Maryland Law Review

Volume 15 | Issue 4 Article 5

Extra-legal Materials and the Law of Evidence

John S. Strahorn Jr.

EXTRA-LEGAL MATERIALS AND THE LAW OF EVIDENCE*

BY JOHN S. STRAHORN, JR.†

One of the recent trends in jurisprudence has been functionalism or the demand that extra-legal considerations be used in developing rules of law. This idea — that rules of law should be tested by the ends sought to be served and by the specific materials relevant thereto — is not only theoretically useful in the judicial and legislative processes but is more immediately valuable in the juridical process of writing, teaching, and studying the materials which are persuasive of judicial decision. Studying book-law in terms of extra-legal considerations leads to increased efficiency in learning. The psychologists tell us that meaningful material is more easily learned than meaningless. Applying extra-legal considerations to legal materials tends to make the latter more meaningful.

When we approach the law of evidence in this functional spirit, we see that the branch of extra-legal learning primarily concerned therein is psychology. The various rules of evidence in serving their diverse policies all reflect certain assumptions which have been made by the judicial or legislative makers of the rules about human psychology. The test to apply to any rule of evidence, either to support its validity, or to argue for change, or to make for more efficient learning, is whether the psychological assumption implicit in the instant rule is a valid one.

Various extant researches have inquired into the psychological validity of sundry individual rules.[1] The present writer feels that there is need for a broad, general inquiry into the problem as a whole which will not attempt as such to solve the matter of the psychological validity of any given rule, but which will state the psychological implications for the whole body of the law of evidence and will group and classify the rules in terms of similarity of the psychological problem. The result should be a picture of the law of evidence sketched by a lawyer for the benefit of a hypothetical psychologist who is interested in analyzing the rules of evidence psychologically. This seems advisable, because it is a matter of applying the psychology to the law, rather than vice versa. In such a spirit the present article will attempt to state and classify the psychological problems of the law of

* [*This article originally appeared in 1934 in the Illinois Law Review, Volume 29, page 300, and is reprinted with the kind permission of their successor in interest, the Northwestern University Law Review.*] This article is based upon manuscripts prepared in 1930-31 while the writer was a Sterling Research Fellow in the Yale Law School. The writer is grateful to Dean Charles E. Clark of the Yale Law School and to Professor Edward S. Robinson of the Yale Department of Psychology for their helpful criticism given in connection with the preparation of the original manuscripts.

† Professor of Law, University of Maryland

[1] Particular examples are the work of Hutchins and Slesinger, who published a series of nine articles on the psychological basis of the rules of evidence. See Hutchins and Slesinger, *Legal Psychology* (1929) 36 Psy. Rev. 13-26, and Hutchins, *The Law and the Psychologists* (1927) 16 Yale Rev. (N. S.) 678-690. The remaining articles of this series will be cited at appropriate places throughout this article. See *infra*, notes 10, 21, 24, 25, 35, and 37.

evidence as they appear to one whose training is primarily legal rather than psychological.

The present objective is to dissect the law of evidence in a functional manner. Much of the execution must be eclectic. Many existent analyses of the law of evidence have given due recognition to psychological concepts.[2] The writer feels that a valid classification in terms of similarity of the psychological problem would be useful for purposes of teaching and writing and also would be available for the incumbents of the judicial and legislative estates if and when they choose consciously to deal with law functionally.

The rules of evidence may generally be divided into three groups, called rules of trustworthiness, rules of confusion, and rules of extrinsic policy. The rules of *trustworthiness* purport to prevent that error in jury verdicts which might follow from the jury's giving full credence to evidence which is untrustworthy or inaccurate. The rules of *confusion* attempt to prevent that error in jury verdicts which might follow from the confusing effect upon the jury of certain evidence, the intrinsic accuracy of which is not in question. The rules of *extrinsic policy* purport to attain desirable ends not at all concerned with the validity of jury verdicts.[3]

It is believed that such a classification of the rules is psychologically valid because they are grouped in terms of the similarity of the psychological problem. The psychological problem common to all the rules of trustworthiness is that of the psychology of the witness or of testimony. The one under the rules of confusion is that of the psychology of the juror or of judgment making. That under the rules of extrinsic policy is not the psychology either of witness or juror but rather that of persons in the human relations which are particularly involved.

Implicit in the first two groups is the theory that the lay juror is unworthy of being trusted to hear all available evidence and that the evidence must carefully be filtered before reaching his ears. Thus, evidence likely to cause him to reach an erroneous verdict, either because of its intrinsic inaccuracy, or its likelihood of confusing his judgment on the whole case, must be excluded or its use qualified in divers ways. The third group does not concern the juror.

The Rules of Trustworthiness

The common psychological problem of the rules of trustworthiness is that of the psychology of the witness or of testimony. In deal-

[2] While Dean Wigmore's treatise on *Evidence* (2d ed. 1923) contains invaluable discussions of sundry phychological phenomena found in the rules of evidence, his analysis does not purport to follow lines of policy but rather is in terms of the practical form of application of the rules. It happens, however, that these two forms of classification largely overlap. For instance, the group of rules involving the conditioning or prophylatic devices also have in common the psychological problem of fear. The rules of impeachment have in common the recognition of the factors indicating subjective untrustworthiness. The rules of corroboration share at once that peculiar mechanical device and almost all the surviving rules based on the policy of avoiding motivated totally false accusations.

[3] Wigmore, *id.*, at §2175. ". . . those rules which rest on no purpose of improving the search after truth, but on the desire to yield to requirements of Extrinsic Policy."

ing with this the law makes three subsidiary assumptions which furnish the sub-classification. The first is that human utterances generally are fallible and so much so as to make them unworthy of being heard by the jury, and that only certain approved types thereof[4] when uttered in a certain approved fashion may be safely used. The second assumption is that certain types of this approved human narration in all cases and from all witnesses are either more or less than normally untrustworthy and in such events, respectively, must either be dealt with more rigorously than ordinary testimony or given higher standing in court. The third assumption is that the temporary or permanent personal qualities of the witness may indicate a departure from normal in the trustworthiness of his testimony. These assumptions furnish the headings of general trustworthiness, objective trustworthiness, and subjective trustworthiness.

1. *General Trustworthiness*

The initial assumption of the rules of trustworthiness is that human utterances generally are too inferior to be considered by a jury. This general assumption is based on the relative inferiority in persuasion of human testimony to the production of the very thing which is the subject of the testimony. Thus there is, first, the question of the relative merits of real and testimonial evidence. Then there will be considered the requirements of perception, recollection and narration and their incidental devices which, in the interests of improving trustworthiness, narrow the field of human utterances which may be considered testimonially. Finally will be treated the conditioning devices which are applied to this narrow field of narration and without which not even it is considered sufficiently trustworthy.

(a) *Real Evidence*

The process of proof in litigation involves persuading a fact-finder of the existence of certain phenomena, *viz.*, the operative facts. This may be done by producing the very thing to the fact-finder,[5] by producing other phenomena which circumstantially tend to prove the first, or by the narration of human knowledge concerning either of these. From the standpoint of the form in which evidence appears in court it is either real or testimonial. From the angle of what is sought to be proved by either, evidence is of operative facts, circumstantial facts, and extra-judicial narration.[6]

[4] Wigmore, *op. cit., supra*, note 2, at §475: "In short, it is not every human assertion, as such, that is worth considering as the basis of an inference to the truth of the thing asserted; but only assertions made under certain conditions — these usually consisting in the presence of certain personal qualities or circumstances in A — *i.e.*, his testimonial qualifications."

[5] Or, the fact-finder may be taken to see the thing, as in the case of a "view" where the jury visits the premises or inspects bulky objects.

[6] Examples of the six possible classes of evidence are: (1) Real evidence of an operative fact — the production of the signed promissory note which is being sued on; (2) Real evidence of a circumstantial fact — the production of the defendant's pistol, which is alleged to have been the gun used in the murder; (3) Real evidence of extra-judicial nar-

Real evidence in itself has no trustworthiness problem.[7] It is naturally superior to testimonial evidence, even when that has been selected and refined by the requirements next to be considered. All of the rules of trustworthiness are concerned with minimizing the relative untrustworthiness of testimonial evidence. The rules of evidence concerned with real evidence are not rules of trustworthiness, but rather are those of confusion and extrinsic policy, and the requirement of authentication.[8]

(b) *Perception, Recollection, and Narration*

Only certain types of human utterances are thought worthy of the jury's attention. The psychological assumption is that only that human narration which represents the recollection of perceived knowledge is sufficiently trustworthy and then only when it is narrated in the approved manner.

Under these topics of perception, recollection, and narration it is proposed to consider certain propositions of the law of evidence which purport to improve the trustworthiness of testimony subject thereto. These differ from the conditioning devices. The latter are applied if the opponent of the testimony so demands. The former are applied, if available, at the behest of the proponent of the testimony. Both purport to improve the trustworthiness of the testimony. Under the former we shall see certain devices which either directly improve perception, recollection, and narration, or persuade the jury of the superiority of these elements in certain types of testimony.

The fundamental assumption of the fallibility of human testimony which supports the law's general suspicion of testimonial evidence and makes the conditioning devices necessary, is that normally there exist such defects of human perception, recollection, and narration as to make human testimony inaccurate. The perception of the witness might have been faulty or incomplete so that the meaning of what he did observe may be erroneous. The witness may have remembered too little, or wrongly, to the same end. The manner of his narration may be such as to convey an inaccurate meaning to the jury.

The essence of the testimonial process is to create for the jury an idea of what happened. This is done by the witness relating the mean-

---

ration—the production of an original marriage certificate signed by the officiating minister; (4) Testimonial evidence of an operative fact — testimony by an eye-witness to the fact of defendant's firing the fatal shot in a murder; (5) Testimonial evidence of a circumstantial fact — testimony that an accused defendant had uttered threats against the deceased; (6) Testimonial evidence as to extra-judicial narration — testimony as to an oral dying declaration by one who heard it.

[7] That is, it has no trustworthiness problem in itself. There is always the matter of the trustworthiness of the evidence offered to authenticate the real evidence, *i.e.*, to show that the thing proferred has some connection with the instant case, particularly the connection suggested by the proponent. For instance: Is this pistol the defendant's pistol? Is this his signature to the note sued on?

[8] Thus the rules against remote and prejudicial evidence, *infra*, notes 44 and 45, bear most heavily on real evidence. The dramatic power of real evidence unduly to attract and prejudice the jury makes it evidence the most susceptible of the application of the rules seeking to avoid this danger. For an example of a controversy of this sort see People v. Gillette, 191 N. Y. 107, 83 N. E. 680 (1908), a case which is reputed to have formed the basis of Theodore Dreiser's book "An American Tragedy".

ing he has acquired from his perceptual experience with the relevant fact. The danger of untrustworthiness sought to be guarded against is that erroneous meaning will be narrated to the jury so that the meaning created in their minds is invalid.

