in the present case other than by an inference based on criminal disposition. But it remains for the proponent to demonstrate this special or restricted logical relation.[93]

Even though by the processes of reason it may be said that evidence of other crimes committed by the accused is logically relevant to an issue other than by inference from criminal disposition, the trial court may still be disposed to exclude such evidence because of the judicial policy against undue prejudice. Since the most obvious and strongly emphasized reason for preventing use against a criminal defendant of other crime evidence is the fear of exciting uncontrollable hostile emotion in the minds of the jury, there is a constant need for the trial judge to balance carefully this risk against the probative value of the evidence offered. Because of this risk the courts generally require the logical relation between such evidence and the proposition for which it is offered as proof to be clear.[94] Implicit in the requirement of logical relevancy is a showing that the accused was actually involved in the other crime.[95] But this does not mean that the

92. See note 84 *supra.*
93. See Note, *Admissibility in Criminal Prosecutions of Proof of Other Offenses as Substantive Evidence,* 3 VAND. L. REV. 779 (1950).
94. People v. Albertson, 23 Cal.2d 550, 557-81, 596-99, 145 P.2d 7, 20-22, 30-32 (1944); People v. Darby, 64 Cal. App.2d 25, 148 P.2d 28 (1944); Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758 (1940); State v. Porter, 229 Iowa 882, 294 N.W. 898 (1940); State v. Hyde, 234 Mo. 200, 136 S.W. 316 (1911); Warren v. State, 178 Tenn. 157, 156 S.W.2d 416 (1941).
95. See note 94 *supra.*

trial judge must make a preliminary determination that the accused committed the other crime, or that proof beyond a reasonable doubt is required for admissibility.[96] Frequently it is said that there must be "substantial evidence"[97] that the accused committed the other crime, but this suggests a legal minimum quantity independent of the policies of exclusion.[98]

A valuable suggestion has been made that when the prosecution proposes to offer evidence of other crimes, it would be "better practice" for the trial judge to excuse the jury; and either hear the evidence preliminarily or upon inquiry of the prosecuting attorney, determine its admissibility.[99]

It must be obvious that the higher the probative value of other-crime evidence the more damaging it is likely to be to the accused.[100] But the discretionary policy against undue prejudice would seem to require exclusion only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence. Related policy considerations of unnecessary consumption of time and confusion of issues would inquire whether or not the other-crime evidence is really necessary to the proponement in order to establish the proposition for which it is offered, or whether there is other substantial evidence to prove this proposition.[101]

The root of the difficulty in this phase of the law of evidence is that it is bedeviled by both a policy of absolute exclusion and a policy of discretionary exclusion by the trial judge. What is worse, the courts in a majority of American jurisdictions reveal no awareness of the difficulty inherent to the trial judges in applying both policies to each ruling. It is possible to maintain both. But if this is to be so, it is of vital importance to efficient judicial administration that the area in which each policy shall operate be clearly defined.

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96. People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569 (1939).

97. People v. Albertson, 23 Cal.2d 550, 145 P.2d 7 (1944); State v. Hyde, 234 Mo. 200, 136 S.W. 316 (1911); see also the Blue Book of Supplemental Decisions to Note, 3 A.L.R. 779, 784 (1919).

98. See note 27 *supra*.

99. State v. Hyde, 234 Mo. 200, 136 S.W. 316 (1911).

100. "There is a human paradox here which logical formulation cannot resolve. In a trial for an unpleasant crime, evidence must be excluded which indicates that the prisoner is more likely than most men to have committed it, but evidence must be admitted which tends to show that no man but the prisoner, who is known to have done these things before, could have committed it. There is a point in the ascending scale of probability when it is so near to certainty, that it is absurd to shy at the admission of the prejudicial evidence." Stone, *Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 983-84 (1933).

101. See note 48 *supra*.

VI. Evidence of Subsequent Repairs

The cases involving admissibility of evidence of subsequent repairs present similar examples of confusion with respect to both the standard of probative value required and the policies of exclusion.

What is the basis for excluding such evidence? Without a doubt there are many instances when evidence of subsequent repairs or precautions made by an owner of property after an injury is sustained does not tend to prove that the condition of the premises was dangerous prior to the accident. On the other hand there are probably just as many cases where such evidence is logically relevant to prove a dangerous condition prior to the accident. At best the question of logical relevancy is a variable depending upon the circumstances of each case.

