Response to the Probative Value Theory of Hearsay Suggested by Hearsay From a Layperson, A

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A RESPONSE TO THE "PROBATIVE VALUE"
THEORY OF HEARSAY SUGGESTED BY
HEARSAY FROM A LAYPERSON

Eleanor Swift*

INTRODUCTION

Hearsay is a problem for lawyers, judges, and juries. As Professor David Schum says in Hearsay From a Layperson, 1 hearsay is for laypeople, too. Laypeople evaluate hearsay, make decisions based on it, and act in reliance on it in all parts of their lives. When they do, they act similarly to legal fact finders, although not within the formal institutional setting of a trial.

If hearsay is a problem for laypeople, they can self-regulate (whether consciously or not) what kind of hearsay they will rely on, and what kind of action they are willing to take in reliance on it. If they do not feel satisfied with the amount of information that hearsay provides them, they can investigate to get more. Or, they can refuse to act (or even think about the matter) and wait until more information is given to them. Or, they can rely, but scale down their actions in reliance. Legal fact finders, in trials, have far less freedom to self-regulate. They do not have the option to investigate more, or the full range of ways either to refuse to act or to scale down their reliance. They are captive, as it were, to the body of information that they receive from the parties and to the instructions from the judge that they must decide the case using the case-specific information that has been presented to them in court.

This institutional passivity of the fact finder in the courtroom underlies a central question in evidence law: Should judges regulate the admission of hearsay on behalf of the fact finder? 2 In other words,
should there be a special hearsay rule, pursuant to which a judge decides what hearsay should be admitted for the fact finder's use and what hearsay should be excluded? And, if there should be such a rule, what should be the standard under which the judge exercises this power?

Hearsay From a Layperson is concerned with how all people reason about the hearsay to which they do have access. Schum's conclusions are not addressed to the question of admitting or excluding hearsay from trials. However, Schum does ask whether his research and findings are surprising or useful to professors who teach evidence law and who think about the questions of judicial regulation. In my view, several of Schum's main points are interesting and useful for a legal audience.

One of Schum's principal conclusions is that the reasoning process used by people (whether lay or legal fact finders) to evaluate hearsay is not different from the reasoning they use to evaluate any other testimonial evidence. Schum also asserts that people use "rules of thumb" to evaluate hearsay statements. And he notes that the value of hearsay for the fact finder depends upon the completeness of the facts about the hearsay declarant's credibility that are available to it.

These conclusions are interesting in two different respects. Part I of this Comment shows how they are useful for critiquing the categorical structure of the current hearsay rule. In addition, they challenge the need for any special regulation of hearsay evidence at all. If legal fact finders are perfectly competent to reason about hearsay, perhaps evidence law should subject hearsay only to the relevance rules, and not to the elaborate mechanism of the hearsay exceptions. Thus, Hearsay From a Layperson suggests that we revisit the "probative value" theory of regulating hearsay. Accordingly, part II takes a closer look at what Schum and others mean by "probative value" and states the problems I see with the probative value theory. Finally, part III summarizes some of the institutional concerns and values that lead many hearsay experts to conclude that there should be a

3 Schum, supra note 1, at 15.
4 David A. Schum, Remarks at the Annual Meeting of the Evidence Section of the American Association of Law Schools (Jan. 5, 1992) [hereinafter Schum, Remarks].
5 Schum, supra note 1, at 46.
6 Id. at 17-18, 69-72.
7 Schum's analysis shows "that hearsay evidence can have the same probative force as any other form of testimonial evidence. Thus, there is no justification for rejecting hearsay as valueless just because it is hearsay." Id. at 71.
8 FED. R. EVID. 401-403.
9 FED. R. EVID. 803-804.
hearsay rule, albeit not the current one, that is separate and distinct from the relevance rules.

I. THE CONCLUSIONS IN HEARSAY FROM A LAYPERSON CONCERNING THE REASONING PROCESS PEOPLE USE TO EVALUATE HEARSAY ARE USEFUL FOR CRITIQUING THE CURRENT HEARSAY RULE

Schum concludes that people use a reasoning process to evaluate hearsay that is not different from what they use to evaluate any other testimonial evidence. This is not a surprising result. The inferential reasoning about hearsay described in Hearsay From a Layperson is very similar to the received theory of reasoning that underlies evidence law and the requirement that only relevant evidence can be admitted at trial. Schum's further discussion of inferential reasoning leads to some important criticisms of the categorical structure of the current hearsay rule.