While we shall treat the testimonial process in terms of the classic trichotomy of perception, recollection, and narration, yet it must be emphasized that the psychological problem is more of a unitary one than that would indicate. It is essentially one of transferring the witness's meaning to the juror. The witness's own attachment of meaning may come at any stage of the process, at the instant of perception, during the intervening time, or upon narration. The division of the process into the three is merely one of convenience involving a recognition of the separate phenomena of happening of event, intervening space of time, and ultimate narration of the former.

Perception. The problem of perception, or testimonial knowledge, is the same as that of the opinion rule. They have the same major psychological basis — that of extrinsic and intrinsic meaning. For it can be said that that which is testimonial knowledge is admissible under the opinion rule, and that which the opinion rule forbids is likewise not testimonial knowledge. That which is forbidden under either principle is only so much of the witness's meaning as is not intrinsic to his perceptual experience but rather is consciously attached by means of an independent process of which he is aware. It is believed that the intrinsic meaning of a witness, *viz.*, that which the judge from *his* consciousness can conceive of as likely to be intrinsic, is trustworthy, while consciously attached meaning is not. The capacity of the witness to attach a given meaning intrinsically is, of course, a function of his experiential capacity.[9]

Only that which the witness has personally observed in his own experience is believed sufficiently credible to be heard by a jury. All else is too untrustworthy. This requirement appears in two forms, first, one excluding such testimony as on its face — from the form of the question or the form of the answer — shows it is not based on the witness's actual perception, and, second, as a qualifying rule permitting a witness to be cross-examined to find out if his apparent personal knowledge related on direct examination is really that. Tangible aspects of this requirement, all concerned with the meaning problem, include the extent to which one may testify to a phone conversation with another, the testimony of blind people or others deficient in some senses, and the matter of whether non-knowledge of the occurrence of an event is equivalent to knowledge of its non-occurrence.

An incidental matter involved both in the topic of perception and of recollection is the rule for rehabilitating or corroborating, which permits the showing of facts not otherwise relevant in order to demonstrate a greater than usual likelihood that the witness observed with unusual acuteness or remembered abnormally well the fact to which he is testifying. This rule, involving as it does the psychological mat-

[9] See Wigmore, *op. cit., supra*, note 2, at §§650, 651, distinguishing between the separable phenomena of observation and experiential capacity.

ters of attention and intent to remember is based on an assumption that human experience shows that the perception of facts in the presence of other and stimulating facts tends to make perception more acute and recollection more certain. Thus the jury are enabled to give greater credence where that is deserved.

A correlative point which also goes to show the inseparability of the topics of perception, recollection, and narration is the rule which permits a witness to be impeached by cross-examination as to his memory of irrelevant facts in order to discredit his apparently excellent perception and recollection of relevant facts testified to on the direct examination. The theory, accurate or not, is that he should as well perceive and remember the one thing as the other.[10]

Recollection.[11] Recollection, or recall, or memory involves the intangible step in the testimonial process bridging the gap between the more tangible propositions of observation of relevant happening and testimonial narration thereof. The principal legal proposition with psychological implications is that of refreshing a present recollection. This is legally closely related to the topic of using a record of a past recollection which had been prepared or inspected by the witness when the memory was fresh in his mind. This latter is really one of the exceptions to the hearsay rule and will be discussed there although the exigencies of teaching and writing usually call for its treatment along with present recollection refreshed.[12]

Normally a witness would testify to such meaning from his perceptual experience as he could recollect at the time of the narration and there would be lost to the case that which he could not remember. Some of this loss of meaning and the incidental untrustworthiness due to incompletely remembered experience being told the jury is obviated by the use of stimuli to refresh recollection. These, by bringing out more detail, make the entire narration relatively more trustworthy. Thus, when a witness remembers an event but slightly, it is permitted to exhibit some stimulus, usually a memorandum of the fact, to his present observation in order to induce more complete recall on his part. Unless the memorandum satisfies the stricter rules[13] for past recollection recorded, it is not shown to the jury but the witness himself phrases the meaning and expresses it orally from the witness stand. There are involved the psychological matters of stimulus, suggestion, and recognition. In refreshing a present recollection, recognition is secondary to recall, as the witness must himself phrase the meaning for narration. In the other propositions of the use of photographs, maps, diagrams, and in past recollection recorded, as we

[10] See Hutchins and Slesinger, *Some Observations on the Law of Evidence — Memory* (1928) 41 Harv. L. Rev. 860-873. These authors point out that this assumption of the law is based upon a discredited "faculty" theory of psychology.

[11] *Ibid.*

[12] On this see Morgan, *The Relation Between Hearsay and Preserved Memory* (1927) 40 Harv. L. Rev. 712-732.

[13] Many courts require that, if the memorandum is to be used itself as evidence and as a record of a past recollection, it must have been prepared by the witness himself or examined by him while the recollection was fresh in his mind. On the other hand, for present recollection revived, any stimulus, however informal, which does enable the witness to testify orally out of his own memory, is frequently permitted.

shall see, recognition is the primary factor and the recall is only as to the factors enabling the witness to vouch for the memorandum or photograph as of the time it was made.[14]

Narration. Human testimony normally appears in court by the narration of the witness of such of his perception as he has recollected. The conditioning devices, next to be discussed, failing which human testimony is not admissible, are incidents of this, as are the rules against leading questions and opinions. One problem is whether the narration shall take the form of uninterrupted narrative by the witness or of question and answer between counsel and witness. The question and answer device is more usual although the narrative one is occasionally used. The voluntary narrative lacks the tendency to inaccuracy caused by suggestion, but allows meaning to escape the jury because of the lack of stimuli which might bring out something perceived and recollected but omitted in narration. It also lacks the counsel's superior ability to phrase the narration in terms most meaningful for the instant case. All of these virtues are relatively present in the question and answer type although they are counter-balanced by the danger of suggestion.

The general defectiveness of human testimony can as much be blamed on inaccurate narration, *i.e.*, phrasing of meaning, as on inaccurate observation and memory. There are available certain devices to use in the direct examination of witnesses which help to improve narration and to avoid the inaccuracy normally found therein. Thus the use of models, maps, photographs, diagrams, and records of past recollection is at once narration in a more efficient and meaningful manner and, at the same time, avoids many of the possible defects incidental to faulty observation and memory. While, legally speaking, the photograph or diagram is the narration of the perception of the maker thereof at the time he made it, or of one who can identify it at the time he identifies it, as a psychological matter the inquiry is shifted to his perception, recall, and narration of the process by which it is made or identified. This type of narration is less subject to normal defects and its use improves human testimony. On the other hand the objection to them is much the same as that to leading questions — they suggest the desired answer. The opposing side, however, is in a position to check and guard against this.[15]

(c) *The Conditioning Devices*

While human testimony, even when it is the narration of recollected, perceived knowledge, is assumed to be too fallible for use by a jury in its natural state, yet it is still necessary to use it to solve

[14] Hutchins and Slesinger, *supra*, note 10 at 867, find that the legal preference of recognition over recall is justified by the psychological proposition that the former lasts longer than the latter.

[15] The use of interpreters to acquire the testimony of foreigners and deaf-mutes is, of course, a matter of narration. Testimony thus secured is subject to dangers of untrustworthiness but expediency demands that such less trustworthy testimony be exceptionally used.

litigation. The law attempts to compromise the untrustworthiness of human testimony and the need for its use by regulating the manner of its production through the means of certain conditioning or prophylactic[16] or curative devices. These appear in the form of stimuli presented to the witness at the time of his narration which purport to improve the trustworthiness of the narration. Some of these are typically present in all testimony and others may be specifically demanded by the opponent of the testimony. They are oath, perjury penalty, sequestration, publicity, confrontation, presence of fact finder, discovery, and cross-examination.

The psychological common denominator of all of them is fear.[17] It is believed that the fear stimulus if presented to a witness at the time of his narration, will sufficiently condition his recall, his attachment of meaning, and his narration so that the latter will be more accurate than otherwise. These devices present, in turn, the fears of divine punishment, of human punishment, and of contradiction, either by one's self, accomplices, opponents, or the general public. These three fears are respectively fears of the three major agencies of social control, *viz.*, religion, law, and public opinion.

The fear stimulus is thought to discourage conscious lying as much as to avoid mistaken transmission of meaning, by stimulating more careful, accurate, and complete recollection and narration. Trustworthiness is equally served by avoiding both lies and mistakes. All through the rules of trustworthiness there exists this dual policy of avoiding lying testimony or conscious transmission of erroneous meaning, and of avoiding mistaken or incomplete testimony or unconsciously rendered erroneous meaning.

The oath and the perjury penalty. The requirement of the oath, which gives form to the correlative disqualifications of atheists, lunatics, and children, is traditionally the principal one of the conditioning devices which seeks to render human testimony sufficiently trustworthy. The technique is to require the witness before testifying to utter a form of words, the import of which is that he fears Divine punishment in the event of false or incomplete testimony. It is believed that this presents the stimulus of fear at the time of narration and induces trustworthiness. While no particular means are used to make it obvious that the witness testifies also under the stimulus of the fear of human punishment involved in being convicted for the crime of perjury, yet this penalty is sufficiently well known to be considered present.

---

[16] Dean Wigmore comprehends all these rules, except the device of cross-examination, under the heading of "prophylatic rules". Wigmore, *op. cit., supra*, note 2 at §1813. He explains their objective as follows: "Some expedient calculated to supply an antidote or prophylactic for the supposed weakness or danger inherent in the evidence." One could as well call them "curative" devices, *i.e.*, they are calculated to cure a defect or disease already present, *i.e.*, untrustworthiness. The present writer feels that a sounder name psychologically is "conditioning devices". These devices serve to condition the utterance of the testimony and seek thereby to improve it. The name emphasizes that they function by being present at the time and place of the narration.

[17] See Wigmore, *Cases on Evidence* (3d ed. 1932) p. 634, for a comparison of the different types of fear found in these devices.

Sequestration. When there is a group of witnesses for one side all of whom are expected to testify to the same set of facts, the opponent's counsel may insist that they be required so to testify out of the presence of each other that those who have not yet testified shall not hear the testimony of their predecessors. Thus, each witness both is ignorant of what has been said before and cannot influence what is to be said by later ones. It is believed that this device prevents a group of witnesses from framing up a story and testifying to it *en masse*, and also obviates suggestion. The psychological stimulus thus exceptionally available to improve human testimony is the fear of inconsistency or of contradiction. The fear of different kinds of contradiction is involved in this and the remaining conditioning devices. Here it is specifically the fear of contradiction by one's fellow witnesses. It is believed that the incidental fear and possibility of public scorn, contempt, and even a perjury prosecution are as efficacious as the direct threats of divine and human punishment in inducing trustworthiness.