But many cases deny that evidence of this kind could ever be logically relevant in a negligence case. Others admit that there may be logical relevancy in some instances, but exclude it on the ground of a lack of a sufficient quantity of probative value, quoting Wigmore to the effect that "the supposed inference from the act [of repair or improvement] *is not the plain and most probable one.*"[102] Still others justify exclusion on the basis of policy—a policy to encourage owners to improve the place or thing by which the injury was sustained. This would be at least a rational basis for a rule of absolute exclusion. But if it is the policy of the law to encourage owners to take appropriate measures to avoid future injury on the premises, what justification can there be for the many exceptions to the rule of absolute exclusion—where such evidence is offered to prove ownership or control of the place where the injury occurs; when there is an issue as to whose duty it is to make repairs; when the evidence is offered to prove notice of defect, conditions existing at the time of the injury, the possibility of having avoided the injury, and as proof of several other propositions.[103] The Model Code of Evidence Rule 308 attempts a restatement of the common law rule of absolute exclusion in the form of a narrow rule, that such evidence "is inadmissible as tending to prove that his failure to take such a precaution to prevent the previous harm was negligent." If the only prohibited inference is that the failure to have taken the precaution before the accident was negligent, then evidence of subsequent repairs may be admitted in the discretion of the trial judge whenever it logically tends to prove any probandum in the case other than negligent omission. Again the trial judge is bedeviled by both a rule of absolute exclusion and a rule of discretionary exclusion to be applied in the process of a single ruling.

102. 2 Wigmore, Evidence § 283 (italics added).
103. See Note, 170 A.L.R. (1947).

Is there a need any longer for a rule of absolute exclusion? Is it not true that to allow exceptions to a policy of absolute exclusion is to destroy the policy itself? Can one safely advise his clients to proceed with repair or improvement after an injury? What should the law of evidence seek to accomplish here? Is it preferable to broaden the area of absolute exclusion, or to abolish it and place the problem of admissibility entirely within the area of trial judge discretion?

Whatever one may think about the merits of the existing policy of absolute exclusion when limited to the small area indicated by the Model Code's restatement of the common law, there it is—identified and defined, so that you can now see it, understand it, and evaluate it.[104]

VII. CONCLUSION

There is an inherent conflict between the theory that all logically relevant circumstantial evidence should be admitted unless a clear ground of policy excludes it, and the doctrine of legal relevancy—that there is a legal minimum quantity of probative value required for each evidential relation to be determined on the basis of stare decisis. Under the former all logically relevant evidence is prima facie admissible regardless of the degree of probative value, and should be excluded only because of stated policy considerations. The concept of legal relevancy when applied literally excludes logically relevant evidence unless legal precedent authorizes admission. This results in the exclusion of circumstantial evidence without reason or explanation. Because it depends entirely upon the digesting and classifying of cases in each state, it results in a large number of cumbersome rules with exceptions and exceptions to the exceptions. Efficient trial administration requires a sound and efficient *principle* by which the admissiblity of circumstantial evidence may be determined. "Principles . . . make it possible to get along with many fewer rules and to deal with assurance with new cases for which no rules are at hand."[105]

Relevancy is a relation between a fact known and a proposition to be proved. Whether or not there is such a relation depends upon human experience and reason with respect to both the known fact and the proposition to be proved. Since relevancy is "an affair of logic and experience,"[106] it is difficult to understand how there can be a concept called "legal relevancy."

104. Similar problems concerning both of the basic elements—logical relevancy and the scope of the policy of exclusion—exist with respect to evidence of compromise transactions. See Notes, 20 A.L.R.2d 304 (1951), 20 A.L.R.2d 291 (1951), 80 A.L.R. 919 (1932); *cf.* MODEL CODE OF EVIDENCE, Rule 309.

105. POUND, JUSTICE ACCORDING TO LAW 58 (1951).

106. THAYER, PRELIMINARY TREATISE ON EVIDENCE 269 (1898).

The law may exclude evidence of a fact which is relevant to a proposition before the court. But if it does, it is for reasons other than its relevance—reasons of judicial policy.

If logically relevant circumstantial evidence is prima facie admissible and may be excluded only upon a clear ground of policy, it is the exclusive function of the law of evidence to identify the policies of exclusion, define their scope, and make them explicit. It is still necessary to distinguish the rules of absolute exclusion from the continually broadening rule of discretionary exclusion. But only by identifying and making explicit the policies supporting both types of exclusionary rules can there be understanding and evaluation in terms of a more rational and efficient administration of judicial trials.

By shifting the emphasis to logical analysis instead of legal precedent, the attention of the legal profession is directed to new developments in human experience as reflected by various social science and other scientific studies, experiments and inventions, *e.g.*, the lie detector, drunkometer, truth serums and blood tests. As experience with these new developments indicates logical relevance between facts offered in evidence and propositions before courts for determination, appropriate policy safeguards against disproportionate risks may be formulated with a view toward evidentiary usefulness.