Schum's description of inferential reasoning about hearsay results in a model of cascaded (“multi-step”) inferences of enormous complexity. Schum bases this model on insights from common experience, epistemology, and psychology. Basically, he asserts that hearsay declarants can "know" that an event happened if they have a "justified true belief" that it did occur. To evaluate the declarants' justification for belief, people must take into account that sometimes declarants lie (do not always say what they believe), are deluded (do not always believe the evidence of their senses), and make perceptual

10 Schum, Remarks, supra note 4.
11 The requirement of relevance demands that the offering party explicate a chain of inferences that begins with the offered item of evidence, ultimately reaches some conclusion concerning a disputed fact, and is grounded on generalizations from common knowledge, experience, and culture. In the case of hearsay, the credibility risks associated with the hearsay declarant are broken out into inferential links in the chain that leads either to belief or to disbelief in the substance of what the declarant has said. The same chain of reasoning is used to evaluate any source of testimonial proof, typically a live witness. Schum, supra note 1, at 11, 23-33.

In fact, based on Schum's description of his conclusions about hearsay, it seems that inferential reasoning about hearsay cannot be distinguished from inferential reasoning about any type of circumstantial evidence. Id. at 58-62 (conclusions 1-4, 6, 8 & 10 seem clearly to be true for all circumstantial evidence). Many of Schum's findings about how to attribute value to hearsay would also apply to non-testimonial facts, such as a footprint found at the scene of a crime. This is also the assumption of evidence law, which subjects both testimonial and non-testimonial evidence to the same requirement of relevance. See Richard D. Friedman, Infinite Strands, Infinitesimally Thin: Storytelling, Bayesianism, Hearsay and Other Evidence, 14 Cardozo L. Rev. 79, 96 (1992).
12 Friedman, supra note 11, at 79.
13 Schum, supra note 1, at 44-45, 44 fig. 9.
14 Id. at 24-25.
errors (human senses are not infallible). The need to evaluate declarants on the basis of these risks of *veracity, objectivity, and observational sensitivity* is the basis for Schum's model of cascaded inferences about hearsay, under which numerous different pathways can be followed depending on the varying evaluations of declarants' testimonial qualities.

Schum does not assert that the model replicates the actual thinking of human beings. Rather, the sheer magnitude of the inferential reasoning task which Schum represents in Figure 918 leads Schum to another important conclusion: It is necessary for people to adopt coarser distinctions or "rules of thumb," in order to cope with the difficulty of drawing conclusions on the basis of hearsay. Schum then states his position in the debate about the competence of people to devise or derive these rules of thumb from knowledge, experience, and culture and to use them. Schum believes that it is through these "simplifying heuristic[s]" that people perform the reasoning tasks involved in evaluating hearsay—that is, cut through the complexity of the underlying cascaded inferences to evaluate credibility.

In *Hearsay From a Layperson*, Schum does not identify the nature or content of the rules of thumb that he believes people use. In my view, these rules of thumb must be generalizations about credibility that, in effect, provide a map through the complex chains of reasoning about hearsay evidence. People bring these rules of thumb from their general knowledge and experience of various aspects of credibility-relevant behavior. These generalizations are triggered in the specific instance by facts known about the hearsay declarant, about her circumstances, or about the subject about which she asserts knowledge. A rich variety of facts about the declarant triggers more of the rules of thumb and provides different maps through the reason-

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15 Id. at 28-30. These are Schum's terms for the usual hearsay risks. *See* Friedman, *supra* note 11, at 80-81.

16 Friedman's "route analysis" of hearsay, although framed as a forward-looking chain of reasoning, has made the same point. Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667 (1987).

17 Schum, *supra* note 1, at 32.

18 Id. at 44.

19 Schum asserts that it is "necessary to adopt coarser distinctions and develop rules of thumb that allow us to draw conclusions on the basis of evidence as complex as hearsay." Id. at 46.

20 Id. at 47 & nn.68-70. The relation of an individual's unique generalizations to cultural patterns of knowledge is not important for this discussion of reasoning.

21 Schum does not state whether these rules, or coarser distinctions, derive from the reasoning routes that he depicts or function independently from cascaded inferences about credibility.
ing routes. These resulting maps may be competing or corroborating ones, or perhaps even a smaller set of more highly probable ones.

Consistent with this view of the rules of thumb, Schum asserts that the value of hearsay depends upon the completeness of the facts relevant to credibility that are available. Incomplete information leaves unanswered many credibility-relevant questions about the declarant. This, in Schum's view, precludes maximization of the value that hearsay can have for people who are deciding whether to rely on it.

This is an important conclusion for the legal regulation of hearsay at trials. Such regulation can determine the quantity and quality of information that the parties make available to the fact finder to trigger its rules of thumb. Without any regulation at all, the operation of the adversary system could produce extreme results. Some parties could present hearsay in the context of so little information about the declarant that the fact finder has only the most abstract rules of thumb with which to evaluate credibility. Other parties could present sufficient information to trigger a complex network of possible inferences that might even be channeled into just a few highly probable conclusions.