Publicity, confrontation, and narration in presence of fact finder. The custom of holding civil trials publicly, and the right of a criminal defendant to a public trial and the right to confront the witnesses against him are thought to have some significance in improving the trustworthiness of the testimony thus rendered by presenting to the witnesses the fear of public scorn and of contradiction by the general public or by the parties. The possibility of a member of the audience taking the stand in contradiction of testimony he knows to be false is thought to condition the testimony of the witness. The psychological assumption is that one will be more likely to lie in private than in public, and will be less careful to avoid mistake.

Incidental to publicity of narration is the idea that the fact finder will get a more trustworthy version of the witness's knowledge if he hears the narration by the witness directly than if he merely reads the preserved report of the narration. There are other advantages in narration in the presence of the fact-finder than that of avoiding the danger of error in reporting the extra-judicial narration to the fact finder by the usual methods. In the first place there is the deterrent effect upon the witness himself who, because of fear of the judge's power, may be induced to make his narration more true or more accurate than otherwise. Then the opportunity in the fact finder to observe the demeanor of the witness and the total appearance of his narration may give the former a more accurate idea of the witness's meaning than if he merely reads the typewritten page, intrinsically accurate though it be.

Discovery. In the cases of the rather narrowly interpreted procedural devices for forcing an opponent to disclose evidence in advance of trial, the fear stimulus functions conversely. When the opponent is forced to disclose evidence, it makes it impossible for him to have erroneous testimony worked up as a surprise. Thus he is prevented from being able to offer evidence exceptionally without the fear of contradiction.

Cross-examination. The definite legal rules concerning cross-examination appear elsewhere in this treatment.[18] We are presently interested in it as a general device for improving the trustworthiness of testimony. This is accomplished by its deterrent influence upon the direct examination of witnesses by the side calling them and by its capacity for increasing trustworthiness in its own right. So highly does the law regard cross-examination that the opponent is entitled to it as of right and if a witness should die between his direct and his cross-examination, the former must be stricken from the record.

It is believed that the average witness, when giving his direct testimony, will be so in fear of contradicting himself when he is cross-examined that he will be careful to make his direct testimony as accurate as possible. Aside from this, cross-examination aids the cause of trustworthiness by getting out the entire knowledge of the witness. On direct examination he may have told only that about which he was asked and that only favorable to the side calling him. Cross-examination brings out the entire story and puts his statements on direct in their true light. A whole story is believed to give the jury a more accurate idea than a part one.

2. *Objective Trustworthiness*

We have been concerned with the normal trustworthiness of human testimony and with the devices available or required to be used for improving its usual state. Now the discussion will deal with the abnormal trustworthiness of specific instances of human testimony, first as indicated by the nature of the testimony itself, or objective trustworthiness, and then in the ensuing part, as influenced by the personality of the witness, or subjective trustworthiness. Objective trustworthiness is further divided into two headings, first, instances of less than normal trustworthiness, and, second, a recognition of the greater trustworthiness of certain evidence.

(a) *Objectively Lesser Trustworthiness*

Three specific rules of evidence, all of them rules of exclusion, are based on assumptions that the nature of the instant evidence is such that it is still too untrustworthy although it purports to be recollected knowledge uttered under the influence of the conditioning devices. These are the rules against leading questions, the opinion rule, and the hearsay rule. All of them can as well be classified as logical developments of some one or more of the general testimonial requirements of perception, recollection, and narration.

Leading questions. It is forbidden to ask a question on the direct examination of a friendly witness which either calls for a categorical answer on a material point or suggests the desired answer. This is permitted on cross-examination, or on the direct examination of chil-

[18] *Viz.*, rules concerning (1) leading questions, (2) the type of facts usable to impeach, (3) the rule against impeaching one's own witness, and (4) the rule concerning the scope of cross-examination.

dren, or with actually hostile witnesses, on immaterial points and to refresh memory. The theory is that a friendly witness will be all too willing to adopt the phrasing of meaning by the examiner in preference to his own spontaneous and probably more valid form of narration. This is thought not likely on cross-examination, or where the witness is actually hostile. The use of such interrogation with children or to refresh memory is a compromise of expediency to avoid the loss of testimonial knowledge otherwise not to be had.

The disadvantage of the leading question where the rule does apply is in the combined power for untrustworthiness of personal motivation of the witness and the influence upon him of suggestion. While they are permitted with children, who are unusually susceptible to suggestion, yet there is lacking in such cases the usual motivation of adults and the resulting evidence is probably as trustworthy as otherwise. The advantages of leading questions result from their powers for stimulating recollection otherwise lost and for phrasing narration in terms meaningful for the instant case. The various ramifications of the rule present a balancing of the untrustworthy features of motivation and suggestion against the forces for trustworthiness of stimulus to recollection and of meaningful narration.

The opinion rule. This rule forbids a witness to state an opinion about facts in issue or within his knowledge unless either he be an expert giving an opinion on a point too complicated for the jury or the use of opinion is the only way in which he can convey his relevant fact knowledge to the jury. Psychologically this rule is an offshoot of the requirement of testimonial knowledge. What is permitted in each case is that a witness may relate to the jury such of the meaning concerning his perceptual experience as is intrinsic thereto. What is forbidden is such meaning as is extrinsic or consciously attached by the witness. The psychological assumption is that the meaning which is intrinsic and unconsciously attached is the more trustworthy whereas that which is consciously attached is less trustworthy and must be rejected.[19] The rule by requiring the witness to break his meaning down into the smallest meaningful percepts places emphasis upon analysis rather than upon synthesis. The questions of the units of perception, the whole meaning problem, and the psychological difference in validity between intrinsic and intentional meaning are here involved.

The hearsay rule. The rule against hearsay forbids the use of extra-judicial statements for the purpose of proving the truth of their content. The rule is primarily a logical application both of the requirement of the conditioning devices and of the requirements of percep-

[19] Wigmore, *op. cit., supra*, note 2, at §1918, advances the theory that the opinion rule is one of the rules of confusion, *viz.*, by stating that its function is to exclude supererogatory evidence. He lists it as one of the "simplificative" rules. To be sure, the rule incidentally does avoid the "dead weight" of the witness's opinion, but the same can be said for all the exclusionary and preferential rules of trustworthiness. The writer is convinced that analysis of the opinion rule in the light of its relation to the requirement of testimonial knowledge and the common psychological conceptions involved in both will disclose that the real danger in inadmissible opinion is the inaccuracy of consciously attached meaning and the consequent possibility of the jury's being deceived by hearing erroneous narration.

tion, recollection, and narration. Looking at hearsay as the prior narration of recollected knowledge by the declarant, we see that it is not made under the beneficient influence of the conditioning devices and therefore is excluded. Looking at it from the standpoint of the witness on the stand who is subject to these devices, we see that the fact ultimately sought to be proved, the subject of the utterance, is not the perceived and recollected knowledge of this witness. Then too, hearsay has further ills than those merely incidental to normal human testimony. To allow its use would be to run the risk of two superimposed testimonial processes — of defective perception, recollection, and narration of the fact in question by the extra-judicial declarant, and then again the same risk for the narration thereof by the witness now on the stand.[20] So we have the hearsay rule or rule against using extra-judicial utterances testimonially, which, as we shall see, is famous primarily for its limitations and exceptions and which has through these channels given rise to much of the law of evidence. These propositions are (1) hearsay rule inapplicable wherein extra-judicial utterances are used but not testimonially and so do not raise a problem of trustworthiness; (2) hearsay rule satisfied, which comprehends extra-judicial utterances offered testimonially but acceptable because actually made under the influence of sufficient of the conditioning devices; (3) and the hearsay exceptions, which permit extra-judicial utterances to be offered testimonially because for cause shown the conditioning devices are dispensed with.

The topic of *hearsay rule inapplicable* presents a group of situations wherein it is permitted to offer in evidence proof of extra-judicial utterances not made under the influence of the conditioning devices because the statements are not offered as testimonial narration and hence raise no problem of the trustworthiness of human testimony. The problem is not a psychological one of trustworthiness but a logical one of whether the utterance is usable for some other purpose than testimonial narration. The essential question for allowing the use of an utterance under this guise is: Can a justification be found for using it which ignores the question of the trustworthiness of the utterance? The conditioning devices need only be applied to those utterances raising the problem of trustworthiness of human testimony. The hearsay rule excludes only those utterances offered solely for testimonial purposes. Under this heading there are admitted opera-

[20] There should be considered the extent to which the typical hearsay exceptions represent situations in which there is likely to be a superiority in the testimonial process of proving in court the fact of the making of the admissible extra-judicial utterance. This superiority is likely to be found in the cases of past recollection recorded and business records because proof of the fact of the utterance can be made by real evidence and there is no problem of the testimonial process therefor. Government records are possible of proof by one of three superior forms of evidence, *viz.*, the original, a certified copy, or a copy used as past recollection recorded. Dying declarations possess the virtues of simplicity of subject matter and likelihood of vivid attention and recollection. For the others there is no peculiar quality save, possibly, the lack of complexity in the fact uttered which itself contributes to the intrinsic superiority of the utterance when considered as the narration of the original declarant. For that matter, when any utterance admissible under a hearsay exception is made in writing, the danger of error in reproducing it in court is minimized.

tive utterances, utterances which are verbal parts of or explanatory of relevant acts, circumstantial utterances, prior inconsistent statements offered to impeach witnesses, and parties' admissions.[21]

The topic of *hearsay rule satisfied* comprehends previous testimonial utterances actually made under the possible influence of all the conditioning devices save utterance in the presence of the immediate fact-finder. In the instances here collected it is felt that the exigencies of the particular situation rather than any definite psychological considerations make it advisable to dispense with the increased trustworthiness which normally results from narration in the presence of the immediate fact-finder. In the cases of the hearsay exceptions next to be treated we shall see that not only is the presence of the fact-finder dispensed with, but also the remaining conditioning devices, because of the exceptional guarantee of trustworthiness thought implicit in testimony subject to recognized hearsay exceptions. Under the present topic there is found the use of deposition testimony, which is allowed exceptionally in all types of litigation and is the rule for certain types. The rules for perpetuating or preserving testimony for future use furnish another example. The classic example is the use of testimony given in a former trial of the same issues between the same parties by one who is at the present stage unavailable as a witness. The required identity of issues and parties assures that there was ample opportunity to cross-examine the witness in a presently relevant manner, and, of course, oath and other devices were as much present as they could be at the instant hearing. The only psychological problems involve the loss of trustworthiness due to the absence of the immediate fact-finder at the time of narration, and the danger of error in reproducing the testimony for his benefit.

(b) *Objectively Greater Trustworthiness*

We have been discussing three rules excluding testimony of a particular type likely to be less than normally trustworthy. Now we look at the other side of the shield and deal with certain rules recognizing the greater trustworthiness of specific kinds of evidence. Thus in some instances, *i.e., the hearsay exceptions,* the unusually great trustworthiness of certain testimony allows for its use even though it has not been uttered under the conditioning devices. In certain other cases, *viz., the rules of preference,* the abnormally greater trust-

[21] See Hutchins and Slesinger, *Some Observations on the Law of Evidence — Consciousness of Guilt* (1929) 77 U. of Pa. L. Rev. 725-740. The writers deal with the extent to which it is psychologically justifiable to use conduct indicating a consciousness of guilt as evidential of guilt. This proposition does not involve any definite "rule" of evidence but rather concerns itself with the general proposition of the relevancy of evidence (see *infra*) *i.e.*, the extent to which the evidence offered is of assistance in the solution of a disputed fact issue. Relevancy is, of course, the essential problem for all utterances offered as "hearsay rule inapplicable" once there is solved the question of whether the type of utterance is narrative or non-narrative. Conduct indicating "consciousness of guilt" and "admissions" are both usable in evidence under the same principle — they are relevant conduct of persons whose conduct helps to solve the issues of the instant case. The present writer is unable to agree with Professor Morgan that admissions are allowed under a genuine exception to the hearsay rule. See Morgan, *Admissions as an Exception to the Hearsay Rule* (1921) 30 Yale L. J. 555.

worthiness of the particular evidence is recognized by rules preferring it to normally trustworthy evidence. Such rules permit the use of the latter only if the former is not available.

The hearsay exceptions. Hearsay is rejected because it is testimonial narration not in the presence of the conditioning devices. We have seen how non-testimonial human utterances and certain testimonial ones which have been uttered under some of the devices may be used. Here we see how certain utterances not made under any of the devices may be considered testimonially either because the type of utterance is intrinsically superior, so that there is no need for the conditioning process, or because there is present at the utterance some stimulus of equal efficacy with the conditioning devices for improving the trustworthiness of normal human testimony.

Orthodox theory has it that for hearsay to be usable under a genuine exception there must be both a necessity and a circumstantial guarantee of trustworthiness. The question of the necessity is more a matter of expediency than of psychology. It is recognized that expediency may call for using testimony actually less trustworthy than human narration in court but still probably more trustworthy than normal human narration not properly conditioned. Certain type situations have, by historical accident, been recognized to the exclusion of others which, no doubt, possess just as compelling a necessity and circumstantial guarantee.

The circumstantial guarantees of trustworthiness present the aspect of the hearsay exceptions which has psychological implications. These have greater or smaller psychological emphasis as one conceives the import of "circumstantial guarantee." If one thinks of circumstantial guarantee as meaning a positive stimulus to trustworthiness equal in efficacy to the normal conditioning device, then, no doubt, psychological problems of the first order raise their heads. If, on the other hand, one feels that the true *rationale* of the hearsay exceptions is not the *presence* of a stimulus equal to the conditioning devices, but rather the *absence* of the normal likelihood of untrustworthiness in human narration which makes these devices necessary, the psychological implications are of a slighter nature. The writer feels that there should be substituted for "circumstantial guarantee" the phrase "intrinsic superiority."[22] Analysis will disclose that all of the hearsay exceptions present type situations both possessing unusually favorable conditions for perception, recollection, and narration, the normal defects of which make the conditioning devices necessary, and, as well, involving the absence of motivation calculated to lead to falsehood.[23]

---

[22] The writer feels that the real psychological problem of the hearsay exceptions should be stated as: "Is the testimony permitted by a given exception of a type calculated to be so unusually free from those defects of human perception, recollection, and narration as to make the conditioning devices normally compensating for those defects exceptionally unnecessary?" rather than as: "Is the psychological assumption that certain external stimuli present at the time of the utterance are equal in validity to the conditioning devices a valid one?"

[23] See Morgan, *supra*, note 12, where, at page 714, Mr. Morgan takes a modified form of this position and prefaces an outline of the various exceptions with this paragraph: "As tending to show that in the various exceptions to the hearsay rule the danger is of

Thus conceived, the circumstantial guarantee as a positive stimulus seems an afterthought.

Traditionally based on a theory of a "necessity" indicated by the probable superiority of contemporaneous exclamations or narration over later testimonial narration in court there are the hearsay exceptions for *spontaneous exclamations, declarations of physical and mental condition,* and *past recollection recorded.* Here the necessity and circumstantial guarantee are practically the same. The spontaneous exclamation[24] can, of course, be discussed in terms of the effect of a startling event as a positive stimulus to trustworthiness, but it also happens that the narration thus admitted is of something likely to have been observed, remembered but for the briefest time, and probably simply narrated. The brevity of the interval as much as the stimulus of the event indicates absence of motive for falsehood. It is hard to discern any positive stimulus for trustworthiness in the case of declarations of physical and mental condition.[25] For them it is purely a matter of probable accurate perception of one's own mental and physical condition, brief recollection, simple narration, and usual absence of motivation. The rule for past recollection recorded[26] also belongs here. When a witness is allowed to offer a record of his past recollection, which itself

---

deliberate or inadvertent departure from the perfect perception, memory and narration are usually not eliminated but merely reduced to a manageable condition, the following suggestions are offered." At page 732, Mr. Morgan suggests that "the rationale of the exceptions to the rule excluding hearsay is that the circumstances of the utterance furnish reasonably adequate information for a satisfactory appraisal of its probative value, and there is a necessity for its use."

[24] See Hutchins and Slesinger, *Some Observations on the Law of Evidence — Spontaneous Exclamations* (1928) 28 Col. L. Rev. 432-440. The writers point out that the law's assumption of the truth-producing qualities of a startling event is erroneous and that narration made under emotional stress is likely to be less, rather than more, trustworthy. They contend that that which the law rejects, unemotional narration of contemporaneous perception is actually more trustworthy than that which it accepts, emotionally induced "spontaneous exclamations". While this is no doubt so, does not analysis of the hearsay exceptions in terms of intrinsic superiority rather than positive stimulus make this form of criticism less valid? Is not the objective of this exception the recognition of superior situations for perception, recollection, and narration, and freedom from motive for falsity? While little can be said for the superiority of perception in the spontaneous exclamation cases, yet is not the interval of recollection of the briefest and is not there a likelihood of accurate narration? For that matter, what of the significance of the legally required startling event as creating an intent to remember which itself contributes to the superiority of the testimonial process. Even if we grant the above writers' point that there is a vestige of untrustworthiness in emotionally induced narration, is it not outweighed by the advantages of freedom from motivation, intent to remember, brevity of interval recollection and likely accurate and meaningful narration in the presence of the event itself? Then is not the law's acceptance of startling event and rejection of contemporaneous narration a matter of accepting that for which a readily applicable rule of thumb is available? Can we state a rule for all trustworthy contemporaneous narration which will be capable of hasty application?

[25] See Hutchins and Slesinger, *Some Observations on the Law of Evidence — State of Mind to Prove an Act* (1929) 38 Yale L. J. 283-299; and Hutchins and Slesinger, *Some Observations on the Law of Evidence: State of Mind in Issue* (1929) 29 Col. L. Rev. 147-157. These writers apparently chose to analyze the problem of statements of mental condition in terms of the dichotomy indicated by their titles rather than in terms of the other one of classing such utterances into testimonial utterances of a mental condition, or a genuine hearsay exception, and circumstantial utterances indicating the mental state regardless of the truth of the utterance. See Wigmore, *op. cit., supra,* note 2, at §1715.

[26] See Hutchins and Slesinger, *supra,* note 10, and Morgan, *supra,* note 12.

goes to the jury as evidence, it is because it is recognized that narration made shortly after perception is less subject to testimonial defect than that made long afterwards in the courtroom. In such a case the witness substitutes recognition for recollection.

The two major hearsay exceptions for which the necessity is the unavailability of the witness himself who possesses the desired knowledge are those for *dying declarations* and *declarations against interest.* In a criminal prosecution for homicide it is permitted to offer the utterances of the deceased person concerning the circumstances of the homicide if he made them under the influence of the expectation of death. Orthodox theory has it that this expectation of death, the imminence of divine punishment for perjury, and the absence of motive to misrepresent all furnish apt substitutes for the conditioning devices. It must as well be remembered that the subject matter of these declarations happens to be matter likely to be well observed, briefly and vividly remembered, and simply narrated. The same can be said for the exception permitting declarations against pecuniary and proprietary interest, the typical specimen of which is a receipt for money paid. The circumstantial guarantee is thought to lie in the fact that one is unlikely to falsify to his own disadvantage. It must as well be remembered that one has better perceptual knowledge about his own money and property, is likely to remember it better, and that the type facts are simple of narration.

Another type of necessity, the inconvenience of producing the original declarant, furnishes the justification for the use under the hearsay exceptions for *government and business*[27] *records* of the extrajudicial utterances of business bookkeepers and government employees. Orthodox theory has it that the circumstantial guarantee is to be found in the duty owed the business or governmental employer, in the likelihood of superior censure for errors, in the habit of making correct entries, and in the likelihood of correction of errors. It must as well be remembered that these records possess intrinsic superiority as they are made by persons whose profession is the making of accurate observation, recollection, and narration, and who generally have no motive for falsifying.[28]

---

[27] The "necessity" for using business records is, traditionally, the death or unavailability of the entrant. The Model Business Transactions Statute of the Commonwealth Fund Committee dispenses with this requirement and, to the extent to which it is adopted, it can be said that the "necessity" is now the inconvenience of producing the original entrant. For that matter, why should there not be a single statute covering both business and government records with, perhaps, a separate provision for the typical proof of the latter by certified copies? Aside from the matter of how to prove the original record in court the two topics seem to be unitary. Why is not a government record one kept "in the regular course of a business"? Is not the *rationale* of both exceptions the fact that the entries are made by persons whose normal occupation is the making of accurate perception, recollection, and narration? Is there not for both the same duty to a superior, fear of censure for mistake, likelihood of disclosure and correction of errors, habit of correct entries, and absence of motivation for falsehood?

[28] The minor hearsay exceptions include pedigree, the attestation of an attesting witness, certain statements about boundaries, deed-recitals, learned treatises, commercial lists, affidavits, and statements of voters. See Wigmore, *op. cit., supra,* note 2, at §§1480-1514, 1562-1626, 1690-1713.