Under the current hearsay rule, the categorical hearsay exceptions (and exemptions) legislate the rules of thumb to which the parties must conform. They require as a condition of admission the presentation of whatever facts about a declarant will satisfy a particular categorical definition. While the fact finder will thus be provided with some information that is relevant to the declarant's credibility, this information will not necessarily trigger the fact finder's own rules of thumb—those generalizations that it finds are most meaningful or persuasive. And, the parties may do no more than merely satisfy the categorical requirements. Of course, the adversaries could present information in addition to the categorically-bound facts, but in many cases it appears that only the minimal foundation for an exception is laid in a ritual, mechanical fashion. And, unless the hearsay is of

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22 This notion of the function of rules of thumb is not inconsistent with the schemata theory of knowledge described in Ronald J. Allen, The Nature of Juridical Proof, 13 CARDozo L. REV. 373, 403-06 (1991).

23 Friedman also hypothesizes the fact finder's use of heuristics to find the most likely account for the evidence in a specific case. Friedman, supra note 11, at 95 ("A fact finder may simplify ... by disregarding altogether certain types of stories that seem unlikely to have accounted for the evidence and by grouping together many other stories ... ").

24 See infra text accompanying notes 63-68.

25 FED. R. EVID. 801(d)(1)-(2), 803, 804(b).

particular importance, and/or impeaching material is ready at hand, the opponent may not expend the resources necessary to present more.

Thus, under the current categorical hearsay rule, the fact finder's use of its own generalizations is constrained. This, it seems to me, inevitably deprives the fact finder of its own independent judgment about hearsay. I consider this a bad result because of the jury's crucial institutional and political role as fact finder.27

Schum's further conclusion that the value of hearsay is on a continuum, dependent on the foundational information that accompanies it,28 supports additional criticisms of the current categorical hearsay rule. Under the current rule, in effect, either a hearsay statement has enough value to be admitted at trial because it was made by a reliable declarant or it has no cognizable value and is therefore excluded, the distinction being that the reliable declarant falls within a predetermined categorical hearsay exception.29

Schum's modeling of hearsay evaluation underscores the inadequacy of this either/or result. First, hearsay need not come from categorically defined reliable declarants to be relevant, since relevance is the minimum threshold test of value.30 Second, there is an inexhaustible variety of facts concerning the declarant's veracity, objectivity, and observational sensitivity that can generate persuasive value,31 certainly not just those reflected in the traditional exceptions. Finally, there is no reason to give preeminence to sincerity in valuing hearsay for admission at trial. Schum's research demonstrates that there is no precedence among veracity, objectivity, and observational sensitivity

27 Eleanor Swift, A Foundation Fact Approach to Hearsay, 75 Cal. L. Rev. 1339, 1367-69 (1987). Professors Mortimer Kadish and Michael Davis also value the autonomy of the jury. They argue that the hearsay rule's preference for live testimony protects the autonomy of the trier of fact in making "her own judgment." Mortimer R. Kadish & Michael Davis, Defending the Hearsay Rule, 8 Law & Phil. 333, 348 (1989). The rule is, for them, thus grounded in social ethics: "The integrity of adjudication as a practice . . . depends upon maintaining the integrity of the trier of fact," id. at 350, which is accomplished by presenting live persons as witnesses.

28 Schum, supra note 1, at 61-63 (conclusions 8 & 10); see also Friedman, supra note 11, at 82-84.

29 In Schum's analysis, the reliable declarant is defined by a particular path of reasoning: 1-4-7-10-13-E. Schum, supra note 1, at 44 & fig. 9. Friedman calls this the "truth path" from a disputed event back to the statement of declarant. Friedman, supra note 16, at 686.


31 Schum, supra note 1, at 51, 34 fig. 8.
in reducing or destroying the value of hearsay. Other research has shown that lack of veracity is not the most important risk. Since perception and memory risks inhere in virtually every category of admissible hearsay, the current hearsay exceptions that require facts aimed at buttressing sincerity (and little else) are thus ineffective in their own terms, that is, in producing a reliable declarant.

Hearsay scholarship can usefully integrate Schum's research in rejecting the either/or stigmatization of hearsay that results from the categorical approach to evaluating it for admission. The challenge then remains for us to consider whether, as suggested by a reading of *Hearsay From a Layperson*, hearsay should be regulated under FRE 401-403 as are other relevance problems in evidence law, or whether other values still support a special form of legal regulation.

II. SHOULD THE USE OF HEARSAY IN TRIALS BE REGULATED ON THE BASIS OF ITS PROBATIVE VALUE?

Judicial regulation of the use of hearsay at trial could be based solely upon two existing principles: the requirement of relevance and the judgment that the hearsay item's probative value is not substantially outweighed by a risk such as unfair prejudice, misleading or confusing the fact finder, or waste of time or delay. The key factor in this theory of regulation would be the judge's attribution of probative value to the item of hearsay, liberated from the constraining effects of the current categorical exceptions described above.