The rules of preference.[29] These rules avail themselves of unusually trustworthy evidence by preferring it to evidence which is but normally trustworthy and forbid the use of the latter if the former is available. The first is the rule for *attesting witnesses.* Whenever the law requires[30] that the execution of a document be attested by witnesses, it is forbidden to offer other proof concerning its execution unless the attesting witnesses have already themselves testified or their testimony be unavailable. The psychological assumption is that the attesting witnesses' knowledge concerning the execution of the document will be superior to the knowledge of other and casual witnesses. Attesting witnesses probably do attend the better and recollect the more accurately the facts in question. The psychological problems involve the superior perception, attention, fixation, intent to remember, retention, recall, and recognition of the document and its surrounding facts. The assumption is that all these have been so superior as to justify insistence on the attester's testimony. The theory is that a witness designedly provided to acquire testimonial knowledge will be more trustworthy than one whose testimony is accidental.[31]

The *best evidence rule,*[32] or rule for documentary originals, forbids proof of the contents of a document in issue by other evidence than its appearance itself unless and until the preferred original document has either been produced or its absence properly accounted for. The psychological distinction recognized is simply the difference in validity between real evidence and testimonial evidence. The rule is valid if the basic assumption of the normal fallibility of human testimony is proper. The rule merely rejects the less trustworthy testimonial evidence in typical recurring situations where real evidence is readily available.[33]

The rule for *verbal completeness* prefers the complete contents of documents and utterances to fragmentary portions. Under the rule, when one side proves part of an utterance or document, the other side

---

[29] Wigmore, *op. cit., supra,* note 2, at §1172, uses the phrase "preferential rules" for certain of these propositions. See *ibid* §§1329-1357 for a treatment of certain miscellaneous preferences.

[30] This is here adopted as the median of three forms the rule has taken at various times and places: (1) to require the attester in all cases where the instrument is actually attested, (2) to require him only where the instrument must, by law, be attested, and (3) to require him only in the case of wills, but not for other instruments which must or may be attested. See Wigmore, *op. cit., supra,* note 2, at §§1289-1290.

[31] The intrinsic superiority of the testimonial process in the case of attesting witnesses receives a dual recognition in the law, both by the rule preferring them as witnesses, and by the hearsay exception which accepts the fact of his signature as the equivalent of admissible extra-judicial narration to the effect that the obligor or testator did execute the instrument. See *supra,* note 28.

[32] See Wigmore, *op. cit., supra,* note 2, at §1174, for a discussion of the various propositions subsumed under the alleged "best evidence" principle.

[33] The so-called "parol evidence rule" (*viz.,* the rule that no evidence can be considered for the purpose of varying the legal effect of the written part of a transaction in issue which has achieved and continued valid existence) is not strictly a rule of evidence, but it is rather a rule of substantive law, determining what facts shall be operative to establish liability. It is, however, customarily treated in courses and treatises on evidence. It seems that the best place thus to handle it in a course on evidence is in juxtaposition to the best evidence rule or rule for documentary originals. There seems to be a definite analogy between the preference of writings over secondary evidence as a means of proof and the preference of the parole evidence rule for writings as operative facts.

is entitled to have the remainder put in evidence. This preference for totality is based on a theory that more accurate meaning will be had from an entire unitary utterance of words than from part of it. This psychological assumption that whole meaning is more accurate than part meaning is also found present in cross-examination and in refreshing recollection.

3. *Subjective Trustworthiness*

We now treat of those departures from normal in the trustworthiness of human testimony which are due to the personality of the witness rather than the nature of the testimony. As, with one minor exception, *viz.*, the rehabilitation of impeached witnesses, all these rules involve less than normal trustworthiness, the classification will be on a basis of temporary and permanent factors reaching that end. The nature of the issue, or the relation of the witness to the case is thought temporarily to influence the trustworthiness of certain witnesses. Some witnesses are believed to be permanently untrustworthy in all types of case regardless of their relation to it *(sic)*.

(a) *Temporary Personality Factors*

The psychological assumption here is that human motivation is such that persons peculiarly interested in winning certain types of litigation, or litigation generally, will give less than normally trustworthy testimony.

Corroboration. The rules of corroboration purport to recognize typical situations where it is believed that human experience shows it to be very likely that the strong motives of the accuser will cause totally false accusations of criminal or immoral conduct to be made against himself or others. This topic is one of the few under the rules of trustworthiness where the primary danger sought to be guarded against is that of deliberate falsehood and where fear of mistake or honest inaccuracy is at a minimum. The mechanical device of the rules of evidence which is used to solve the problem indicates this. The evidence is neither excluded nor is the jury warned to scale it down. They are merely told not to consider it at all unless other normal evidence on some of the points indicates that the story is about an actual event. The psychological inquiry involves a consideration of the motives present in the situations which have been recognized by the rules.

Thus in criminal cases the testimony of an *accomplice* must be corroborated. It is believed that there is too much danger of accomplices turning "state's evidence" and giving false testimony either in order to gain the favor of the prosecutor by a convincing story against the others, or to avoid an unjust conviction and more severe sentence. The danger of "crank confessions" made either by pathological subjects or by those desiring notoriety is back of the rule that *confessions* must be corroborated, at least by other proof of the *corpus delicti* of

the crime. The motive to be free of an unhappy marriage is thought sufficiently strong to make the testimony of parties to divorce cases necessary of corroboration. Experience is thought to have shown that accusations of *treason* are so likely to be vehicles of revenge or political oppression that they must be corroborated. Specifically, there is a constitutional requirement of two separate witnesses. The likelihood that defeated litigants will be motivated to seek their revenge by false accusations of *perjury* explains the rule that such accusations must be corroborated. The possibility of vengeful or pathological *sex accusations* supports a rule in a few jurisdictions requiring their corroboration. The major psychological problem of these rules is motive, and incidentally present in some is the question of mental disorder.[34]

Interest. Rules which are now largely obsolete once assumed that the motive to win litigation was so destructive of trustworthiness as to justify the exclusion as witnesses of the parties to the case, the accused defendant in a criminal prosecution, the spouses[35] of any of these, and any other interested person who would profit by success. Today these qualities largely bear only on credibility. The psychological assumption, then for exclusion, today for impeachment, was and is that the temporary mental set induced by the motivation of desire for success will cause inaccuracy and lying.

A remnant of the interest exclusion that is very prevalent is the so-called "survivor" or "dead man" statute. This usually provides that in cases against the estates of dead men[36] the parties shall not testify as to transactions with the deceased. The theory is that in such instances there is a double psychological indication of untrustworthiness, first, the normal element of motivation, no longer in its own right thought sufficient to disqualify, and, second, the additional factor of a peculiar absence of the normal fear of contradiction. It is felt that there is too much danger of "trumped up" claims against the estates of dead men because of the absence of fear of contradiction. Again we see the fear stimulus, found in the conditioning devices, bearing on trustworthiness. The question is, however, whether the danger of untrustworthiness is sufficient to justify the injustice of the exclusion.

(b) *Permanent Personality Factors*

Now we deal with those personality factors which indicate that a witness will give abnormally untrustworthy testimony in all cases, regardless of the issue or his relation to the case. Certain rules, of

[34] The rule requiring two and, in some states, three attesting witnesses to a will is really a rule of substantive testamentary law fixing the operative facts necessary to create a valid will. It is not a rule of evidence concerned with the process of proving operative facts.

Certain minor rules deal with the kinds of witnesses required for the proof of certain issues. They are not treated here. See Wigmore, *op. cit., supra*, note 2, at §§2078-2093.

[35] See Hutchins and Slesinger, *Some Observations on the Law of Evidence — Family Relations* (1929) 13 Minn. L. Rev. 675-686. The writers are primarily concerned with the rules of extrinsic policy involving the marital relation and, to a lesser degree with the matter of impeaching a witness for bias because of the family relations.

[36] The statutes of this type frequently apply also to testimony about transactions with persons since insane or otherwise unavailable as witnesses.

which but few remain in force, have applied the rigorous device of exclusion to the testimony of those thought entirely untrustworthy. Others handle witnesses who are relatively more reliable by the milder device of qualification or impeachment.

Exclusion.[37] The legal rules concerning the testimonial competency of *mental defectives* and *drunkards* are so conveniently vague that the wealth of psychological material concerned with these qualities has but little legal relevancy. A witness is not excluded from narrating his testimonial knowledge for these reasons so long as he is able to comprehend the oath, to have perceived and remembered the subject of his testimony, and to narrate it intelligently. Both here and in connection with impeachment for these qualties there are relevant such psychological topics as paramnesia, amnesia, and pathological lying. The tendency of the law is to allow the jury to judge from the witness's demeanor whether his mental state is such as to make his testimony usable. The religious disqualification of *atheists* and *children*[38] who are too young to comprehend the nature of an oath is but a logical development of the too rigid oath requirement of the conditioning devices. If we postulate that testimony is too fallible for use unless given under the fear of divine punishment, the absence of such fear is naturally a ground for exclusion. The erstwhile disqualification of *convicted felons* was probably based upon a theory that such persons were destined for divine punishment anyhow and hence could fear none further for false testimony. It has now largely been done away with although it is still a device for impeachment. Occasionally there is preserved a disqualification for convicted perjurers, who have, perhaps, manifested relatively more untrustworthiness meriting total exclusion.

Qualification. Certain qualities which have never formed the basis of an exclusionary rule and certain others which have may be shown to the jury to put them on guard against deception. This qualification of the witness's testimony is accomplished by the process of impeachment, by his own demeanor on the stand, by quizzing the witness himself, and by calling other "impeaching" witnesses to testify as to the particular quality in question. It happens that while the impeachment process itself serves the policy of trustworthiness, yet all the tangible rules of evidence concerning it are limitations imposed in the interest of avoiding jury confusion. Hence the rules of impeachment will form the first topic under jury confusion, the next heading. At the present point there will be outlined merely the qualities recognized as capable of demonstrating untrustworthiness for impeachment.

---

[37] See Hutchins and Slesinger, *Some Observations on the Law of Evidence — The Competency of Witnesses* (1928) 37 Yale L. J. 1017-1028. The writers are primarily concerned with the competency of "infants, mental defectives, and insane persons". They bring out the significance of intelligence testing in the matter.

[38] The legal device adopted for handling the question of the competency of children seems entirely to miss the point of what factors bear on the trustworthiness of children's testimony. Children are more likely to be subject to suggestion, to testify to imaginary facts, or to lack the necessary experiential capacity and powers of meaningful narration. On the other hand they are less likely to be motivated toward inaccurate testimony.

Witnesses may be impeached by showing their temporary personality factors of bias and prejudice or relation to the case. The permanent personality factors of religious belief, infancy, mental disorder, immoral conduct, and conviction of crime are usable in so far as limited by the rules of confusion. The psychological problems are about the same as for the comparable rules of exclusion. Do such qualities bear on trustworthiness?

There may also be investigated, usually by cross-examination, the faculties of the witness for giving testimony. Thus his experiential capacity, the acuteness of his observation, the excellence of his recollection,[39] and his capacity for narration may be investigated.

The remaining impeachment device is an important one, that for impeachment by manifested untrustworthiness. If the demeanor of the witness indicates a sub-normal trustworthiness of his testimony, the jury are thus guarded against him. On the other hand on cross-examination he may contradict himself and so intrinsically indicate a quality for untrustworthiness. Or he may on being questioned to that end admit making statements previously which are inconsistent with his testimony. Still again the opponent of his testimony may offer extrinsic proof that he has made such inconsistent statements or that he possesses a bad reputation for truth and veracity.[40] Thus by demeanor, inconsistency in presence of fact-finder, other proven inconsistency, and by reputation therefor the manifested untrustworthiness of the witness himself can be shown the jury to impeach him. The psychological problem is whether isolated or habitual untrustworthiness on other occasions indicates a probability of untrustworthiness in the court room.[41]

When the proponent of an impeached witness is permitted to rehabilitate him by calling sustaining witnesses to show that the major one has a good reputation for truth and veracity, there is presented an instance of the recognition of subjectively superior testimony. The same thing happens when one is allowed to quiz one's own witness as to his perception and recollection of irrelevant facts in order to fix the validity of his narration of relevant ones.

---

[39] See Hutchins and Slesinger, *supra*, note 10, and the present text matter to which that footnote is appended.

[40] In contrast to impeachment by proof of the prior inconsistent statements of the impeached witness himself there is the incidental impeachment which is involved when the witness is contradicted by the testimony of other witnesses about the same subject matter. To the extent to which the jury believes the contradicting witness there results an incidental impeachment of the original one. The process of contradiction is subject to limitations somewhat analogous to those imposed on the use of prior inconsistent statements. See Wigmore, *op. cit., supra*, note 2, at §§1000-1002.

[41] Deception tests and "lie-detector" apparatus have not, as yet, received sanction for court-room use. Should they or the results of their use ever be received for use in trials the matter could be rationalized as an aspect of the processes of impeachment and rehabilitation. If offered by the opponent, the object would be testimonial impeachment. If offered by the proponent of the suspected witness, rehabilitation would be the purpose. See McCormick, *Deception Tests and the Law of Evidence* (1927) 15 Calif. L. Rev. 484-504, reprinted (1928) 6 Tenn. L. Rev. 108.

The Rules of Confusion

While the rules of confusion, like the rules of trustworthiness, seek to avoid erroneous jury verdicts, the specific danger sought to be avoided is that of the jury's becoming confused in making a judgment on the evidence rather than that of their being deceived by individual items of evidence. There is sought to be avoided error due to confusion in handling the mass of evidence in the case rather than error in a detail of the case. The psychological emphasis is on the juror rather than on the witness. The problem is that of the juror's making accurate judgments rather than that of the witness's accuracy and honesty of perception, recollection, and narration. The ultimate question is whether the rules of evidence serving this function validly recognize situations where there is such a great danger of jury confusion and resulting error in verdicts as to justify the exclusion of trustworthy evidence or the regulation of its use.

In analyzing the rules of confusion it does not seem as feasible to classify them exactly on a psychological basis as was the case for the preceding heading of trustworthiness. Rather because certain rules involve two or more of the divers psychological assumptions about a juror's reactions, it is proposed to outline the latter at the start and then to give a cursory summary of the rules of evidence along with a statement of which psychological propositions seem implicit in them respectively.

1. *The Psychological Assumptions about Jury Confusion*

The rules of confusion generally seem predicated on combinations of four separable assumptions about the psychology of jurors and their tendencies to become so confused as to reach erroneous verdicts even though the evidence be trustworthy. These general principles of jury psychology will here be called those of dead weight, undue attractiveness, orderliness, and insolubility.

(a) *Dead Weight*

The psychological assumption made hereunder is that jury confusion increases as there increases the volume of evidence and the number of issues to be solved and that jury confusion can be lessened by any positive step taken to reduce the bulk of the evidence or issues. As for all these four psychological assumptions, there is little profit in trying to distinguish between the confusing effect of additional *evidence* and additional *issues*. It is too hard to tell where evidence leaves off and issues begin. For this particular one the psychological assumption seems to be that the more material to which one has to react, the less valid will be one's reaction.

(b) *Undue Attractiveness*

The psychological assumption here is that experience shows that certain evidence or certain issues may prove to be so attractive to

jurors that they will tend to give too much credence to or devote too much of their attention to them and ignore the other and equally worthy evidence and issues. Thus it is felt that their concentration on but part of the case may cause their reaction to the whole case to be erroneous. The rules of confusion based on this principle purport to avoid this by excluding or minimizing the evidence and issues calculated to cause this unfortunate result. It is sought to avoid having jurors decide cases on minor issues while ignoring the major ones. The psychological phenomenon of differences in attention to the unduly and normally attractive elements, respectively, can give form to discussion of this proposition.

(c) *Orderliness*

This principle assumes that jury confusion can be lessened by so arranging and timing the giving of the evidence that the jury's reaction to the issues and the evidence will be of the greatest efficiency. The objective of such rules is to make the material as meaningful to the jury as is possible.

(d) *Insolubility*

This principle assumes that the presence of an unduly difficult issue to solve may affect the jury's reaction to all the other issues so that their total reaction is erroneous.[42] The assumption seems to be that when one is balked by a mental problem, the result is less accurate than otherwise.

2. *The Legal Rules Themselves*

(a) *The Limitations on the Impeachment Process*

The policy of informing the jury of the possible personal untrustworthiness of certain witnesses allows proof of the various qualities heretofore set out. As far as trustworthiness is concerned the rule is to admit any legally recognized quality relevant in this regard. All of the definite rules of evidence applicable to impeachment are rules of jury confusion which limit the use of these relevant qualities because of considerations here appropriate. As the issue of trustworthiness raised by impeaching evidence is on the periphery of the case and involves matter less essential to be settled than the main issues, the tendency is to restrict impeachment within narrow limits in order to avoid the confusion incident to the dead weight, undue attractiveness, and disorderliness of the impeaching evidence.

Rules restricting impeachment to the intrinsic method. Certain qualities bearing on credibility can be investigated only by cross-

[42] "Insolubility" is connected with other of the psychological principles of jury confusion. In the case of insoluble issues, but for their artificial solution by presumptions, there would be a tendency on the part of parties litigant having the general burden of proof to cumulate second and third hand evidence possibly but not probably capable of solving the issues in question with the resulting increase in the "dead weight" of the case. And, for that matter, an insoluble issue is, perforce, an unduly attractive one.

examination of the suspected witness. It is forbidden to go farther into the quality by calling extrinsic impeaching witnesses to testify about this. This is so for investigations into the witness's faculties for perception, recollection, and narration, including his experiential capacity with the subject matter of his testimony, and, occasionally, his mental condition. It is likewise the rule for impeachment by specific immoral acts other than conviction of crime. Despite the fact that contradiction of the witness's denial of immoral conduct would show whatever untrustworthiness was implicit in the fact and as well show him up for a specific liar on the witness stand for having denied it, yet it is believed that the tendency of such extrinsic proof to increase the dead weight of the evidence and to add unduly attractive issues outweighs its value to the cause of trustworthiness. Where the quality sought to be used is conviction for a crime impairing credibility, proof of it is allowed by extrinsic evidence, *viz.*, the formal record of conviction. This type of issue is not so likely to be confusing as specific immorality generally, either because it is harder to dispute about it, or it lacks the undue attractiveness of the latter, or because the number of instances for a given witness is likely to be relatively less. Bias, corruption, and interest, likewise may be proven extrinsically as they are hard to prove otherwise.

Avoiding the need for extrinsic proof. The rule — that extrinsic proof that a witness has made an inconsistent statement is inadmissible unless the witness himself has first been asked concerning it — purports to avoid the need for such proof and its incidental confusion of issues by the dead weight of additional evidence, by enabling the witness either to admit the making of it, or to explain it away, if possible. This "laying of a foundation" purports to keep down the amount of evidence and number of issues by making it possible for the separate issue of whether he did make the statement to be settled before he leaves the stand.

The type of impeaching evidence. Two rules limit the evidence which may be offered to impeach. One is that it is permitted only to impeach by those prior inconsistent statements which are in themselves relevant in the instant case, and not by "collateral" ones. While an inconsistent statement about an irrelevant matter would as much show the impeached witness to be a liar as one about a relevant fact, yet the former is more likely to confuse the jury too much by additional evidence and strange issues than the latter. The other rule is that only general reputation for untrustworthiness[43] is admissible and not proof of specific acts of lying. While the former is but a combination of hearsay and opinion, yet it is preferred to the more trustworthy latter because the latter tends to raise numerous and confusing issues,

---

[43] A correlative rule is the one that limits impeachment by extrinsic proof of reputation to reputation for truth and veracity and forbids the use of general bad reputation or reputation for other qualities. No doubt one's reputation for drunkenness or sexual immorality, for example, would prove more "unduly attractive" to a jury and hence more confusing than one's reputation for truth and veracity. At the same time it is less relevant on the issue of trustworthiness. See Wigmore, *op. cit., supra*, note 2, at §§922-923.

one for each specific lie. For the former there is but one issue, *i.e.*, what do his neighbors think of him?

Impeaching one's own witness. The rule against impeaching one's own witness is hard to classify. To a certain extent it can be called a rule of truthworthiness because it encourages trustworthy testimony on direct examination by enabling the witness to be free from revenge for giving true testimony against the side calling him. But it is also a rule avoiding confusion by enabling the jury to think of all the testimony for the same side as a definite unit and to weigh the one group of witnesses against the other. While this is a questionable policy, yet this specific rule, and the impeachment process generally, seem to encourage this mental process on the part of the jurors in making judgments.

Rehabilitation. Certain rules limit the rehabilitation of an impeached witness. It cannot be shown that he has made prior consistent statements, even if he has been impeached by inconsistent ones. These former merely show further what has already been shown, *viz.*, that he has on separate occasions been inconsistent in his statements. Nor is it permitted to show that a witness, impeached by record of criminality, was actually innocent of the crime although it may usually be shown that he has since reformed. It may also be shown that he has a good reputation for truth and veracity. These latter do not create such discernible separate issues.

(b) *The Order of Giving Evidence*

In making for maximum efficiency in jury verdicts the law provides a certain order for giving evidence, calculated to cause its production in the least confusing manner. It is believed that the best order for this purpose is to have the moving party call his witnesses in turn, to quiz them, to allow the opponent to quiz them on cross-examination with reference to the direct examination while still on the stand for the first time, and then to allow the process to be reversed for the opponent. The federal rule about the "scope of cross-examination" restricts this process to quizzing about the subject matter of the direct examination only and requires the cross-examiner to wait his turn and call the same witness among his own witnesses if he wishes to elicit further information. This is on the theory that the jury is the least confused by having all the evidence for one side as a unit, disturbed only by cross-quizzing on those facts alone.