In *Hearsay From a Layperson*, Schum does not explicitly advocate a "probative value" theory of regulation. However, his principal conclusion—that people are perfectly competent to evaluate hearsay using the same process of inferential reasoning and rules of thumb that they use to evaluate any other testimonial (and, I believe, non-testimonial) evidence—is a justification for such a proposal. However, Schum's concept of probative value seems to be one which I think would be wrong for a judge to use when applying FRE 403 (or any other rule) to admit hearsay at trial. Some careful thought on the meaning of probative value is appropriate when considering whether to treat hearsay as just another relevance problem under evidence law.

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32 Id. at 59-60 (conclusion 3).
34 Except perhaps Fed. R. Evid. 803(3) (statements of current bodily condition and state of mind supposedly bear no perception or memory risk).
35 Fed. R. Evid. 401.
36 Fed. R. Evid. 403.
Schum’s use of the term “probative value” requires a prior estimate of one’s beliefs about whether a disputed fact is true—prior, that is, to consideration of the new item of evidence. These prior beliefs, he asserts, are a factor in measuring the probative value of the new item. “[T]he rareness or improbability of the reported events has a bearing upon the probative value of testimony about these events.”

In explaining this finding, he states that “[t]he more improbable the reported event, the greater the degree of credibility we would require of all sources in the hearsay chain in order to believe that the event occurred.”

Some probabilists also have defined probative value to mean the change in one’s preexisting beliefs about disputed facts that is effected by new information. Other theorists disagree and suggest the concept of “intrinsic” probative value, where value is “a function of the evidence itself” without reference to estimates of prior probabilities.

Schum’s inclusion of prior probabilities in his concept of probative value highlights an ambiguity in the use of the term. Schum’s description implies valuation as a matter of actual persuasion, from the perspective of the fact finder. But probative value, in evidence law, refers to the valuation performed under FRE 403 by a judge who does not act as the fact finder in a jury trial. Since the two valuations are different, it is confusing if the same term is used to identify both.

In *Hearsay From a Layperson*, Schum does not distinguish between the judge’s and the jury’s valuation of hearsay, perhaps because in lay reasoning the judge/jury function is merged. But in a legal setting, the functions should be distinguished. Judges should not estimate their prior beliefs about the probable truth of disputed facts in

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37 Schum, supra note 1, at 7; see also id. at 61 (conclusion 7).
38 Id. at 61.
39 This is Schum’s term for probability theorists. Schum himself applies a Bayesian approach to the valuation of evidence, derived from Bayes’s Theorem of probabilistic reasoning. Id. at 47-49, 57-62. Schum states that the “bearing of the rareness of events upon the probative value of testimony regarding . . . events has been recognized both by evidence scholars and by probabilists.” Id. at 7 & n.4; see generally, Wigmore, supra note 30, § 37.6, at 1059-60 (describing probative value in Bayesian terms).
41 See D.H. Kaye, *Quantifying Probative Value*, 66 B.U. L. REV. 761, 763 (1986) (“PV is simply a function of the evidence itself, and the order in which the evidence is introduced has no effect.”). But see Richard D. Friedman, *Postscript: On Quantifying Probative Value*, 66 B.U. L. REV. 767, 770 (1986) (“The most straightforward, and probably the best, measure is the one most naturally suggested by the definition of probative value—the change in the probability of the disputed proposition, as assessed before and after introduction of the evidence.”).
valuing hearsay for admission in jury trials. If Schum and other probabilists intend that they should, then I disagree.

If the use of hearsay at trial were to be regulated only by the relevance rules, the judge would first evaluate hearsay for its relevance and then for its probative value. Should the judge admit the hearsay item, the jury would then evaluate the hearsay for its persuasive value. The judge and jury—regulator and fact finder—perform their valuations for quite different purposes. At least in the legal setting, the term probative value should be defined and used to describe the mental operation and data that the judge uses to admit hearsay, once it is found relevant. The term persuasive value should refer to the mental operation and data that the jury—or any fact finder—uses to evaluate the hearsay that has already been admitted. In other words, the same term—probative value—should not be used to denote the different acts that are performed by the judge and by the jury. The following discussion elucidates the functional differences between the two types of valuation.

In admitting and excluding evidence, the judge examines the offered item from the proponent’s perspective, taking it at face value. For relevance, all that concerns the judge is that the proponent articulate a chain of inferences between the offered item and a fact of consequence to the litigation. With an item of hearsay, the judge examines the generalizations underlying the proposed inferences about the declarant’s credibility to decide whether they are possible, regardless of great uncertainties or other competing inferences. Since all relevant evidence is admissible under FRE 402, the judge’s inquiry could end here.

42 Kaye notes that there may be no single correct meaning or representation for probative value. Kaye, supra note 41, at 766. He also states that the interpretation of the term “should be guided by the uses to which such an expression will be put.” Id. Thus in jury trials, the meaning of the term probative value should be guided by the use to which it is put under FRE 403. However, in bench trials, it may be that judges do not apply the concept of probative value as defined in this Comment because they do not exclude evidence under FRE 403 except in instances of waste of time or delay. See infra note 53.

43 See supra note 11.

44 Under FRE 401, the judge decides whether to accept or reject the proponent’s theory of relevance. The proponent’s theory usually follows what Schum calls the microanatomy of hearsay. Schum, supra note 1, at 8-33, 33 fig. 7. The determination of relevance is an essential step in determining probative value, but it is not the same as evaluating probative value. The decision is made by the judge, the data used are the proponent’s arguments and, ordinarily, “the judge’s own experience, his general knowledge, and his understanding of human conduct and motivation.” McCormick on Evidence 778 (John W. Strong ed., 4th ed. 1992); see also Wigmore, supra note 30, § 37.6, at 1064 n.28 (“Rule 401 does not expressly instruct the judge that the probative force of the evidence depends on his prior assessment of the probability of the fact in issue.”).
However, if an objection is made under FRE 403 (or under a new hearsay rule similar to 403), probative value is the concept then used by the judge to determine whether admission of concededly relevant hearsay is justified. The judge examines the probabilities in the generalizations underlying the chain of inferences about the hearsay declarant. On this basis, she estimates the strength of these inferences, again taking the evidence at face value. This estimate, I believe, is the most significant factor in the judge's determination of probative value at this stage of trial.

Finally, the jury evaluates the persuasive value of evidence for the purpose of coming to a belief about unknown facts. The jury must decide how persuaded it is (by hearsay and other evidence) on the ultimate facts of the case. The jury attributes value to new information by recognizing that such information changes its beliefs. The jury's estimate of its prior beliefs originates in its general knowledge and experience of the world and then becomes case-specific, based on

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45 Many of Schum's conclusions about the probative value of hearsay relate to this task of valuing the declarant's credibility based on inferences about the declarant's credibility-relevant behavior. Schum, supra note 1, at 59-62 (conclusions 2-6, 8 & 10).


47 Wright and Graham appear to agree that the most important factors in probative value under FRE 403 are "the strength of the immediate inference" followed by "the strength and number of intermediate inferences between the immediate inference and an ultimate issue in the case." Wright & Graham, supra note 30, § 5214, at 270-71.

With respect to these factors, the judge follows much the same path he would in determining relevance under Rule 401, but in the Rule 403 inquiry the question is not whether the evidence has any tendency to prove the consequential fact but rather how strong a tendency it has to prove that fact. Id. at 271.

Other factors, apart from the strength of the inferences, may also affect the judge's assessment of probative value under FRE 403. See generally Carlson et al., supra note 46, at 313-14 (facial vagueness of the starting point, number of inferences in the chain, availability of other means of proof); Graham C. Lilly, An Introduction to the Law of Evidence 21-28 (1978) (strength and number of inferences); Fed. R. Evid. 403 advisory committee's note (availability of other means of proof).

48 This is the valuation that Schum refers to when he describes how and whether decision makers ultimately use evidentiary facts to come to a belief about unknown facts. Schum, supra note 1, at 9-10; see also Ronald J. Allen & Richard B. Kuhns, An Analytical Approach to Evidence: Text, Problems, and Cases 128-29 (1989) (suggesting that it is the final decision maker whose valuation, under Bayes's Theorem, requires "a preliminary assessment of the odds of guilt or liability before the receipt of evidence," while the trial judge admits or excludes evidence on the basis of arguments about the strength of the inferences that the evidence triggers).
the evidence already presented to it at trial.\textsuperscript{49}

Estimates of prior beliefs do affect the legal (or any) fact finder's attribution of persuasive value to evidence. In deciding whether one is persuaded, the context of one's already existing belief in the rareness or improbability of a disputed fact is significant. But the judge's role in deciding to admit or exclude evidence for the fact finder is different, and the power given to judges in the legal regulation of hearsay should be limited by this difference. For the judge's role, the context of estimates of prior beliefs should not be important.

Many commentators suggest, however, that a party's other available means of proof can affect the probative value of a particular item of evidence.\textsuperscript{50} If an item of evidence duplicates proof already admitted, this item may be excluded under FRE 403 either as having low probative value or as a waste of time.\textsuperscript{51} To make this decision, the judge has to look at what other evidence exists in the party's line of proof.\textsuperscript{52} In this "special case,"\textsuperscript{53} the judge's valuation of the item of evidence may depend on context. But this should not be the general rule.

If the judge's decision to admit or exclude evidence at trial were always based on the context of the judge's then-existing estimates as to the probabilities of disputed facts, then the judge would have to ask, about each new item of evidence: "How much more or less persuaded am I about the disputed facts, based on my view of the case so far, than I was before?" My objections to requiring the judge to pose such a question are on ethical, institutional, and practical grounds.