(c) *Relevancy*

The rule that only relevant evidence may be admitted in the case purports to avoid jury confusion by rejecting additional evidence and extraneous issues. The policy of "dead weight" is served. The discretionary power of the trial court to reject cumulative evidence does the same thing. Also serving the policy of avoiding "dead weight" is the much criticised rule forbidding comparison of disputed handwriting with any document not otherwise relevant in the case.

(d) *Character, Remote and Prejudicial Evidence*

The character rule and the rules against remote and prejudicial evidence purport to reject trustworthy and relevant evidence because of its potentialities for confusing the jury by raising additional and unduly attractive issues. The principle of "undue attractiveness" is believed to justify the exclusion because of the tendencies of juries to render their verdicts solely on their reaction to the unduly attractive evidence or issues rather than on a proper consideration of all the evidence and issues. Thus it is not permitted normally to show other crimes by the accused defendant in a criminal case. It is too likely that the jury will convict him for being a bad man rather than for doing the instant crime. The peculiarities of the instant case may make proof of other crimes abnormally relevant and the great demand for it may outweigh the possibility of confusion. The character rule[44] normally forbids the use of character to prove specific acts. There is too great a likelihood of the jury's devoting their endeavors to a solution of the issue of whether the one possesses such character.

Remote evidence[45] which is unduly likely to distract a jury and is only of slight relevance is rejected. So, too, it is with prejudicial evidence, such as the fact that a damage suit defendant carries liability insurance. There is too much likelihood of a verdict for plaintiff regardless if it be known that defendant will not suffer. Evidence of a liability policy is believed capable of causing the jury to ignore the main issue in the case. Through all these rules based on the principles of "dead weight" and "undue attractiveness", there is seen a balancing of relevancy against confusion. The more relevant and more necessary to the case the given evidence is, the less likely it is that the probability of confusion will be allowed to exclude it.

(e) *Court Officers*

Any rule restricting or regulating the testimony of court officers in cases in which they are immediately functioning is based on a theory that their testimony will be unduly attractive to the jury.

(f) *Burden of Proof, Presumptions, and Judicial Notice*

The rules of burden of proof purport to avoid jury confusion by providing an orderly manner of conducting litigation and by assigning to those best calculated to adduce evidence on certain issues the duty of doing so. Thus under the penalty of not persuading the jury, or of an unfavorable ruling by the judge, parties possessing the information capable of solving an issue are encouraged to submit it. The danger of confusion due to "insolubility" is thereby lessened. Insolubility can as much arise from the failure to produce available evidence as from

[44] See Wigmore, *op. cit., supra*, note 2, at §8-A, analyzing the character rule in terms of (1) a rule against traits, and (2) a rule against particular instances of conduct.

[45] The rule against remote evidence is also subsumed under the names of the rule against *res inter alios acta* and the rule against particular instances of external happenings. *Ibid.*

the impossibility of producing any. A rebuttable presumption or permissible inference involves the jury's being instructed that they must or may infer the existence of a fact in issue from the proof of a separate fact. These exist to avoid jury confusion for two alternative reasons, one of "dead weight" and the other of "insolubility". It may be that the fact proven so highly indicates the existence of the fact desired to be proved that to demand proof of the latter would merely tend to cumulate the evidence in the case and cause the jury to be confused by the dead weight thereof. To avoid the possibility of the jury's so being confused a presumptive rule is established to make the cumulative evidence unnecessary to be proven by the side seeking to establish the fact. Or certain presumptions may be based upon the consideration that it is very likely to be utterly impossible to provide evidence normally solving the issue. Thus it is necessary that the issue be artificially solved so that the jury will not be confused. Where this is the case, the law attempts to avoid this insolubility and incident confusion by solving the issue in advance in terms of evidence normally capable of being provided. In either event rules of rebuttable presumption or permissible inference avoid the necessity of the jury's going into voluminous or insoluble issues unless rebutting evidence calls for this. When a court takes judicial notice of a fact, it instructs the jury either that a fact is so or that they are permitted to consider it so. In doing this it is avoiding the jury confusion that would result from the dead weight of normal proof of facts not capable of being disputed and for which normal proof is unnecessary. It is the jury's function to solve disputed fact issues. To ask them to listen to facts about an issue which cannot be disputed would confuse them in their true function.

3. *The Mechanical Difference in the Devices of the Rules of Evidence*

One of the problems of jury psychology is the psychological difference in the various devices adopted for achieving the ends of the sundry rules of evidence, particularly the rules of trustworthiness. Why is it that the jury is guarded against untrustworthiness of various kinds by devices of different mechanical nature? Why is some untrustworthiness handled by the application of conditioning devices, other by exclusion or instruction to disregard, and still other by less rigorous devices such as preference, corroboration, or impeachment of witnesses. Is the difference a matter of a difference in the relative trustworthiness of the various classes of untrustworthy evidence or is it a matter of the relative danger of the jury's being misled by the type of evidence, if we assume its untrustworthiness to be a constant. The answer to this involves but another problem of jury psychology. The rules of trustworthiness themselves thus are seen to make certain assumptions about the psychology of jurors[46] which is more particu-

[46] That the psychology of jurors is, in the last analysis, the central problem of the psychology of the law of evidence is seen in a postscript to the Hutchins-Slesinger series of articles, *supra*, note 1, which was uttered by President Hutchins in 1933 and published in 1934. See *infra*, note 52.

larly the psychological nub of the rules of confusion. There are differences in the mechanics of the devices found in the rules of confusion themselves. Some problems are handled by exclusion or instruction to disregard, others by regulating the order of the proceedings, and still others by advice of court to jury. In the rules of extrinsic policy we shall see that the nature of the problem is such that only exclusion, either absolute or at the will of the person whose interest is being immediately protected, can effectually serve the policies sought to be fostered. We shall now discuss the various devices of the rules of trustworthiness.

The conditioning devices and other incidental propositions surrounding the narration of testimony are expedients calculated to compromise the fallibility of human testimony and the need for its use in litigation. Only when they result in the definite exclusion of available testimony, is there any problem of weighing in the balance the desire to serve the policy of the rule against the injustice of depriving parties litigant of the involved testimony.

The device of exclusion as an abstraction presents but little problem. If the evidence so excluded is very likely to deceive the jury, confuse them, or by its publication affect adversely a protected human relation, there is no doubt but that by its exclusion the jury is not deceived, nor confused, nor is the relation affected. There is, of course, a slight possibility of untrustworthiness due to the jury's giving erroneous meaning to other evidence which they would not have given had that which was excluded been before them. And the lack of it may cause some confusion due to the insolubility of some issue caused thereby. But the major problem is that of weighing in the balance of the desirability of avoiding untrustworthiness and confusion, or of serving out the extrinsic policy, against the likely injustice following from the suppression of relevant testimony. And this is more of a human demand problem than a psychological one once the initial psychological problem of the probable trustworthiness of the involved evidence, or of its confusing effect, or its effect on the human relation has been solved.

In exceptional instances where evidence which should have been excluded[47] by a rule of exclusion does get into the case and is heard by the jury, it is customary, rather than to declare a mistrial therefor, to instruct the jury to disregard the evidence. This presents the psychological problem of whether it is mentally possible for them to disregard the evidence they have once heard and which, by legal hypothesis, they should not have heard.

The devices of the rules of trustworthiness which are less rigorous than exclusion are preference, corroboration, and impeachment. The rules of preference are rules of temporary exclusion only and can hardly be said to work any injustice. They merely serve to encour-

[47] The device of instruction to disregard is also used to handle the problem of self-incrimination. In some jurisdictions an accused criminal defendant is entitled to demand that the judge instruct the jury that they must draw no unfavorable inferences from the failure of the defendant to become a witness. Is it not futile to give this instruction? Does it not do more harm than good?

age the production of more trustworthy evidence and as such provide little question of jury psychology, which, after the required evidence has been presented, is a constant matter. The rules of corroboration, likewise, involve but little consideration of jury psychology because they function at a different level. They are dealt with by the judge in his function of ascertaining whether there is sufficient evidence to go to the jury or to support a jury verdict actually rendered. Their consideration by the jury is only incidental. The device of corroboration is peculiarly adapted to the specific danger of untrustworthiness found in the situations where it is used. These situations primarily involve the danger of total falsehood and but incidentally have any danger of mistaken error in narration. This device adapts itself well because if the jury are convinced from non-suspect sources that the story is probably so, they can then add the otherwise suspected testimony to the total mass in reaching a conclusion. Where the danger is as much mistake as lying, exclusion or impeachment has been felt to be the only answer. It would be well if the corroboration device were substituted for exclusion in other situations where the major danger is total falsity and where the danger of mistake is but normal. Such a one would be the "dead man" situation.

The rules of impeachment do involve some considerations of jury psychology. To what extent is it possible for a jury to be guarded against untrustworthy testimony by merely being warned of the quality of the testimony it is permitted to hear? The tendency today is to substitute impeachment as the device for handling much of the subjective untrustworthiness, which was at one time handled by exclusion. The validity of this involves two considerations, first the relative untrustworthiness of different types of testimony, and, second the relative effect different types of testimony of constant trustworthiness will have on a juror's mind. It may be that one type of untrustworthiness can efficiently be guarded against by impeachment where another will demand exclusion. The advance in the intelligence of jurors, indicated by the spread of universal education, may explain why today much of untrustworthiness once handled by exclusion is now handled by impeachment.

THE RULES OF EXTRINSIC POLICY

Here we deal for the first time with rules not concerned with the validity of jury verdicts but which rather purport to accomplish other but nevertheless equally desirable ends. Where for the earlier groups the psychological problem was that of the witness or of the juror, here the problem is the psychology of human beings generally as they perform in the human relations sought to be fostered by the rules. Three general types of policy, of separate psychological significance, can be discerned. These are the policies of encouraging business and social relations, of encouraging the efficient conduct of governmental affairs, and of protecting persons accused of crime. These policies are sought to be served either by the absolute exclusion of evidence the narration of which would injuriously affect these relations,

or by excluding it save upon the permission of the interested person, *viz.*, by privileging it. It is believed that the injustice of the exclusion of relevant evidence is outweighed by the desirability of fostering the involved relation.