Requiring judges to assess their own view of the probabilities regarding the disputed facts as the trial proceeds departs from the


\textsuperscript{50} See, e.g., supra note 46.

\textsuperscript{51} WRIGHT & GRAHAM, supra note 30, § 5214, at 269.

\textsuperscript{52} Schum points out two different types of proof—corroborative and cumulative—that might make an offered item of evidence redundant. Schum, supra note 1, at 67-70. Redundancy affects the value of evidence in the relative sense, "determined by supply and demand." WRIGHT & GRAHAM, supra note 30, § 5214, at 269.

\textsuperscript{53} RICHARD O. LEMPERT & STEPHEN A. SALTBURG, A MODERN APPROACH TO EVIDENCE 161 (2d ed. 1983) (referring to the special case where the judge examines the prior odds in favor of the disputed hypothesis to decide whether arguments of delay and waste of time justify exclusion). Schum asserts that redundancy reduces the probative value of new evidence to zero only if other evidence on the same point is "perfectly credible," Schum, supra note 1, at 69, a state of certainty rarely if ever achieved.

There may be other reasons for the judge to examine the context of the case when making a FRE 403 decision, such as to determine whether an offered item is confusing. WRIGHT & GRAHAM, supra note 30, § 5214, at 273. This is not the same thing as the judge constantly estimating and reestimating the odds in order to admit or exclude evidence.
model of the detached neutrality that is a central ethical constraint on the adversary system. The judge who suspends her own evaluation of the case can remain relatively neutral; the judge who engages in subjective assessments of the probabilities to admit or exclude evidence risks becoming partisan. It would not be ethically acceptable for a judge to make evidentiary and other legal rulings on the basis of which party she thinks is winning at trial.

Making such estimates as the trial proceeds also appears to negate the presumption of innocence which criminal defendants are supposed to enjoy. To enforce this presumption, the judge should make no estimates of the disputed facts of guilt, should look at offered evidence from the proponent’s perspective, and should estimate its “intrinsic”\textsuperscript{54} probabilistic value on the basis of the strength of the inferences it generates. Otherwise, the defendant may be harmed by the exclusion of probative evidence because, at the time, the odds appeared to the judge to highly favor the prosecution.\textsuperscript{55}

Injecting estimates of belief about the disputed facts into the judge’s decision making departs from institutional norms of fairness in civil cases as well as criminal. First, it would change the role of the parties. When the judge takes evidence at face value and estimates probative value by the strength of its underlying generalizations, the judge can articulate the basis for this estimate. Then, the parties can debate these estimates and may even change the judge’s mind. But if the judge’s estimate is influenced by the judge’s assessment of the case so far, articulation is far more complicated. The parties will have difficulty focusing their arguments since disagreement with the judge’s estimate could require rehashing the whole case, or even trying to reformulate the judge’s preexisting world view. This is not easy to do, nor are they likely to succeed.

Second, if the judge uses her own estimates of the then-probable outcome to exclude evidence, she reduces the role of the jury. If the judge does exactly what the jury does—evaluate how persuaded she is by an item of evidence—then she is acting like a thirteenth juror. The judge’s then-existing assessment of the case influences what evidence

\textsuperscript{54} See Wright & Graham, supra note 30, § 5214, at 269; Kaye, supra note 41, at 763.

\textsuperscript{55} Kaye, supra note 41, at 765 (predicting the exclusion of moderately probative evidence for the defendant when the odds overwhelmingly favor the plaintiff/prosecutor). The fortuity of timing—of when an item is offered—should not have a dispositive effect on its admission or exclusion. Evidence that gains in intrinsic value when it is connected up to other items can be kept track of by the trial judge, which is what I think Wright and Graham intend in their discussion of postponing FRE 403 decisions. Wright & Graham, supra note 30, § 5214, at 273; see also Friedman, supra note 41, at 769-70 n.14.
the jury will hear. But her assessment may not correspond to the
court’s assessment of the case so far.

For example, the judge may exclude evidence for having low probative value when she views the then-existing probabilities one way. If the jury does not view those probabilities the same way, this decision deprives the jury of what might be important proof.56 Or, the judge may admit evidence as having sufficient probative value to outweigh the risk of prejudice because of the way she estimates the then-existing probabilities in the case. If the jury differs in its estimate of those probabilities, the prejudicial effect of the new evidence may overwhelm the jury.

Of course, there is always a risk that the judge and jury will not agree on an item’s value even without taking into account the context of prior estimates of belief. The judge may differ from the jury in valuing the strength of inferences, and the jury may always respond to the prejudicial effect of evidence in ways the judge does not predict. But why add further risk of such divergence? Estimates of value are difficult, even when they can be articulated and debated apart from estimates of then-existing beliefs about the disputed facts. To add a further element of subjectivity increases the risk of divergence between judge and jury and enhances the judge’s power to control the flow of information to the jury. Evidence law should not empower judges to admit or exclude hearsay on the basis of an evaluation that mirrors the evaluations done by juries.

Finally, on the practical level, it is a rigorous task to evaluate and reevaluate probabilities in the case as the trial proceeds. The judge is occupied with other business, including trial objections, legal arguments, and even other cases. Keeping track of the substance of all the testimonial and documentary evidence in order to admit individual items of evidence would be exhausting.

In sum, a probative value theory of regulating hearsay must be clear about defining probative value. If, as I submit, the judge should not measure the change in her own prior beliefs about the disputed facts when admitting or excluding evidence, then the definition of probative value should reflect this. A different term, such as persuasive value, should be used to denote the very different valuation undertaken by the jury.

Other problems with the probative value theory of hearsay should be mentioned briefly. First, should the probative value of hearsay depend upon the judge’s evaluation of the declarant’s testimo-

56 See WIGMORE, supra note 30, § 37.6, at 1060-61 n.16 (noting that evidence with low probative value in Bayesian terms may have great practical value for the fact finder).
nial qualities? Judges do not evaluate the testimonial qualities of witnesses in admitting live testimony.57 The probative value of testimony is determined upon the assumption that the testimony is true. If the probative value of hearsay, in contrast, would require judges to evaluate credibility, then the jury’s traditional role would be supplanted whenever judges excluded declarants’ statements that seemed unreliable to them. This approach to regulating hearsay has been rejected as resulting in a lack of predictability for lawyers as well as intrusion into the province of the jury.58

However, if all hearsay is taken at full face value, then its probative force will be calculated exactly as if it were live testimony. This, I take it, is what Professor Richard Friedman has in mind when he proposes as a standard of admission that the trial judge should usually admit hearsay when the probative value of the declarant’s statement, if given as live testimony, would exceed its prejudicial impact.59

This relevance/probative value standard of admission virtually abolishes judicial control over the parties’ ability to choose to use hearsay at trial. Since hearsay always imposes more risks and burdens onto opponents than does live testimony,60 application of this standard would inevitably affect values of fairness attached to both civil and criminal litigation as well as other institutional concerns that may justify regulating the parties.61

III. THE INSTITUTIONAL JUSTIFICATIONS FOR REGULATING THE USE OF HEARSAY AT TRIAL

There is much current writing in the field of evidence that identifies institutional concerns and values that may justify judicial regulation of what hearsay is admitted at trial. Because of the jury’s

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57 Wright & Graham, supra note 30, § 5214, at 265-66.
58 Fed. R. Evid. 801 advisory committee’s note.
59 Friedman, supra note 11, at 99. By “prejudice,” Friedman means primarily the risk that the jury will overvalue hearsay. Richard D. Friedman, Toward a Partial Economic, Game-Theoretic Analysis of Hearsay, 76 Minn. L. Rev. 723, 737-43 (1992) [hereinafter Friedman, Economic Analysis].
60 Eleanor Swift, Abolishing the Hearsay Rule, 75 Calif. L. Rev. 495, 514-18 (1987).Essentially free admission of hearsay based upon abstract “covering generalization[s]” about reliability may be allowable, see Friedman, supra note 11, at 101 n.59, but it would raise many of the institutional concerns addressed in part III. See infra note 68.
61 See Ronald J. Allen, The Evolution of the Hearsay Rule to a Rule of Admission, 76 Minn. L. Rev. 797, 810 (1992) (“[Friedman’s] scheme creates incentives . . . to shift costs to an opponent . . . . At a minimum, Friedman should examine this incentive, which may be at odds with the settled expectations of who bears costs at trial.”). Friedman disagrees with the general rule allocating costs to the proponent of hearsay and argues that, outside the context of the confrontation clause, “fairness generally . . . points in the same direction that efficiency does.” Friedman, Economic Analysis, supra note 59, at 746.
uniquely passive role as a fact finder, many current proposals focus on judicial control of the behavior of the adversaries as a way of respecting and not overreaching the jury. Rather than constrain the jury through categorical exceptions, these proposals impose different obligations on the parties and their lawyers.

In my view, the litigants should be burdened with the obligation to maximize the jury's ability to reason about hearsay. The value of achieving accurate outcomes, through facilitating the fact finder's use of its general knowledge and experience in inferential reasoning, justifies this form of hearsay regulation. So, too, do other values—the value of institutional independence achieved by liberating the jury from the substantive rules of thumb imposed by the current categorical hearsay exceptions and the value of fairness between the parties.