1. *Business and Social Relations*

We have already seen how at one time the law excluded the testimony of a spouse when offered on behalf of a spouse because it was considered too untrustworthy. Here we shall see how other rules of evidence concerning the *marital relation*[48] are supposed to serve the extrinsic policy of fostering that relation. Thus at one time it was also provided that a spouse could not testify against a spouse. It was believed that if this were permitted marital discord would result. More frequently today the sole vestige of this is to make the witness spouse non-compellable in criminal cases but to permit the witness spouse to testify voluntarily in all cases and to be compelled in civil cases. This variation probably more closely accords with the policy of avoiding marital discord. Then by another rule, which still survives, it is forbidden to compel or permit a spouse to testify concerning confidential communications made by the other spouse. This is done on the theory that making them inadmissible encourages spouses to make confidential communications to each other more frequently and thus marital happiness will be fostered. The psychological problem is the validity of the assumption that sufficiently more desirable communications are made because of the rule to justify the exclusion.[49]

The same attitude underlying the rule of privileged marital communications is found back of the professional privileges. It is assumed that the conduct of certain allegedly socially desirable professions will be improved by rules rendering forever secret any communications between the parties to the relation and that this secrecy is more desirable than that the communications shall be used as evidence. Here, too, the psychological question is whether people make any more communications because of these rules than otherwise. Thus the law recognizes the attorney-client relation by a privileged communications rule and so encourages people to seek legal advice. Statutes have occasionally extended it to physician and patient, priest and penitent, and other socially desirable relations and occupations. The socially desirable end of encouraging the compromising of litigation is sought to be encouraged by a rule which makes inadmissible in evidence against the offeror the fact of a bona fide offer of compromise of the matter in issue.

2. *Government Functions*

These rules of evidence seek to encourage the efficient conduct of government business by excluding or privileging testimony as to

[48] See Hutchins and Slesinger, *supra*, note 35.

[49] The so-called "Lord Mansfield rule" or "rule against bastardizing the issue" which forbids the testimony of spouses to prove the illegitimacy of the child of the wife purports to serve the policies of decency and of fostering marital accord.

certain things or from certain persons. Thus the head of the state cannot be compelled to attend court and may testify, if at all, by deposition. Then, state secrets are privileged and need not be disclosed, nor may original copies of valuable government records be taken away. These rules purport to render more efficient the conduct of government business by the officials themselves.

In order that persons having relevant knowledge concerning the commission of crime may be encouraged to report that knowledge without fear of vengeance so that the offenders may be apprehended, and as well to protect those innocently accused from having the rumor spread, there is a privilege for informer's testimony given to a prosecuting official or before a grand jury. This privilege is subject to exception when the purpose of the privilege has been served and nothing will be accomplished by further secrecy, or when an unusual desirability for using the testimony appears.

In order to encourage free discussion of issues in the jury room, there is a rule, which in one aspect is called the "rule that no juror can be heard to impeach his verdict". The rule makes secret and privileged whatever is said and done in a jury room by a jury while deliberating their indictment or verdict.

3. *Protection of Accused Persons*

The underlying theory of these rules is that it is desirable that prosecuting officials shall bestir themselves to work up cases against suspected criminals by normal means and shall not be permitted to rely on unfair and abnormal devices.[50] Thus we have three rules serving this policy which are the rule excluding evidence obtained by unconstitutional search and seizure, the rule against self-incrimination, and the rule excluding involuntary confessions. It is believed that prosecuting officials will thereby be encouraged to function normally in working up cases for court and thus public confidence in the administration of justice will be fostered.

The rule of the federal courts and of some states is that evidence obtained by an unconstitutional search and seizure must be returned to the defendant and cannot be used against him in any way. It is believed that only by excluding the evidence itself can the subsidiary policy of discouraging these searches and seizures effectually be carried out. The privilege against self-incrimination justifies an accused criminal defendant in refusing to testify at all in his case and as well authorizes any witness, in any case, to refuse to answer any question the answer to which might possibly be incriminating, *i.e.*, be usable against him as an admission if he were later prosecuted. The rule excluding

[50] Wigmore, *op. cit., supra*, note 2, at §2251, thus states the policy of the privilege against self-incrimination: "Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby." Why cannot this be expanded into a statement of the policy of the rules against illegally obtained evidence and compulsory confessions as well? Can it not be said that all three of these rules have in common the policy of protecting accused persons against methods of prosecution which have proven distasteful to the public generally, and thereby encouraging the proper and normal mode of prosecution which, in turn, will foster public confidence in the administration of justice?

confessions obtained by force, fraud, threats, promises, and fear serves the same policy. It is a natural corollary of the self-incrimination rule[51] and as well involves a vestige of exclusion for untrustworthiness. A forced confession is likely to be untrue and may deceive the jury.

CONCLUSION

The present article has purported merely to outline the problems without attempting their solution. We have seen how the problems of the law of evidence are respectively matters of the psychology of testimony, of the psychology of jury judgments, and of the psychology of certain human relations.

One consideration suggests itself in closing as to the validity of detailed research into the correctness of the psychological assumptions made by the sundry rules of evidence. This is that psychology cannot finally answer the problem of the validity of any given rule. Psychology can give us a relative insight into how probably untrustworthy, or confusing, or unfavorable to the extrinsic policy, a given item of evidence may be, but psychology cannot answer the problem of whether evidence of such trustworthiness, or confusing effect, or effect upon the extrinsic relation, is so untrustworthy or confusing or destructive as to justify its being excluded or qualified.[52] That is,

[51] Wigmore, *op. cit., supra*, note 2, at §823, denies the connection between the privilege against self-incrimination and the rule against involuntary confessions. As suggested in the preceding footnote, the present writer is unable to agree with this. Rather it seems that the same policy forbids with equal force (1) testimonial compulsion of an accused or suspected person on the witness stand, (2) the non-voluntary furnishing of evidence implicit in the "third degree", promises of immunity, or threats of punishment, and (3) the forcible obtention of evidence by the physical force which occurs when a serious constitutional policy against search and seizure is violated. The same policy underlies the three rules. What is forbidden in each case is the obtention of evidence against the will of the suspected person. While there is a vestige of untrustworthiness in a forced confession, yet is not the major reason for the exclusion of confessions obtained involuntarily the policy of punishing the prosecuting official for his misconduct in order to deter future ones from doing the same thing. If untrustworthiness be the sole *rationale*, why do we not as well exclude forced admissions obtained by private citizens? The fact that the exclusionary rules for confessions and illegally obtained evidence are limited to evidence obtained in an undesirable manner by officials of the very court indicates that the objective is to have effect on the functioning of these officials and not to debar untrustworthy evidence for that reason alone.

[52] The following statement by one of the authors of the Hutchins-Slesinger series of articles, *supra*, note 1, seems to state the major obstacle to the usability of extra-legal materials in the law of evidence: "The fact was that though the social scientists seemed to have a great deal of information, we could not see and they could not tell us how to use it. For example, the law of evidence is obviously full of assumptions about how people behave. We understood that the psychologists knew how people behave. We hoped to discover whether an evidence case was 'sound' by finding out whether the decision was in harmony with psychological doctrine. What we actually discovered was that psychology had dealt with very few of the points raised by the law of evidence; and that the basic psychological problem of the law of evidence, what will affect juries, and in what way, was one psychology had never touched at all. Thus psychologists could teach you that the rule on spontaneous exclamations was based on false notions about the truth compelling qualities of a blow on the head. They could not say that the evidence should be excluded for that reason. They did not know enough about juries to tell you that; nor could they suggest any method of finding out enough about juries to give you an answer to the question." Hutchins, *The Autobiography of an Ex-Law Student* (1934) 1 U. of Chi. L. Rev. 511, 513.

The present writer feels that there is implicit in this a too-dismal view of the utility of extra-legal materials in the law of evidence. Should we not use the extra-legal materials for what they are worth, the while realizing their limitations?

in the last analysis, a matter of human hunch as to what to do with evidence which does possess some unfavorable qualities but the exact degree of which qualities cannot, human knowledge being what it now is, exactly be ascertained.

And, for that matter, even if the applicable psychology did possess the general power of solving finally the problems of the rules, it is apparent that in large areas of the law of evidence the psychological principles are vague or bear but lightly on the legal problem. Thus, under the rules of trustworthiness we see that the omnipresent psychological consideration is that of the general inferiority of testimonial evidence. This is an obvious proposition for which psychology can do but little. It is the motif of any treatment of real evidence, and of the topics of perception, recollection, and narration. The best evidence rule preferring documentary originals is but a recognition of the superiority of real over testimonial evidence. The hearsay rule itself is but a logical development of the combined requirements of perception, recollection, and narration and the conditioning devices. The topic of hearsay rule inapplicable is but a logical problem of what is testimony and what is not. Hearsay rule satisfied is but a matter of when expediency dictates dispensing with some of the conditioning devices. The hearsay exceptions, as better analyzed in terms of intrinsic superiority rather than positive stimulus, involve nothing more than a recognition of superior situations for perception, recollection, and narration, as does the preferential rule for attesting witnesses. There are left the conditioning devices, raising the psychological problem of the fear stimulus to trustworthiness; the opinion rule and rule for verbal completeness, with their question of meaning; and the rule against leading questions, bottomed on the suggestion phenomenon. Motivation is presented in the rules of corroboration and the surviving vestiges of the interest disqualification and in certain qualities usable for impeachment. The exclusionary rules for atheists, mental defectives, and children are but logical corollaries of the oath requirement and of the requirement of perception and recollection. These present but little in the way of additional psychological problems.

The rules of confusion and of extrinsic policy do, of course, have definite psychological implications and probably as diverse ones as the rules of trustworthiness, common understanding to the contrary notwithstanding. In these areas, however, the major problem is that of "is it worth it?"

But even if the ultimate problem of the validity of the rules of evidence be that of a judgment as to whether the end justifies the means, it is submitted that the making of this judgment is a more intelligent process if it be oriented by thinking of the matter in terms of the applicable psychology.

Thus we see the true significance of the extra-legal psychological materials in the law of evidence. They can be used to test out the basic assumptions apparently made by the judicial or legislative makers of the rules. They cannot with scientific accuracy convince us finally

that any given rule is either exactly right or exactly wrong. This incapability, however, does not prevent their having some utility.

They have utility for discussing the rules of evidence in terms of human demands concerning litigation, *viz.*, demands for efficient jury verdicts and for protecting certain extrinsic interests. They can be useful as materials of persuasion in arguing law to judges to induce decision, or in arguing for legislative change. The materials should be usable as materials of rationalization by the judges in writing their opinions. Pending the adoption of these materials by the judicial and legislative estates they are immediately available for improving the efficiency of the juridical process of teaching, writing, and studying.

The present writer has found the instant outline of the subject a convenient one for teaching the law of evidence. He feels that a discussion of the legal materials in terms of the instant outline, of the psychological problems subsumed thereunder, and of such relevant psychological materials as an instructor may be able to command, leads to more efficient learning of the legal materials by making them more meaningful. These same considerations should make for improvement in writing the law of evidence.

Thus the extra-legal materials have immediate utility in teaching and writing and have potential utility in persuading, making, and rationalizing judicial decision and legislation concerned with the law of evidence.