To implement these values, I have proposed a "foundation fact" approach to hearsay. This approach requires the proponent of hearsay to present it together with live witnesses who are sources of information about the declarant. This information—foundation facts—is the same as the "credibility-relevant evidence" in Schum's model of reasoning. This information allows the fact finder to evaluate the testimonial qualities of the declarant. Schum asserts that completeness of this foundational material about the declarant maximizes the value of the hearsay for the fact finder. I argue further that such maximization should be the purpose of the hearsay rule. If there is little data about the declarant, and no way for the fact finder to make further inquiry, then how can it reason? The foundation fact approach is a first effort to articulate a way to require the parties to present data sufficient to serve the fact finder's functional reasoning needs.

Professor Dale Nance has also suggested an institutional expla-

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62 Nance, supra note 2, is explicit in this regard: "[T]he present thesis emphasizes the judge's role in protecting the jury from actions attributable to understandable biases or weaknesses of parties, their witnesses, and of course, their lawyers. This function is especially important because the jury ordinarily can do little itself to control the conduct of these participants." Id. at 291.

63 Swift, supra note 27, at 1354-77.

64 Id. at 1357-58.

65 Schum, supra note 1, at 35-36, 34 fig. 8.

66 Id. at 62 (conclusion 10).

67 Swift, supra note 27, at 1363-67.

68 Schum and Friedman assert that the jury can fall back on highly abstract "covering generalizations" about the testimonial qualities of people who speak. Schum, supra note 1, at 50; Friedman, supra note 11, at 101 n.59. It is correct that such abstract generalizations may furnish sufficient possibilities for relevance, but reasoning on this basis is significantly different from reasoning based on a live witness's testimony. Swift, supra note 60, at 506-07. And admission on this basis would significantly shift the balance of risks and burdens in producing proof between the parties. Id. at 515-18.
nation for the hearsay rule that respects the role of the fact finder. The public nature of litigation, the end result of which is the exercise of the government's coercive power to change the status quo, justifies a special concern for the value of accurate outcomes.\(^6\) Nance proposes that this value be served through court-imposed obligations on lawyers to produce the "epistemically best"\(^7\) evidence for use by fact finders. He also suggests that the current hearsay rule stands in a close relationship to this best evidence principle because it prefers live witnesses over hearsay declarants.\(^7\)

Professor Michael Seigel also argues for an institutional basis for the hearsay rule.\(^7\) He extends the best evidence principle to identify an explicit public interest in controlling the competitive, strategic behavior of the parties. Adversarial behavior, such as strategic decisions to present inferior hearsay evidence precisely when it is most likely to distort the fact-finding process, should be avoided.\(^7\) Thus, he argues that hearsay should not be admitted unless it is the best evidence of what a particular person has to say about the case.\(^7\)

Professor Roger Park discusses concerns other than probative value that "are reflected in the structure"\(^7\) of the current hearsay rule and that, in his view, justify continued regulation. Among these are the danger of unfairly surprising opponents with unforeseeable hearsay, fear of unbridled judicial discretion, protection of the litigation underdog, and fear of abuse of governmental power in criminal cases.\(^7\) In response to these institutional concerns, Park suggests a modification of the hearsay rule for civil trials that liberates admission significantly, but maintains a system of class exceptions, including a notice-based exception.\(^7\)

Professor Friedman has proposed a microeconomic approach to hearsay in civil cases, grounded on a theory of allocating the burden of producing the hearsay declarant "in such a way that, consistent

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\(^6\) Nance, supra note 2, at 230-33.

\(^7\) Id. at 240 ("the set of information, reasonably available to the litigant, that a rational trier of fact, expert or nonexpert, would find most helpful in the resolution of the factual issue").


\(^7\) Id. at 45-46.

\(^7\) Id. at 54-56.


\(^7\) Id. at 62-68. Additional concerns identified by Park, such as inability to test the declarant by cross-examination and the additional risks of inaccuracy injected by the need for in-court reporters of hearsay go to the probative value of hearsay. Id. at 55-62.

\(^7\) Id. at 115-21.
with fairness, the parties' own self-interest will lead to an efficient result."\textsuperscript{78} The goal of the hearsay rule would be judicial rulings that produce the greatest "expected value," affected only in part by estimates of the fact finder's ability to reason about hearsay.\textsuperscript{79}

\textbf{CONCLUSION}

Whether one agrees with any of these specific arguments and proposals, they demonstrate that there is a significant body of opinion that institutionally connected values justify a hearsay rule. This body of opinion assumes, as Schum concludes, that legal fact finders are competent to reason about hearsay. But these legal writers add to Schum's layman's insights. They perceive the institutional function of trial, the different roles played by the judge, the jury and the parties in the trial process, and the balance of power that must be struck among them. The hearsay rule is central to these concerns.

\textsuperscript{78} Friedman, \textit{Economic Analysis}, supra note 59, at 751.
\textsuperscript{79} Id. at 734-35, 751-52.